



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**CIVIL SUIT NO.13 OF 2017**

**WKM.....PLAINTIFF**

**VERSUS**

**JWM.....DEFENDANT**

**CORAM: Hon. Justice R. Nyakundi**

**Kinyanjui F. M. for the Plaintiff**

**Kariuki Runo for the Defendant**

**JUDGEMENT**

WKM (herein the Plaintiff), brought the before the Court for purposes of hearing and determination, a plaint dated 27<sup>th</sup> day of June, 2017 as amended on the 7<sup>th</sup> November 2017 seeking the following reliefs:

**a. That there be a declaration that she is the absolute proprietor of:**

- i. Kajiado/Ochoro-onyore/ xxxx, xxxxx, xxxxx and xxxxx;**
- ii. Ngong/Ngong/16904;**
- iii. Plot No. Axx on L.R NO. xxxxx R BLOCK [particulars withheld] Dandora Terminus scheme and;**
- iv. Kajiado/Kitengela/xxxx**

**b. A permanent injunction restraining the defendant or any other person claiming under him from interfering with any of the properties named in (a) above in any manner whatsoever and**

**c. A permanent injunction restraining the defendant from interfering with the person of the plaintiff and her three daughters.**

**d. A declaration that the reconciliation agreement made on 21<sup>st</sup> March 2017 is null and void.**

The Parties have not concurred on the issue as to when they met and started cohabiting. The Plaintiff claims that she befriended the defendant who was a married man in the year 1995 and they started cohabiting in 2000. She also got married to the Defendant in accordance with the Kikuyu/Kamba customary law. While the Defendant claims that they started cohabiting on or about 1990. In his submissions the Counsel for the Defendant states that parties started their relationship in 1989 and cohabiting in 1991. The Plaintiff had four children at that time.

Thus, the fact of marriage between the parties is not in dispute. They have only differed as regards to when they met and started cohabiting. Further, after having carefully perusal of the evidence tendered by both parties in support of their claim, I have not been able to established whether the parties herein divorced as no evidence of decree nisi or a decree absolute was attached to the affidavit. The aforesaid decree is stated to be conclusive evidence that parties are no longer together hence the need for distribution of their matrimonial property.

**The Plaintiff 's Case**

In her amended plaint dated 7<sup>th</sup> November, 2017, the Plaintiff has made several serious allegations against the Defendant which range from visiting physical violence on her, threatening to kill her and even occasioning her mental anguish. She claims that at one time she reported a matter of that sort with Langata Police Station.

In paragraph 7 of the plaint the Plaintiff asserts that she is no longer staying with the Defendant they stopped cohabiting together as she alleges that the Defendant has locked her daughter out of the matrimonial home. Further that the Plaintiff has hitherto been residing with her daughters at the matrimonial home which is registered in her name while the defendant has a home registered in his name.

In paragraph 9 of the said plaint, the Plaintiff claims to have acquired the following properties without any contribution whatsoever from the Defendant:

- a. Kajiado/Olchoro-Onyore/xxxx**
- b. Kajiado/Olchoro-Onyore/xxxxx**
- c. Ngong/Ngong/xxxxx**
- d. Plot No. Axx on L.R xxxxx R Block [particulars withheld] Dandora Terminus Scheme**
- e. Kajiado/Kitengela/xxxx**
- f. Kajiado/Olchoro-Onyore/xxxxx and**
- g. Kajiado/Olchoro-Onyore/xxxxx**

The Plaintiff's claim against the Defendant is for an order of permanent injunction restraining the Defendant from interfering with the above-named properties, the Plaintiff's person and her children. The Plaintiff has also alleged that on or about 21<sup>st</sup> day of March, 2017 she was coerced and unduly influenced by the Defendant to sign a reconciliation agreement which the Plaintiff seeks be declared null and void.

#### **The Defendant's Case**

The Defendant responded to the instant suit by way of an amended defence and counterclaim dated 26<sup>th</sup> February 2018. The Defendant acknowledges that the Plaintiff had four children at the time they started cohabiting and he added that he educated and met their financial needs ever since he met plaintiff. The defendant asserted that he is a business man in the real estate business. He denies allegations of inflicting physical violence and threatening the Plaintiff with a knife in the 25 years that they have lived together.

