



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL SUIT NO. 1 OF 2017 (OS)

E W M.....PLAINTIFF

-VERSUS-

M O M.....DEFENDANT

A N M.....1ST INTERESTED PARTY

J T M.....2ND INTERESTED PARTY

JUDGEMENT

The plaintiff and the respondent are divorced. An order of court dissolving the marriage was issued on the 8th of February 2017 in SRMCC No.1 of 2016. The plaintiff in her Originating Summons dated 4th March 2017 is seeking the following orders: -

- 1. That the Honorable Court be pleased to declare and issue a declaration that the listed movable and immovable properties set out in the schedule herein below were acquired through the joint efforts of the Plaintiff and Defendant during the subsistence of their marriage and registered in the name of the Defendant, and in possession of the Defendant are jointly owned by the parties, and the same are held in trust by the Defendant for the benefit of the Plaintiff in the ratio of 50:50.***
- 2. That this Honourable Court be pleased to issue an order directing equal division of the properties listed in the said schedule between the parties.***
- 3. That this Honourable Court be pleased to issue an order to restrain the defendant or his servants or agents from alienating, transferring, giving in exchange or encumbering or in any other way disposing the properties listed in paragraph 2 of the originating summons.***
- 4. That this Honourable court be pleased to issue an alternative order that the said assets be valued, their value be divided, and each party be given an option of buying out the other's share within a period of 120 days from the date of the judgement, and in default the said properties, with the exception of the matrimonial home be sold and the net proceeds of sale shared out between the parties.***
- 5. That this Honourable court be pleased to issue any other order that it may deem fit.***
- 6. That the cost of the application be provided for.***

The defendant is represented by Learned Counsel, Mr Wandaka, the plaintiff by Mrs. Onditi and the 1st and 2nd Interested Party by Mr. Ndung'u.

The application is based on the grounds that: the plaintiff was married to the Respondent on the 7th day of September 1964 in Lower Kabete in Kiambu County; that the said marriage between the parties was dissolved by an order of court on 8th February 2017; that the properties listed at paragraph 2 of the originating summons was jointly acquired by the parties during the subsistence of their marriage; that parties have equal rights at the time of the marriage, during the marriage and at dissolution of the marriage; that the defendant may interfere with the suit property by selling, transferring, alienating, disposing, interfering or otherwise in order to deprive the Applicant of her right to the said properties and that it is the interest of justice that this Honorable Court should be pleased to issue the orders sought above.

According to Plaintiff and as aforesaid, the parties herein got married in 1964 and they had no properties at all. At that time they were stayed in a mud house of the Defendant's mother (now deceased) at Illasit within Loitokitok Sub-County where she gave birth to my 1st, 2nd and 3rd born children respectively. It was further stated that in 1970 the parties moved to Rombo within Loitokitok Sub-county where they freely

allocated 50 acres of land comprised in the title number Loitokitok/Rombo "A"/ [particulars withheld] by the Local Maasai Community where they constructed their first semi-permanent house build with mud and an Iron sheet roof.

She averred that upon settling at Rombo, she started cultivating part of 50 acres, grew maize and beans crops from which she claims to have generated income, while the Defendant was employed by his brother to work in a shop. She further averred that in 1974 she started a shop for selling Maasai beads after she had raised considerable capital out of her farming venture. It was stated that it was out of the proceeds of that Masaai bead business that the parties were able to purchase their first cow and in addition were gifted with a goat by one Mzee Ole Ngape (deceased). She also stated that their livestock have increased over the years to 1,500 heads of cattle and 1,000 goats and sheep.

According to the Plaintiff the parties also started a hide/skin business and beer business which she claimed to have been lucrative both in Kenya and Tanzania. At that time they had enough capital and that is when they bought their first motor vehicle Registration Number [particulars withheld] (Toyota) and subsequently other motor vehicles including a Land Rover Motor vehicle Registration Number [particulars withheld], through a bank loan and that at some point the motor vehicle had been attached due to their failure to repay an outstanding loan amounting to Kshs.90, 000/-. That was when she intervened to clear the date using her personal savings with POSTA SAVINGS which secured the release of the vehicle which had been attached. In the late 70's she obtained a driving license henceforth she could drive one of their vehicles to transport hides and beer to different destinations.

