



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
CIVIL CASE NO.29 OF 2005 (0S)

AC.....APPLICANT

VERSUS

JAC.....1ST RESPONDENT

D K P.....2NDRESPONDENT

P P.....3RDRESPONDENT

C P.....4THRESPONDENT

AND

[PARTICULARS WITHHELD] LUBRICANTS LIMITED.....1STINTERESTED PARTY

F A C.....2NDINTERESTED PARTY

JUDGMENT

The Applicant, AC married the 1st Respondent, JAC on 4th December 1979. The marriage lasted until 2005 before the Applicant and the 1st Respondent separated. The Applicant has filed divorce proceedings in this court. Meanwhile, the Applicant seeks certain declaration orders by way of amended chamber summons dated 14th November 2005. The Applicant is claiming beneficial interest in several properties held in the name of the 1st Respondent, the 2nd Respondent D K P, the 3rd Respondent P P and the 4th Respondent C P . The Applicant has put forward various claims directed towards the following properties:-

- a) Land parcel No. IR No.[Particulars Withheld])
- b) Land parcel IR No. [Particulars Withheld])
- c) Land parcel IR No. [Particulars Withheld])
- d) Motor Vehicle Registration No. [Particulars Withheld]), Nissan Patrol
- e) Motor Vehicle Registration No. [Particulars Withheld]), Land Rover

- f) Motor Vehicle Registration No. [Particulars Withheld]), Daewoo Saloon
- g) Motor Vehicle Registration No. [Particulars Withheld]), Prado
- h) Shares held by the 1st Respondent in [Particulars Withheld]) Enterprises Limited and [Particulars Withheld]) Lubricants Limited.
- i) Money in Bank Accounts Numbers [Particulars Withheld]) and [Particulars Withheld]) at Prime Bank, Bank Account Number [Particulars Withheld]) at Southern Credit Bank and Bank Account Number [Particulars Withheld]) at Standard Chartered Bank in the name of the 2nd Respondent
- j) Money in Bank Account Number [Particulars Withheld]) at Prime Bank in the name of the 4th Respondent
- k) Money in Hong Kong & Shanghai Banking Corporation Limited being Account Numbers [Particulars Withheld]) (USD) and [Particulars Withheld]) (HKD) in the name of the 1st Respondent
- l) Electronic Visa Cards operated by the 2nd Respondent namely, Senator Card Number [Particulars Withheld]), Senator Card Number [Particulars Withheld]), Standard Chartered Card Number [Particulars Withheld]), Prime Bank Visa Card Number [Particulars Withheld]), ICICI N CASH Card Number [Particulars Withheld]) and State Bank Cash (State Bank of India) Card Number [Particulars Withheld])

The application is supported by the affidavit of the Applicant. The reasons advanced by the Applicant in support of the application are that the said properties were acquired jointly by herself and the 1st Respondent during their marriage. The Applicant claims that the 1st Respondent has transferred several of the properties to the 2nd, 3rd and 4th Respondents in a bid to “steal a march” on her. According to the Applicant, the Respondents are holding the said properties in trust for herself and thus she is claiming beneficial interest in them.

The 1st Respondent opposed the Applicant’s application through a replying affidavit filed on 29th November 2005. He raised several responses denying the claims made by the Applicant. Although the 3rd and 4th Respondents entered appearance in this suit, they did not file any pleadings in response to the Applicant’s application. There was no appearance for the 2nd Respondent. [Particulars Withheld]) Lubricants Limited and F A C were enjoined as the 1st and 2nd Interested Parties respectively in these proceedings. The 1st Interested Party relied on a replying affidavit filed on 22nd June 2007 in which it denied the Applicant’s claims in the company. On her Part, the 2nd Respondent relied on her supporting affidavit filed on 29th June 2010 and a supplementary affidavit filed on 19th July 2010. She denied the Applicant’s claim in respect to land parcels registered as IR No. [Particulars Withheld]) and IR No. [Particulars Withheld]) claiming a purchaser’s interest in the properties.

Hearing of the case commenced on 4th June 2009 before the Hon. Lady Justice J. W. Gacheche (as she then was). By consent of all parties, this court took over the conduct of the case when the Honourable Lady Justice J. W. Gacheche (as she then was) was transferred. During the hearing, the Applicant was represented by Learned Counsel Mrs. Wambugu, the 1st Respondent was represented by Learned Counsel Mr. Koech whereas the 1st and 2nd Interested Parties were represented by Learned Counsel Ms. Ouya. Parties relied on their respective bundle of documents filed during the proceedings. When the Applicant gave her evidence, she testified that she married the 1st Respondent on 4th December 1979 at the Office of the Registrar in Nairobi. She annexed a copy of the Certificate of Marriage. The Applicant testified that the marriage was blessed with one (1) child. She testified that they also lived together with the 1st Respondent’s child from a previous relationship together with three (3) other children who they had adopted. The Applicant testified that the marriage subsequently broke down and they separated in 2005.