It is the Defendant's averment that he has once called for a reconciliation meeting with a view of resolving their issues. That they met with elders who resolved the dispute. He further claims that he solely catered for the purchase price of the said properties and the plaintiff was only listed in the same as a witness. He also avers that at the time he bought the said suit properties he was married to both the Plaintiff and his first wife

The Defendant avers that the Plaintiff swore a deed poll and changed her names from WKM to WKW (the husband's names) vide deed poll dated 29<sup>th</sup> April 2004 and Gazetted in the Kenya Gazette 25<sup>th</sup> June 2004 vide Vol. CVI-No.57 Gazette Notice No. 4889. He says that he puts the Plaintiff as the absolute owner of his parcel of land because she wanted to use the title deeds to secure loans from the bank. The defendant acknowledges that initially the plaintiff worked for KRA.

After buying the properties, the Defendant claims to have entered in an agreement of developing it where he solely catered for such costs. The Defendant further claims to have individually acquired several properties which he embarked on important and some to be placed on sale.

In paragraph 9, the Defendant avers as follows:

- a. They held a meeting with elders at the Gringos Hotel at Kiserian and the Plaintiff confirmed that he was the sole owner of all the properties and she agreed to consent dated 21<sup>st</sup> March 2017.**
- b. After signing the consent, the Plaintiff rushed to her Advocates Kinyanjui Njau & Co Advocates who sent the defendant a document to sign but he declined.**
- c. The Plaintiff later told her parents who summoned the Defendant and his parents and they attended a meeting on 20<sup>th</sup> May 2017 at the plaintiff's parent's home at Kangundo and after discussions, the matter was adjourned to 30<sup>th</sup> September 2017.**
- d. The Plaintiff also went to see his father who advised us to discuss alone and if they cannot agree then they should go see him over Easter.**
- e. That the Plaintiff was not satisfied with this and she looked for elders at Kiserian and from there the matter degenerated to her going to court.**

**f. That the Plaintiff has further gone to write to the Registrar of Lands Ngong requesting to put a caveat on his properties with allegations that he wants to sell the said properties.**

The Defendant also contends that the Plaintiff locked him out of his house and he cannot access his house and all his personal belongings are still held in the same house.

#### **The counter claim**

The Defendant reiterates each and all the foregoing averments of its his Defence and counterclaims from the plaintiff as follows:

- a. That the Plaintiff has been claiming that she owns the properties that the Defendant had bought with his hard-earned money.**
- b. That the Plaintiff has been collecting money from the Defendant's borehole business and using the same for her own pleasure.**
- c. That the Plaintiff has locked the Defendant out of his house and refused to let him access of his documents and person effects.**
- de. That the Plaintiff has put a caveat on the Defendant's properties**

Furthermore, the Defendant asserts that he solely acquired all the properties listed in the paragraph 9 of the Plaintiff, which is the subject of this matter. He avers that the same forms part of their matrimonial property though registered in the name of the plaintiff. Hence, they ought to be shared in equal shares. The Defendant seeks that the instant suit be dismissed with costs and judgement entered in his favor accompanied by the following orders:

- a. That the Plaintiff removes the caveats registered on the Defendants properties.**
- b. A declaration that the plaintiff holds Kajiado/Olchoro-Onyore/xxxx in trust for the defendant as his matrimonial home.**
- c. A declaration that the plaintiff holds Kajiado/Olchoro-Onyore/xxxxx, xxxxx and xxxxx, and Plot No. Axx on L.R No. xxxxx R [particulars withheld] Dandora Terminus in trust for defendant.**
- d. An order that the trusts in (a) and (b) be terminated and the plaintiff to transfer Kajiado/Olchoro-Onyore/xxxx, Kajiado-Onyore xxxxx, xxxxx and xxxxx, and Plot No. Axx on L.R No. xxxxx R [particulars withheld] Dandora Terminus to the defendant.**
- e. A declaration that the Defendant holds Ngong/Ngong/16904, Kajiado/Kitengela/xxxx and Flat No. Axx in Block xxx on Land Tittle Number Nairobi/ Block xxx/ 251-261 in trust for the plaintiff for half share in each property.**
- f. That the Plaintiff opens the Defendant's home and be prohibited from accessing it.**
- g. That the Plaintiff be stopped from collecting the money from the Defendant's borehole project.**
- h. That the Plaintiff, her daughters and or servants be prohibited from abusing the Defendant.**
- i. Costs of the counterclaim and interest thereon at such rate and for period of time as this Honorable Court may deem fit to grant.**