The plaintiff claims that during the subsistence of her marriage with the Defendant, she actively participated in the running of their businesses, and in acquiring various properties including Lorries, plots which they further developed in Loitokitok using the monies generated from their diverse businesses. She also stated that she played a supervisory role during the construction of their properties in Loitokitok, Kariobangi, Ngei, Roysambu, South C, Nairobi and Embakasi in Nairobi.

The plaintiff further stated that the Defendant and her acquired all the properties listed in paragraph 2 which are also listed on paragraph 17 of the supporting affidavit of the Plaintiff, during the subsistence of her marriage with the Defendant and that all the said properties were acquired before the Defendant married a second wife in 1994. She stated that her contribution towards the acquisition of the aforementioned properties was monetary and non-monetary contribution which includes; farm work carrying out domestic work and management of the matrimonial home, taking care of the children, management of all our family businesses and properties, companionship and running our family businesses. She produced evidence in forms of photographs taken in different years showing the properties acquired and owned by the parties.

It was also mentioned that the said property even though it was jointly acquired, was registered in the name of the defendant and in the Plaintiff's view the said properties were held in trust by the Defendant for the benefit of the Plaintiff. Having said so, the Plaintiff asserted that she has an equal right to the properties in the ratio of 50:50.

The Plaintiff told the court that she learnt that the Defendant is surreptitiously transferring and registering all the suit properties to his brothers and especially one J T M with the sole aim of defeating justice. The Defendant is also working in cahoots with officials of the County Government of Kajiado to fraudulently transfer the properties/plots registered at the said County Government Registry so as to render my suit herein an academic exercise.

In the premises the Plaintiff urged the court in the interest of justice to grant the orders sought herein to restrain the Defendant from interfering with the said properties in any manner.

In response to the to the plaintiff's case, the Defendant was represented by Learned Counsel Mr. Kinuthia Wandaka. He filed replying affidavits dated 4th April, 2017 and 18th April, 2017 filed on 4th May, 2017. The defendant, also filed a supplementary affidavit on the 3rd July 2017 and the Defendant also adopted the averments in his Replying Affidavit sworn on 3rd October 2001 in Civil Suit No. 24 of 2001.

In his Replying affidavit, the Defendant denied ownership of nine properties listed under paragraph 3 of his supporting affidavit. These include; Plot No. [particulars withheld], Ngei [particulars withheld], Nairobi; Plot No.[particulars withheld], Ngei II, Nairobi; Plot No. [particulars withheld], Loitokitok; Land Reference No. [particulars withheld]/1530, Fedha Estate, Nairobi; Land reference Number [particulars withheld] South C, Nairobi; Loitokitok Town ship No.[particuj];ars withheld]; Plot No.[particulars withheld], New Roysambu (Housing Co. Limited); Motor vehicle No. [particulars withheld] and Vehicle [particulars withheld]H.

He also denied ownership of Loitokitok Township No. [particulars withheld] which he claimed to have been sold to J T M and could not be transferred as the plaintiff had lodged a caution. (He annexed a bundle of sale agreement, consents, transfer and payment receipts marked as "MM-A"). He also stated that, Vehicle No. [particulars withheld]F is jointly owned with R T Co. Limited and has a loan of about Kshs.1,254,000/=. (Annexed is the copy of sale agreement marked "MM-B").

He further denied ownership of yet another list of properties (plots) which he said to have no allotment letters or lease and by dint of that they cannot be said to belong to him. these include: Plot No.[particulars withheld], Rombo; Plot No. [particulars withheld] Illasit; Plot No. [particulars withheld] Rombo; Plot No. [particulars withheld] Rombo; Plot No. [particulars withheld] Entarara; Plot No.[particulars withheld] Kimana; Plot No.[particulars withheld] Isinet; Plot No. [particulars withheld] Rombo (Business); Plot No.[particulars withheld] Business Olpo pongi; Plot No. [particulars withheld] Business Olpo pongi; Plot No.[particulars withheld] Business Rombo and Plot No. [particulars withheld] Business Emwemwenyi.