She later filed a divorce petition which is pending in this court. The Applicant testified that they acquired several properties during their marriage. She claims that following the breakdown of the marriage, the 1st Respondent has transferred the matrimonial properties to third parties in a bid to 'steal a march' on her. The Applicant claims that the 1st Respondent's actions are meant to deny her claim to the matrimonial properties. She has therefore filed this application seeking orders from this court declaring her beneficial interest in the matrimonial properties.

The Applicant testified that they have had several businesses during their marriage among them clearing and forwarding business which they registered as [Particulars Withheld] Enterprises Limited in the year 1988. The Applicant claims that at the time of incorporation, she and the 1st Respondent were the directors of the company each holding one (1) share in the company. She annexed a letter dated 8th August 2005 from the Registrar of Companies confirming the directorship and shareholding in the company as at the time. She testified that she worked in the company from the year 1988 until 2001. According to her, the company had a thriving business. They managed to purchase land parcels Nos. [Particulars Withheld] and IR No. [Particulars Withheld] in the year 1995 from the proceeds of the business. They relocated the business to the said premises. The Applicant claims that although the properties were acquired by the company, they were registered in the name of the 1st Respondent. The Applicant claims that in a bid to deny her claim to the properties, the 1st Respondent transferred the two properties to the 2nd Respondent in the year 2005. With respect to land parcels Nos. IR No. [Particulars Withheld] and IR No. [Particulars Withheld], the Applicant therefore seeks for a declaration from this court declaring that the said parcels of land are jointly owned by herself and the 1st Respondent in equal shares.

PW3 Charles Kipkorir Ngetich, a Senior Lands Registrar Officer gave evidence on the ownership status of land parcels No. IR No. [Particulars Withheld] and IR No. 12938 [Particulars Withheld]. He testified that records from the Lands Registry indicate that land parcel IR No. [Particulars Withheld] was acquired by the 1st Respondent on 4th September 1995 at a transfer sum of Kshs.20,000,000/-. He testified that the records indicate that the property was then transferred to the 2nd Respondent at a transfer sum of Kshs.5,000,000/- then charged to Prime Bank Limited for a sum of Kshs.15,000,000 on 2nd August 2005. PW3 testified that the 2nd Interested Party registered a caveat on the property on 17th November 2008 claiming a purchaser's interest in the property. As regards land parcel No. IR No. [Particulars Withheld], PW3 testified that records at the Lands Registry indicate that the 1st Respondent acquired the property on 4th July 1995. The property was then transferred to the 2nd Respondent on 2nd August 2005 at a sum of Kshs. 5,000,000/- and charged with Prime Bank Limited for a sum of Kshs.15,000,000/-. PW3 testified that the 2nd Respondent has made an application to transfer the two properties to the 2nd Interested Party. He confirmed that stamp duty on the transfer of the two properties was paid on 11th February 2010. In the opinion of PW3, the sum in which the properties were transferred to the 2nd Respondent was questionable considering the value of the properties were transferred to the 1st Respondent about ten years prior.

The Applicant further testified that [Particulars Withheld] Enterprises Limited also acquired land parcel known as IR No. [Particulars Withheld] in the year 1997 from proceeds of the business. The property was registered in both her name and the 1st Respondent. She testified that the property became their matrimonial home. She claimed that she later renovated the matrimonial home at a cost of Kshs. 25,000,000/- with proceeds from the sale of her property known as land parcel LR [Particulars Withheld]. The Applicant's claim in respect of this property which is said to be the matrimonial home is for a declaration by this court declaring that the property is jointly owned by herself and the 1st Respondent in the ratio of 0.75 and 0.25 respectively.