#### **The Consent Agreement**

Parties are in consonance with each other that on 30<sup>th</sup> July 2015 a consent agreement between the parties was reached regarding properties Kajiado/Ochoro-Onyore xxxxx, xxxxx and xxxxx and Ngong/Ngong/xxxxx. There the properties thus remain for determination are:

- a. Kajiado/Ochoro-onyore/xxxx**
- b. Kajiado/Kitengela/xxxx**
- c. Plot No. Axx on L.R No. xxxxx R [particulars withheld] Dandora Terminus**
- d. Flat Cxx, Block xxx/251-261**

#### **Findings, Analysis and Determination**

I have carefully analyzed the pleadings and the submissions made by both Counsels in support of the instant case. What seems to be the first issue arising for determination in this matter is whether this Court has jurisdiction to entertain a suit for division of property during the

pendency of a marriage.

The definition of a marriage is envisaged in terms of Section 3 of the Marriage Act. It is a voluntary union of man and a woman whether in a monogamous or polygamous union and registered in accordance with the act. As I have earlier mentioned, the fact as to whether parties were married to each other is not in dispute. The marriage is polygamous with the Defendant having been married to another wife before his marriage with the Plaintiff. From the evidence tendered by parties, the marriage has not been dissolved or annulled in any court of law. Neither are there pending proceedings of divorce.

In light of the foregoing the question to ponder is whether this court is seized with jurisdiction to make a determination as regards who gets what on the matrimonial property during the existence of a marriage. According to section 6 of the Matrimonial Property Act, Matrimonial Property means the matrimonial home or homes, household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

What the foregoing provision of law entails is that property acquired before the marriage would not form part of matrimonial assets unless it has been substantially improved or developed during the marriage by the other spouse or both parties to that marriage.

The jurisdiction of this Court to hear and determine an action for declaration of rights to property is encapsulated 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.”**

In view of the foregoing, it is by dint of Section 17 aforementioned that this court may be seized with jurisdiction to declare the rights of the parties in relation to any property which is subject to a contestation. The instant case, therefore the plaintiff seeks more than a declaration of rights. She asked this Court to declare her the absolute owner of Kajiado/Ochoro-onyore/xxxx; Kajiado/Kitengela/xxxx; Flat No. Cxx in Block xxx L.R Nairobi/Block xxx/251-261 and Plot No. Axx on L.R No. xxxxx R Block [particulars withheld] Dandora Terminus Scheme.

On the other hand, the Defendant vehemently opposed the reliefs sought by the Plaintiff and asked the Court to dismiss the Plaintiff's claim with cost and further sought an order that the said properties be distributed in equal shares. Thus, in that respect this matter graduates from being a mere declaration of rights pertaining to property suit to being a matrimonial dispute which seeks division of property.

I wish to place reliance on the Court of Appeal case of PNN vs ZWN (2017) eKLR, where Waki JA, examined the purpose of section 17 of the Married Women's Property Act (repealed). He stated as follows:

**“An inquiry may thus be made under section 17 and declarations may be issued, the subsistence of a marriage notwithstanding. As stated by Lord Morris of Borthy-Guest in *Petit vs. Petit* [1970] AC 777:**

**“One of the main purposes of the Act of 1886 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this in my view negates any idea that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to title to property, the question for the court was whose is this? And not to whom shall it be given?”**

The foregoing caselaw demonstrates that a declaration in terms of section 17 of the Act can be made at any stage of the parties' marriage, to wit, at the beginning, during the pendency and even upon and after dissolution of such marriage. Thus, the court is seized with jurisdiction to make a declaration with regard to the suit property in this case even though the marriage is still subsisting, it does not however equip the court with powers to share the property between parties. In other words, this court is properly equipped with jurisdiction to resolve any question about the parties' beneficial entitlement to the property subject to contestation by the parties without necessarily severing it.