The defendant therefore listed the properties that he claims to own in paragraph 6 of his replying affidavit. These include: Land Reference No. Loitokitok/Rombo "A"/ [particulars withheld] measuring 5.5 Hectares; Land Reference No. Loitokitok/Rombo "B"/ [particulars withheld] measuring 3.4 Hectares; Land Reference No. Loitokitok/Rombo "A"/25 which he acquired through inheritance from his Maasai clan Nkindongi measuring 17,5 hectares; Land Reference No. Loitokitok/Olkaria/[particulars withheld] acquired through inheritance from his Maasai Clan Nkindongi measuring 21.6 Hactares and Plot No. /[particulars withheld] Rombo which he claimed to have been allotted to him by the County Government of Kajiado which she is currently doing business in (see annex "MM-C"). He further deponed that Land Reference No. /[particulars withheld]/31 Tassia II does not belong to him since it's not in his name and that the same is to be registered in the

name of the son of his second wife since he has already given his 2 sons of the Plaintiff property worth millions. He also admitted that he owns Motor vehicle registration numbers [particulars withheld] and [particulars withheld].

It was his testimony that the alleged 1500 cows and 100 goats and sheep are a total fabrication and exaggeration. He said that in his humble view, the cows are about 200 including calves and 100 goats. He further stated that many of the cows and the goats have died because of drought currently affecting the whole country and the same is in public domain. He stated that he doesn't know the current number since he doesn't see them frequently and that the Plaintiff has not seen the livestock for 20 years hence her figures are based on speculation.

The defendant refuted the exact date as to when they were married saying that she was employed as a house girl and not educated as him thus she cannot give the accurate date.

It was stated that the plaintiff filed a case i.e. Nairobi Civil Suit Number 24 of 2001 claiming subdivision (O.S) claiming subdivision of Matrimonial Property he applied for this suit to be dismissed on ground of res judicata. (Copy of originating summons marked as "MM-D").

The defendant also stated that his second wife similarly filed Nairobi Suit Number 38 of 2006 claiming matrimonial property and that if both suits were to succeed he would be left with nothing. (Copy of originating summons annexed and marked as "MM-E").

It was argued that the Plaintiff in this suit has claimed properties that he did not in any way contribute to the acquisition of those properties. Further that her conduct has been poor and has given him stress and that since they divorced, he will seek a refund of the dowry he paid under Kikuyu Customary Law.

He also said that the photographs that the plaintiff produced before court depict the few times that the Plaintiff and the Defendant have lived happily. It was also his testimony that he married his second wife in 1980 and they have three children, the eldest was born in 1981, followed the 2nd born in 1985 and the last born in 1996. (Copies of identification cards annexed and marked as MM-H).

ISSUES FOR DETERMINATION

The parties herein agreed on the list of issues for determination which are as follows:

- (a) Whether there is another suit subsisting on the subject matter.**
- (b) Whether the said properties should be shared between the Plaintiff and the Defendant equally.**
- (c) Whether A N M has a claim to the subject properties**
- (d) Whether J T M has a claim to Loitokitok/Township/[particulars withheld]**

Whether there is another suit existing touching on the same subject matter.

The Defendant alleged that there another suit existing touching on the same subject matter. He stated that the suit herein was filed by the Plaintiff whilst Civil Suit No.24 of 2001 was still pending for determination. He annexed a copy of pleadings marked as "MM-D". The counsel for the defendant produced annexure MM-F to show that the plaintiff refused to withdraw the said case even after being advised to do so. It was argued in the defendant submissions that no party should be vexed twice. Further that the letter produced by the plaintiff in the view of the defendant is no proof of withdrawal and it was necessary to produce a certified order. The defendant therefore argued that the suit herein is improperly before the court and he urged the court to dismiss this suit.

The counsel for Plaintiff admitted having filed the said suit. However, according to the plaintiff, the said suit was withdrawn by the Plaintiff on 28th July 2017. The Plaintiff produced a notice of withdrawal of the suit before the court. In response to the defendant's suggestion that the plaintiff ought to have produced proof in form of an order confirming withdrawal of the previous suit, counsel for the plaintiff argued that the same is without basis. The plaintiff argued that there is provision of law that says an order must issue for withdrawal to be effective. It was therefore submitted on behalf of the plaintiff that the previous suit was properly and effectively withdrawn and the present suit is properly before court.

In the foregoing and impliedly, what the issue that the defendant is raising as a shield is the doctrine of res judicata even though the Defendant in his submissions was very economical in using the word res judicata. What the Defendant is raising as a shield is estoppel thus the defendant is saying that this court is not competent to hear and determine the case at hand. In that regard, the doctrine of *res judicata* is set out in the **Civil Procedure Act** at **Section 7** as follows:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

The Civil Procedure Act also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:

'Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or

not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”

In light of the above, what the doctrine of res judicata as couched under the abovementioned provision talks about trying a case, thus that parties ought to have ventilated the issued and court on adjudicating those particular issues made a determination. In my view, trying means “to hear and determine”. Thus the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. The Court in the English case of HENDERSON VS HENDERSON (1843-60) ALL E.R.378, observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

Applying the foregoing to present case, has the previous matter in question been trialed or heard on merits? The herein did not do enough in terms of their duty of disclosure to the court. If the defendant were indeed suit in the former case, they ought to have brought material evidence to indicate that the case was heard and determined on merits. Neither the Defendant nor the Plaintiff brought the same to the attention of the court in form of some documentary evidence. Both parties owe the court a duty of care which is a duty to disclose material facts. In the circumstances and in view of section 7 aforementioned and the above court decision, there was no material evidence to prove on a balance of probability that the case reference to this was ever tried or determined in favor or against any of the parties before this court. The court is unable to agree with the Defendant that court is not competent to hear and determine the present case. If there was a matter filed, the aggrieved or either Defendant or plaintiff would not have filed a fresh matter before this court, they would have gone on appeal.

Whether the assets set out in prayer 2 of the originating summons are registered in the name of the Defendant or are held by the Defendant.

The defendant herein in his Replying Affidavit that he owns the following properties;

- (a) Title No. Loitokitok/ Rombo “A”/[particulars withheld];
- (b) Title No. Loitokitok/ Olkaria/[particulars withheld]; ;
- (c) Title No. Loitokitok/ Rombo “A”/[particulars withheld];;
- (d) Title No. Loitokitok/ Rombo “B”/[particulars withheld];;
- (e) Plot No. /[particulars withheld];Rombo;
- (f) Motor Vehicle Registration No. /[particulars withheld];;
- (g) Motor Vehicle Registration No. /[particulars withheld];; and
- (h) And 200 cows and 100 goats.

On whether the properties known as Title No. Loitokitok/ Rombo “A”/[particulars withheld]; ; and Title No. Loitokitok/ Olkaria/[particulars withheld];included on the above list form party of matrimonial property and whether they are available for distribution, **Section 6(1) of the Matrimonial Property Act** defines matrimonial property as- 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. In that respect the plaintiff let effect to the effect that these properties in question were acquired during the subsistence of the marriage and that at the time of their marriage, they had none of the properties in contention a fact which was not controverted by the Defendant. As regards the two aforementioned properties which he acquired through inheritance from his Maasai Clan, Nkindongi, the Defendant refuted the Plaintiff’s claim that the properties had been given to them as couple by the government with the concurrence of the local Maasai Community. He stated that customarily, his community give land to their sons and these properties were given to him likewise. If at all these properties had been given to the Defendant as inheritance before the commencement of his marriage with the Plaintiff, such property ought to have excluded. This court finds that since the said two properties were acquired during the subsistence of the marriage, they form and parcel of matrimonial property and they are therefore available and subject to distribution herein together with the other above listed properties which the defendant admitted ownership. Having made the above findings, the said properties are still to be distributed as per the contribution of each party.

Furthermore, the Plaintiff’s evidence was to the effect that the Defendant deliberately transferred properties to the names of third parties, in

particular, plot No. / [particulars withheld]; to P.K M, his son so that the same would be removed from the properties registered in his name. Two more properties are said to have been transferred to his sons namely Nairobi/Block 97/1530 and L.R No. / [particulars withheld];/71 to M O M and Peter Mwaura. In response to the Plaintiff's assertion that she had obtained certified copies of title to Nairobi/Block / [particulars withheld];/1530 Fedha Estate, Plot Number / [particulars withheld];, Loitokitok and New Roysambu Housing Company Limited, the reiterated that he did not own these properties. He contested the documents produced by the plaintiff to prove that he owns the properties and termed them illegal. He denied having attempted to sell properties to third parties including the 2nd Interested Party in a bid to defeat her claim.