For persuasive purposes, I find proper guidance in the case of *N.C.K vs G.V.K* [2015] eKLR, *Muchelule J* observed thus:

**“In England, under the Matrimonial Causes Act 1973, in instances where parties, for religious or other reasons, do not want to divorce, and if a couple chooses not to bring matrimonial proceedings, the court will resolve any questions about the beneficial entitlement to their property without using the divorce court's adjustive power. The Family Law Act 1966 at section 33(4) provides for declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. In the case of *Arif vs Anwar* [2015] EWHC 124 (FAM) the parties filed divorce proceedings but the same was yet to be determined. The court proceeded to declare each party's beneficial interest in the matrimonial property without severing the same...**

**It would appear to me that a spouse can, under section 17 of the Matrimonial Property Act 2013, either where there is a divorce matter pending, or where, for whatever reason, he can no longer live together with the other spouse but is not seeking to divorce, come to court to resolve any questions about beneficial interest in the matrimonial property without severing the same.”**

In view of the foregoing, I hold the view that this court has the jurisdiction to make declarations pertaining to the parties' beneficial interests in property during the pendency of their marriage. However, issues pertaining to the sharing of the property can only be dealt upon or after dissolution of the marriage. I find as such herein.

This matter is hinged on permanent injunction. The question to ponder is whether the Plaintiff has established a legal interest in the property she claims to have absolute ownership. A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

In **Nguruman Limited v Jan Bonde Nielsen & 2 others, CA No. 77 of 2012; [2014] eKLR**, the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief as follows:

**“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**

- a. establish his case only at a prima facie level,**
- b. demonstrate irreparable injury if a temporary injunction is not granted, and**
- c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.**

**These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”**

In light of the above well settled principles, I therefore analyse the evidence on record so as to figure out whether the Plaintiff was able to demonstrate a prima facie case and whether if the said properties in question are declared to be in her absolute ownership, she would suffer irreparable damage. The properties subject to this case shall be considered separately as under:

#### **Kajiado/Ochoro-onyore/xxxx**

The Plaintiff claims to have bought the land in the year 1999 and subdivided into two portions, to wit, Kajiado/Ochoro-onyore/xxxx and xxxx. She claims that despite the fact that all the money that was used to purchase of this particular property, she gave the Defendant one portion No. xxxx. The Plaintiff told the court that she is the one that financed the construction of the two identical houses with her resources. Conversely, the Defendant told this court that he purchased the original parcel number Kajiado/Ochoro-Onyore/xxx to settle two houses. He further asserts that the said parcel of land was subdivided and registered in the names of the Defendant and the other portion in the Plaintiff's name.

The Plaintiff reiterates in her plaint that she gave the Defendant the purchase money in trust and respect of their mutual relationship. That's why she let the agreement be entered in his names. The Learned Counsel for the Plaintiff also contends that the parties were not married at the time and even the cheques that purchased the Land were supplied by the Plaintiff.

The Learned Counsel for the Plaintiff goes with the narrative that if the parties were married then there was no reason why the titles ought to have been separated. Counsel therefore rubbished the Defendant's claim that he bought the properties for his two wives. Counsel went further to question why parcel No. xxxx was registered in the name of the Defendant instead of the names of his first wife if indeed it is true that the defendant had bought the land for his two wives. He therefore humbly submits that this particular parcel of land should be regarded as one which does not form of the matrimonial property.

In the Learned Counsel for the Plaintiff's view, the Defendant has failed to show any shred of evidence pertaining to development or construction of the Plaintiff's house. Conversely, the Defendant avers that he also sank a borehole on the land portion subject to contention herein. The Defendant produced a contract for the drilling of the borehole. The Counsel for the Plaintiff dismissed this claim and contends that the fact that the Defendant did not drill a borehole on parcel No.xxxx which is registered in his name shows that he doesn't own the property in question. The Counsel for the Plaintiff contends that despite the fact that the contract was entered in the names of the Defendant, the money for the drilling of the said borehole amounting to Kshs. 700,000/= was paid by the Plaintiff.