In the foregoing and according to the evidence on record, the Plaintiff produced documentary evidence showing that the said properties are still registered in the name of the Defendant. There is no proof led by the Defendant to rebut the plaintiff's claim that he owns those properties. It was stated that in the previous suit which was withdrawn, the Defendant had denied having been married to the Plaintiff. (See pg.19 of the Defendants record), counsel for the Plaintiff urged the court to treat the defendant's evidence denying ownership of some plots with utmost caution and suspicion. In response to the Plaintiff's assertion that she had obtained certified copies of title to Nairobi/Block / [particulars withheld];/1530 Fedha Estate, Plot Number / [particulars withheld];, Loitokitok and New Roysambu Housing Company Limited, the reiterated that he did not own these properties. He contested the documents produced by the plaintiff to prove that he owns the properties and termed them illegal. He denied having attempted to sell properties to third parties including the 2nd Interested Party in a bid to defeat her claim.

It is clear that Defendant merely denied ownership and challenged the legality of the Plaintiff documentary evidence. Further, the contents of the Plaintiff evidence was not controverted rather the defendant challenged whether it was legal for the Plaintiff to obtain the said documents of title. These properties seem to have been removed from the list that the Defendant owns or the matrimonial property for purposes of defeating the purpose of this suit. Therefore, I am of the view the documentary evidence produced on this limb is prima facie evidence that proves on a balance of probabilities that the defendant owns the properties in question. In the premises it is the court's finding that Plot No. / [particulars withheld];; Nairobi/Block / [particulars withheld];/1530 Fedha Estate, Plot Number / [particulars withheld];; Loitokitok; Plot No.4 Rombo; Plot No. 25 Illasit; Plot No.8 Entarara; Plot No. / [particulars withheld];; Kimana; Plot No. / [particulars withheld]; Rombo and New Roysambu Housing Company Limited is still part of matrimonial property and that the same is available for distribution herein.

The Defendant further refuted the allegation by the plaintiff that he owned 1,500 heads of cattle and 1,000 goats and sheep. The Defendant stated that the true number of his livestock is 200 cows and 100 goats. He argued that the number given by the Plaintiff is exaggerated since she has not seen them in 20 years. Further that the plaintiff did not consider the fact that some of the livestock was given away as dowry for his sons and most of them died due to drought. In respect of the above, there is need for the parties to ascertain the exact number of the livestock available since both parties seem have no idea in regards to the exact number of the cows, goats and sheep. The court also finds that the livestock herein is part and parcel of matrimonial property and is available for distribution.

In concluding this issue in contention, this court finds that the properties which are subject to matrimonial property and available for distribution are as follows:

- (a) Title No. Loitokitok/ Rombo "A" / [particulars withheld];;
- (b) Title No. Loitokitok/ Olkaria / [particulars withheld];;
- (c) Title No. Loitokitok/ Rombo "A" / [particulars withheld];;
- (d) Title No. Loitokitok/ Rombo "B" / [particulars withheld];;
- (e) Plot No.70 Rombo;
- (f) Motor Vehicle Registration No. / [particulars withheld]; ;
- (g) Motor Vehicle Registration No. / [particulars withheld]; ;
- (h) And 200 cows and 100 goats.
- (i) Plot No. / [particulars withheld]; Rombo
- (j) Nairobi/Block / [particulars withheld];/1530 Fedha Estate,
- (k) Plot Number / [particulars withheld];, Loitokitok
- (l) Plot No. / [particulars withheld];, Entarara.
- (n) Plot No. / [particulars withheld]; New Roysambu Housing Company Limited.
- (m) Loitokitok Township No. / [particulars withheld];.
- (o) Plot No. / [particulars withheld]; Rombo

(p) Plot No. /[particulars withheld]; Illasit

(q) Plot No. /[particulars withheld]; Kimana

(r) Plot No. /[particulars withheld]; rombo

Whether the suit property was acquired through joint efforts of the Plaintiff and Defendant; and whether the same is to be shared equally between the parties.

There is no dispute that the plaintiff and the defendant were married and that their marriage was eventually dissolved by a court order in 2017. The evidence of the plaintiff is such that she was married at the age of 15 and cohabitated with the Defendant from 1964, the union of which brought 9 issues. She said they had no property at all when their marriage commenced and that evidence was not controverted by the Defendant since he was not able to demonstrate what he had acquired at the material time. Further that none of the properties listed in the originating summons had been acquired at the time their union commenced. She stated that the local Maasai Community at that time freely allocated the newly wedded couple 50 acres that is Loitokitok/Rombo A//[particulars withheld];.

As proof of contribution the plaintiff adduced evidence to the effect that she grew maize and beans crops, run a shop for selling Masaai beads using the money she raised through her farming venture, started and operated a hide/animal skin business and beer shop, out of which business the parties purchased their first cow and that she acquired driving license in the early 70s so that she could transport beer to various destinations. The Mrs Onditi, the learned counsel for the Plaintiff referred to the divorce proceedings where it is claimed that the defendant admitted that the Plaintiff has a hotel which he described as huge and well furnished, where she earns Kshs.100, 000/= per month. It is also claimed by the plaintiff that in the said divorce proceedings, he also admitted that the plaintiff milks cows. Mr. Wandaka, the learned counsel for the defendant on the other hand argued that parties' marriage had been fraught with numerous challenges and that during the subsistence of their marriage, the Plaintiff ran away from the matrimonial home thrice and at times leaving children in the care of his mother and 2nd wife. The Defendant denied that the Plaintiff gave him companionship and an environment suitable for acquisition of his property. He also refuted that claim by the plaintiff that she owns a driving license for lack of proof in from of a copy of the same. It was further contented that the plaintiff claimed to have been in business of selling beads, hides, etc. but however no invoices, cash sales, bank account statements or any document was produced to show the income generated from these business. The defendant also questioned why she has no properties in her names if indeed she is an entrepreneur. It was adduced that Plaintiff inherited properties from her mother which she sold without giving the Defendant a share.

It was the Defendant's testimony that all the properties which rightly belong to the defendant have been acquired through loans and by higher purchase agreements with financial institutions.

In the foregoing, I wish to first agree with the Mr Wandaka, on behalf of the defendant that the Plaintiff did not produce any documentary evidence by way of invoices, cash sales, bank account statements or any document was produced to show the income generated from the above said businesses or if they ever existed. In that regard, the Plaintiff's monetary contribution was not proved on a balance of probability. However, it is my finding that the plaintiff's efforts and contribution in the family cannot go unnoticed. Despite the fact that the marriage between the parties was fraught with challenges, the plaintiff dutifully took care of the family. She worked for many years for the family through her participation in domestic work and management of matrimonial home, and taking care of the children is a worth contribution. There is uncontroverted evidence that she managed farm work and was out the proceeds her farming venture that helped her and the defendant to acquire their first cow.

Section 45 of the constitution of Kenya 2010 provides that:

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”

Section 6 of the Matrimonial Property Act No. 49 of 2013 defines Matrimonial Property as follows: -

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.

Section 7 of the same Act stipulates that ownership of Matrimonial Property depends on each spouses' contribution. Section 7 states 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.

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

Section 9 of Act No.49 of 2013 recognizes contribution through improvement of a property acquired before or during the marriage. Section 9 states as follows: -

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”

Further, section 14 of the Act provides that:

“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 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. Contribution is couched both in terms of monetary and non-monetary contribution. The contribution includes: domestic work and management of the matrimonial home; child care; companionship; management of family business or property; and farm work. As quoted in the case of **PNN vs ZWN (2017) eKLR**, “One of the earliest opportunities to interpret the provisions of **Article 45 (3)** came one year after the promulgation in the case of **Agnes Nanjala William -vs- Jacob Petrus Nicolas Vander Goes, (Civil Appeal No. 127 of 2011)**, where this Court stated as follows: -

“Article 45 (3) of the Constitution provides that parties to a marriage are entitled to equal rights at the time of the marriage during the marriage and at the dissolution of the marriage. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However pursuant to Article 68 Parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home. Although this is yet to happen, we hope that in the fullness of time Parliament will rise to the occasion and enact such a law. Such law will no doubt direct a court, when or after granting a decree of annulment, divorce or separation, order a division between the parties of any assets acquired by them during the coverture. Pending such enactment, we are nonetheless of the considered view that the Bill of Rights in our Constitution can be invoked to meet the exigencies of the day.”

In the case of **PWK vs JKG 2015 eKLR** the Court said;

Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim Equality is equity while heeding the caution of Lord Pearson in *Gissing vs Gissing* [1970] 2All ER 780 Page 788.