Learned Counsel also pointed out that the water bills regarding the borehole by the Water Resources Management Authority are addressed to the Plaintiff and that goes to show that the Defendant does not own the borehole. Counsel humbly submits that the Defendant is not entitled to any share of parcel xxxx and the developments herein.

I have perused the sale agreement which was produced by the Defendant. It bears the Defendant's name. The said sale agreement indicates that it was executed on the 12<sup>th</sup> of July, 1999. According to the Plaintiff, she started cohabiting with the Defendant in 1995. That's 5 years before they decided to solemnise their courtship in the year 2000. It seems to me that the relationship between the parties had already grown during the time they were cohabiting to that of trust and respect.

The Plaintiff in her own words told the court that she gave the money to the Defendant to purchase the property in question due to the respect she had for him as fiancé. Thus, in my view the period of five years they had cohabited together was as good as a marriage. The actions of the parties in working together towards a common goal, for instance purchasing properties together shows that parties anticipated to be married or be together forever.

It must note that in cases like the one at hand, it tends to be difficult for parties to account for every penny they put in towards achieving their goals during the subsistence of their marriage. This is because despite marriage being a very unique contract, it is also a covenant between parties which is heavily built upon trust, love, affection, loyalty, respect among other aspects which facilitates the achievement of a common goal by parties to it. In that respect, it cannot be said that the property in question herein was acquired before marriage as that would defeat the intention of the parties at the time the property was acquired. Thus, being together till nature takes its course. I therefore find that the property herein was acquired during the subsistence of the marriage or cohabitation.

Furthermore, the involvement of both parties in the acquisition of this particular property cannot be gainsaid. Parties on this limb only concentrated much on providing evidence of acquisition of this particular property but however their evidence fell short on development or improvement. Both parties only claimed to have constructed the two identical houses but they did not provide the extent each of them contributed towards its construction and improvement.

In spite of the foregoing, what about non-financial contribution? None of the parties herein sought to prove this form of contribution. But however, there is no doubt that the Defendant provided sufficient non-financial contribution as he among other things, facilitated the purchase of the property in question. There is also prima facie evidence to show that he was actively involved in the drilling of the borehole. Even though there is evidence to show that the monies which were used came from the Plaintiff, the contract documents appertaining the drilling of the said boreholes bears his name.

In light of the foregoing of the considered view that the property in question on this limb constitutes part of matrimonial property. In the premises, both parties acquired beneficial, legal and/or equitable interest during the time they have been together. As such, the plaintiff failed to establish on prima facie basis that she holds absolute rights of ownership in the property in question to the exclusion of the Defendant.

#### **Kajiado/Kitengela/xxxx**

The Plaintiff claims to share bought this parcel of land with a co-worker who came to court and affirmed the existence of that fact. I have perused the agreement for sale was in custody of the Defendant. The Defendant indeed produced the same on page 29 of his defence alleges that he bought out the share of the said Co-Worker. The Plaintiff also produced evidence of an agreement which she entered with the co-worker showing that she indeed refunded her the equivalent of half of the value of the purchase money.

According to she Learned Counsel for the Plaintiff, the Defendant has not been able to prove that he is entitled to half of this property as he claims in the counterclaim. The Defendant in his counterclaim admits that the property was initially purchased by the plaintiff with a co-worker. He however claims to have bought off the plaintiff's co-purchaser share.

From the Sale Agreement, I have noted that it indicates that the purchaser of the property in question was the Plaintiff and her Co-worker, a fact that is admitted by the Defendant. However, the Defendant claims to have bought off the plaintiff co-purchaser's share in this particular property hence according to him, he acquired a beneficial interest in it. In that respect, he claims half share of this property.

I'm unable to find any evidence showing that the Defendant indeed bought off the co-purchaser share. The Defendant has not tendered any shred of evidence to support his claim that he paid off the co-worker's share. Neither did he produce any other evidence of contribution, which shows that he participated financially in the improvement or development of this property.