After analyzing English authorities, this Court in **Peter Mburu Echaria v. Priscilla Njeri Echaria, (2007) eKLR** stated in part as follows:

“It is clear from those cases that when dealing with disputes between husband and wife over property the court applies the general principles of law applicable in property disputes in all courts between all parties irrespective of the fact that they are married. Those principles as Lord Diplock said in *Pettit* are those of English law of trusts. The House of Lords specifically decided so in *Gissing vs. Gissing*. According to the English law of trusts it is only through the wife’s financial contribution, direct or indirect towards the acquisition of the property registered in the name of her husband that entitles her to a beneficial interest in the property.”

11. The Court also examined local decisions and came to the following conclusion: -

“In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this Court, the court has invariably given the wife an equal share (see *Essa vs. Essa* (supra); *Nderitu vs.*

Nderitu, Civil Appeal No. 203 of 1997 (unreported), Kamore vs. Kamore (supra); Muthembwa vs. Muthembwa, Civil Appeal No. 74 of 2001 and Mereka vs. Mereka, Civil Appeal No. 236 of 2001 (unreported). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of each case and independently assessed the wife's contribution as equal to that of the husband.

The nub of the above cited judicial precedence is that the Trial Court is mandated to scrutinize the direct and indirect contribution of each party to the marriage in acquisition and/or development of the suit properties so as to inform the division of matrimonial properties after dissolution of the marriage. In the circumstances, the instant case will be determined with accordance to each party's contribution.

In the foregoing, I wish to first agree with the Mr Wandaka, on behalf of the defendant that the Plaintiff did not produce any documentary evidence by way of invoices, cash sales, bank account statements or any document was produced to show the income generated from the above said businesses or if they ever existed. In that regard, the Plaintiff's monetary contribution was not proved on a balance of probability. In that regard, it is my finding that the plaintiff's efforts and contribution in the family cannot go unnoticed. Despite the fact that the marriage between the parties was fraught with challenges, the plaintiff dutifully took care of the family. She worked for many years for the family through her participation in domestic work and management of matrimonial home, and taking care of the children is a worth contribution. There is uncontroverted evidence that she managed farm work and was out the proceeds her farming venture that helped her and the defendant to acquire their first cow. 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.

In the foregoing, this court recognize the constitutional dictate as provided for in section 45 of the Constitution of Kenya, 2010 which envisages the principle of equality between parties' to marriages. However, disputes of this nature are way beyond the question of reducing them into mathematical precision. There is uncontroverted evidence that the Plaintiff has not been staying with the Defendant for 20years. Further that during the subsistence of their marriage, the plaintiff ran away thrice living her husband and children with the 2nd wife. Thus it can be said that the plaintiff was not always there for the Defendant and thus he was denied his conjugal rights for years.

Whether J T M has any claim to Loitoktok Township/[particulars withheld];

The evidence on record is such that the above mentioned property allegedly owned by J T M (2nd interested party) is registered in the name of the Defendant. The Counsel for the defendant argues that 2nd interested party had purchased the land for good consideration and had proceeded to substantially develop since 2001. The sale had gone through the necessary procedures and what remained was registration. An agreement for sale executed in July 2002 as well as the necessary consents from the County Government were produced as evidence in support of the defendant's assertion. It was stated that the claim for this property is untenable. The Plaintiff on the other hand told the court that the defendant receives all rental proceeds from the said property and is therefore available for distribution as matrimonial property and therefore the property is available for distribution as matrimonial property.

In view of the above arguments, the court notes that there is prima facie an agreement was entered into between Defendant and the 2nd Interested Party. Further I have also seen that consent for transfer of the suit property was duly granted by Olkejuado County Council of the 27th November 2001 and Ministry of Lands and Settlement Consent was approved on the 22nd July, 2012. In the premises, it seems that the beneficiary interest of the suit property is already vested in a 3rd Party but however the proprietary rights seem to be still in the name of the Defendant. If though the property has not been registered, the court cannot ignore without cogent evidence on the part of the plaintiff that the property of the ownership of the suit property is still with plaintiff. The fact that this title has not been acquired is not by itself a ground to vitiate the said sell. There is no evidence adduced by the plaintiff to show some sort of fraud or concealment that this sale was a fraud to defeat any other claim which may arise under the matrimonial property act. Further, no evidence was led to show that the intermeddling of the matrimonial property by the Defendant was done in such way to defeat any other decree or judgement which may arise from the Act. It is the court's view that if we allow the property to be shared between the plaintiff and the Defendant, it would affect the rights of the 2nd Interested Party who already has a legal beneficial interest in the suit property. Furthermore, the plaintiff alleged that the Defendant is still collecting rent but however the plaintiff led no evidence to prove that fact. Thus that assertion was not proved on a balance of probability. If at all such evidence had been brought before the court, it could have been its finding that the suit property is held in trust by the 2nd Interested Party on behalf of the defendant. That is not the case in the instant case. The court also wishes to allude to the fact that in the African context, it is possible that people may own land even though title to that land has not passed as in this case. The takes cognizance of the fact that valid contractual relationships exist even in the absence of the fulfillment of conditional precedence and that does not entail that they do not own such properties or that such ownership is illegal. Having made the above findings, the court further finds that the suit property is part and parcel of matrimonial property as the Defendant did not controvert that fact. Furthermore, for the purposes sharing the suit property, will remain with the Defendant so that the rights of the 2nd Interested Party who is not a party of the matrimonial property dispute herein.

Whether A N M has any claim to the subject properties in the suit.

It is settled law that matrimonial property can only be divided between the spouses if they divorce or their marriage is otherwise dissolved. The 1st Interested Party in her affidavit dated 30th October 2017 deponed that she married to the Defendant, thus her marriage with the Defendant is subsisting. Therefore, I place reliance on section 17 of the Matrimonial Property Act which provides that one may make an application for declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person as part of a petition in a matrimonial case regardless of whether the marriage has been dissolved. The court acknowledges that the 1st Interested Party might have interest in some of the properties subject to distribution herein but however cannot be party to these proceedings since she

is in a subsisting marriage with the Defendant. I agree with the assertions of my brother W.M. Musyoka in MNW v WNM & 3 Others where he stated that it is against public notice to entertain matrimonial disputes as it would accelerate the break-up of the family involved and that public policy favours family unity and should foster peace and reconciliation. Alienation of lands between spouses during unbroken coverture does not augur well for the well-being of the family as a unit.

THE LACK OF A PROVISION IN THE MATRIMONIAL CAUSES ACT WHICH PROVIDES FOR CHILDREN

The matrimonial causes act seems to focus on two people, that is, the husband and the wife. It common cause that there are other beneficiaries to that property other than husband and the wife and that is the children born out of the dissolved marriage. It can also be argued that the property acquired during the subsistence of the marriage is not only for the benefit of the husband and the wife but the family. The Constitution of Kenya 2010 talks of a family as the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State and clearly a family cannot be said to be one without children. Thus law is silent on what children must get upon dissolution of marriages. What will the children get as inheritance?

I do proceed and distribute the estate as follows:

1. PROPERTIES ALLOCATED TO THE DEFENDANT

- a) Title No. Loitokitok/ Rombo "A"/ [particulars withheld];;
- b) Title No. Loitokitok/ Olkaria;/[particulars withheld];
- c) Motor Vehicle Registration No. /[particulars withheld];;
- d) Plot No. /[particulars withheld]; Rombo
- e) Nairobi/Block /[particulars withheld];/1530 Fedha Estate,
- f) Plot Number /[particulars withheld];, Loitokitok
- g) Plot No. /[particulars withheld];New Roysambu Housing Company Limited.
- h) Loitokitok Township No../[particulars withheld];
- i) Plot No. /[particulars withheld]; Rombo
- j) Plot No. /[particulars withheld];Illasit
- k) Plot No. /[particulars withheld];Kimana
- l) Plot No. /[particulars withheld]; rombo

2. PROPERTIES ALLOCATED TO THE PLAINTIFF

- a) Title No. Loitokitok/ Rombo "A"/ [particulars withheld];;
- b) Title No. Loitokitok/ Rombo "B"/ [particulars withheld];;
- c) Plot No. /[particulars withheld]; Rombo;
- d) Plot No /[particulars withheld];Entarara.
- e) Motor Vehicle Registration No. /[particulars withheld] B;

That the 200 cows and 100 goats and sheep be shared between the Defendant and Plaintiff at 50% -50% ratio respectively, per each category of livestock.

Since the dispute involves family members, I do hold that parties shall meet their respective costs.

It is so ordered.

Dated, Signed and Delivered at Kajiado High Court this 16th day of October 2018.

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R. NYAKUNDI

JUDGE

Representation

Mrs. Ontiti for the Plaintiff – present

Mr. Ndungu for the Interested Parties

Mr. Wandaka for the Defendant