Therefore, the question of non-financial contribution come into play. The property in question was acquired in 2009, during the subsistence of the marriage. I have noted the Defendant facilitated in the purchase of that property and his name indeed appears in the sale agreement as a witness. There was express intention by the Plaintiff that she intended to absolutely own the property to the exclusion of the Defendant.

#### **Section 14 of the Matrimonial Property Act provides 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.”**

The above provision indicates that there is 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 other person but the other spouse made contribution towards its acquisition, then each spouse has proprietary interests in that property. Further, it is noteworthy 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.

In the instant case, parties were living as husband and wife. They both participated in the purchase of this particular property despite the fact that the Defendant was not able to prove financial contribution. I'm unable to find that when this property was purchased, parties had not

intention that it was to be later utilized for their common good. And if non-financial contribution encapsulated in the Act is to be given credence, then one cannot be able to doubt the Defendant efforts in the acquisition of this particular property. I therefore find that land portion **Kajiado/Kitengela/xxxx** cannot be said to absolutely belong to the Plaintiff. The Defendant acquired either equitable, legal or beneficial interest in this particular property. The Plaintiff's case fails on this limb.

**Flat No. Cxx in Block L.R Nairobi/Block xxx/251-261**

I have perused the affidavits and exhibits thereof tendered by parties in support of their claims. I have noted that the Plaintiff took a loan to the tune of 4 million shillings from Equity Bank for purposes of purchasing this particular aforementioned property. In doing so, she used property Title Number Ngong/Ngong/xxxxx as security.

The Defendant seems not to be very knowledgeable as regards the amount at which the property was purchased, how the loan has been repaid, how much the balance is and neither does he have anything to show that he was in one way or another involved both financial and non-financial in the acquisition of the said. The Defendant only claimed that the property is being serviced by a mortgage/charge to Ngong/Ngong/xxxxx whose rental income is being used to pay the installments. He did not go further to show the extent of the rental income he claims to be servicing the said loan. He offered no documentary evidence to show that indeed there are any payments being used from rental income.

Despite the fact that this particular property having been acquired during the subsistence of marry. I am not able find that the Defendant made any notable contribution to its acquisition. The evidence he produced is not convincing as regards his involvement in its purchase. In that respect, I have no other alternative but to find the Plaintiff's claim credible that she bought the property for her daughter. Due to the lack of evidence of contribution towards acquisition and improvement of this particular property on the part of the Defendant, he has no make over it.

I therefore find that he did not acquire any beneficial, legal or equitable interest in this particular property. In that regard, the property in question does not form part of matrimonial property.

**Plot No. Axx on LR.No. xxxxx R Block [particulars withheld] Dandora Terminus Scheme**

The Plaintiff claims that this particular plot was allocated to her on the 4<sup>th</sup> of April, 1995 by the office of the president through the District Officer Embakasi Division. She brought proof that the survey fees paid up on 21/9/1996 and all payments to the Nairobi City Council (as it then was) were done by her.

The Counsel for the Plaintiff contends that the plot was allocated to the Plaintiff five years before the marriage between the parties and further contends that she has single handedly constructed residential block of houses. She claims to have at that time employed the Defendant as a foreman to oversee the construction. The Plaintiff on pages 144 to 149 of the Plaintiff's bundle of documents has produced evidence of water application to the City Council of Nairobi Water Company, the building plans approved by the City Council of Nairobi.

The Learned Counsel for the Plaintiff also invited this court to look at the sources of money used for the construction. Counsel therefore attached the plaintiff's pay slip, savings book, loans by the plaintiff as well as evidence of her sale of different plots on pages 48-120 of the Plaintiff's Buddle of documents.

The Plaintiff also told this Court he allowed the Defendant collect rents so that he could have a source of income. She expounded that the Defendant is unemployed and has no other source of income save for rents from this house and the other home she constructed for him. She further claims that she made an agreement with the Defendant would surrender the allocation of the rent to the Plaintiff once she retires, but no such agreement was admitted in evidence. Counsel for the Plaintiff contends that the plaintiff has now retired and has no other source of income. Counsel also claims that the Plaintiff has been paying the Kenya Revenue Authority and despite the consent filed the Defendant has never paid the taxes to KRA.

The Defendant's side of the story is that he was in the allocation panel or committee of the plots in this section and as a panel member he was barred from allocating plots to his own names but his nominee and thus be entered the plaintiff's name. He claims to have developed the property single handedly and has always been in possession and exclusive control of the property. The Defendant therefore claims this plot absolutely.

In light of the foregoing arguments presented by both parties in relation to the above-mentioned property, it appears to me that from the onset, the relationship between them was never an ordinary one. To my mind the argument that the Defendant was an employee to the Plaintiff at the time this property was acquired does not hold water considering the fact that the property was acquired at the time parties started cohabiting.

The parties were in a relationship of trust and they had just started working together towards attaining common goals. That is why at this juncture none of the parties has conclusively proved financial contribution. The Plaintiff only gave the court documents which show the source of money but not that those monies were directed towards the acquisition and development of this particular property.

Assuming that this Court was to go by the Plaintiff's claim, would the Defendant's efforts towards the acquisition of this property and their relationship during that time go in vain? I would answer in the negative. The Plaintiff was working with Kenya Revenue Authority at that time, and she must have been equally busy to manage some of her affairs. That's where in my view the Defendant would come in and fill that gap. Thus, if the Defendant was to be found to have not provided any financial contribution, he would not fail to fit in the non-financial contribution category due to his participation in the acquisition of this property.

I'm also appalled by the Plaintiff's generosity towards the Defendant to the extent of allowing her to collect rent from a property she

absolutely owns. She claims that there was an agreement made that the Defendant would collect rent until she retires and once she retires he would start channeling the same to her. I have not seen such agreement hence it remains a claim which has not been proved on a balance of probability. To my mind, the parties herein acquired this particular property together and that explains why the property is registered in the names of the Plaintiff and rent is being collected by the defendant.

For the above reason I'm unable to agree with the Plaintiff claim that she be declared an absolute owner of this particular property. In the same test, I am neither in agreement with the Defendant's counter claim that he ought to be declared the absolute owner of the particular property. In my view, even though this court is unable to determine to what extent did the parties herein contributed to the acquisition of the aforementioned property, it cannot be gainsaid that they indeed worked together towards its acquisition.

As mentioned at the onset of this matter, parties herein have come to court to resolve any questions about the beneficial entitlement to their property even though the manner in which the pleadings were canvassed clearly show that parties want the properties subject to this suit to be distributed between them. However, in the absence of proof of dissolution of their marriage, the best this court can issue are declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. Both sections 7 and 17 of the Matrimonial Property Act 2013 are in tandem with, and seek to fortify, Article 45(3). In my view, one deals with the distribution of matrimonial property upon divorce and the other shields the rights of spouses in regards to matrimonial property if the marriage is still subsisting. As I have earlier mentioned, the court is not dealing with an application under section 17 of the Matrimonial Property Act 2013.

The upshot of this matter is that the Plaintiff's case herein partially succeeds. I hereby make the following orders:

**a. A declaration is hereby issued that the Plaintiff is the absolute proprietor of Flat No. Cxx in Block L.R and Nairobi/Block xxx/251-261 whereas the Defendant and any other person purporting to be his agent is hereby restrained from interfering with the said property.**

**b. A declaration that *Kajiado/Ochoro-onyore/xxxx; Kajiado/Kitengela/xxxx* are matrimonial properties within the realms of the Matrimonial Property Act (2013) and may be liable for distribution in accordance with Section 17 of the Matrimonial Act in the event that parties herein have their marriage dissolved.**

In the midst of such, I make no orders as to costs of this litigation. Each shall bear their own costs.

It is so ordered.

**Judgment, written, signed by me on this 8<sup>th</sup> day of November 2019**

.....

**R. NYAKUNDI**

**JUDGE**

**DELIVERED BY IN OPEN COURT AT KAJIADO THIS 11<sup>TH</sup> DAY OF DECEMBER 2019.**

.....

**CHACHA MWITA**

**JUDGE**