The Applicant further testified that she and the 1st Respondent also acquired motor vehicles registration numbers [Particulars Withheld], Land rover and [Particulars Withheld], Daewoo Saloon during the marriage and registered them in 1st Respondent's name. In respect of the two vehicles, the Applicant urged this court to make a declaration declaring that the motor vehicles are jointly owned by herself and

the 1st Respondent in equal shares. She further claims a beneficial interest motor vehicle registration number [Particulars Withheld], Nissan Patrol. She claims that the vehicle was initially registered in the name of [Particulars Withheld] Enterprises Limited before the 1st Respondent transferred it to [Particulars Withheld] Lubricants Limited in the year 2005 to prevent her from claiming the same. Her claim in respect of the motor vehicle is on the basis that it was acquired through proceeds from [Particulars Withheld] Enterprises Limited. She therefore seeks a declaration of the court that the motor vehicle is jointly owned by herself and the 1st Respondent in equal shares. The Applicant also claims a beneficial interest in motor vehicle registration number [Particulars Withheld], Prado registered under [Particulars Withheld] Lubricants Limited. She testified that her claim to the vehicle is on the basis that [Particulars Withheld] Lubricants Limited is a sister company of [Particulars Withheld] Enterprises Limited. She therefore urged this court to make a declaration declaring that the motor vehicle is jointly owned by herself and the 1st Respondent in equal shares. The Applicant urged this court to issue an order directing that the aforementioned properties be sold and proceeds therefrom be shared in the proportions she has put forward.

The Applicant further claims that the 1st Respondent holds shares in [Particulars Withheld] Lubricants Limited through the 2nd Respondent who is said to be a previous employee of [Particulars Withheld] Enterprises Limited. She testified that the 1st Respondent leased all the assets of [Particulars Withheld] Enterprises Limited to [Particulars Withheld] Lubricants Limited in order to deny her claim to the assets. She annexed a copy of a Lease Agreement dated 17th March 2005 between the two companies. She therefore sought a declaration by this court declaring that all those shares held by the 1st Respondent in [Particulars Withheld] Lubricants Limited are jointly owned by herself and the 1st Respondent in equal shares.

The Applicant further claims that the 1st Respondent has stashed away money in various bank accounts held by the 2nd and 4th Respondents. She claimed that the 2nd and 4th Respondents are holding the money in trust for the 1st Respondent. The Applicant therefore seeks a declaration by this court declaring that all monies held by the 2nd Respondent in Bank Account Nos. [Particulars Withheld] and [Particulars Withheld] at Prime Bank Limited, Bank Account No. [Particulars Withheld] at Southern Credit Bank, Bank Account No. [Particulars Withheld] at Standard Chartered Bank and all monies held by the 4th Respondent in Bank Account No. [Particulars Withheld] at Prime Bank Limited are properties of both herself and the 1st Respondent and are therefore held in the said bank accounts in her trust. She also claims a beneficial interest monies held by the 1st Respondent in Hongkong & Shanghai Banking Corporation Limited being Account Numbers [Particulars Withheld] (USD) and [Particulars Withheld] (HKD) which according to her are also properties of both herself and the 1st Respondent held in the said bank accounts in her trust. Lastly, the Applicant has sought a declaration by this court declaring that Electronic Visa Cards operated by the 2nd Respondent namely, Senator Card No. [Particulars Withheld], Senator Card No. [Particulars Withheld], Standard Chartered Card No. [Particulars Withheld], Prime Bank Visa Card No. [Particulars Withheld], ICICI N CASH Card No. [Particulars Withheld] and State Bank Cash (State Bank of India) Card No. [Particulars Withheld] are properties of both herself and the 1st Respondent held by the 2nd Respondent of their trust. She urged the court to release the monies from the said bank accounts to herself and the 1st Respondent in equal shares.

The Applicant alleged in a bid to steal a march on her, the 1st Respondent had fraudulently altered the shareholding in [Particulars Withheld] Enterprises Limited. She claims that the 1st Respondent forged her signature on a purported agreement for the sale of her share in the company. The Applicant further claimed that the 1st Respondent had fraudulently allotted himself a further 4998 shares in the company. She relied on annexed copies of the company's Share Certificates Nos. 1, 2 and 3, its annual returns for the year 2004, minutes of a meeting of the directors of the company held on 11th August 2004 and a copy of a return of allotment dated 11th August 2005 filed with the Registrar of Companies in support of her claims. The Applicant claims that the changes in the shareholding of the company were effected without her consent. She further claimed that the 1st Respondent forged her signature on a purported agreement

for the sale of her share of the matrimonial property. Therefore in respect to [Particulars Withheld] Enterprises Limited, the Applicant seeks a declaration by this court declaring that all those shares held by the 1st Respondent in the company are jointly owned by herself and the 1st Respondent in equal shares.

PW2 Mackenzie Mweu, a Forensic Document Examiner testified that he examined the signatures on the disputed sale agreements and compared them with the specimen signatures obtained from the Applicant and found that there were inconsistencies. His observations regarding the disputed signatures are noted in the annexed report as showing a different pattern of formation which does not conform to the pattern of formation on the specimen submitted.

When the 1st Respondent testified, he denied the Applicants claims in all the listed properties. He claimed that he had already established himself as a businessman by the time he married the Applicant. He testified that in the year 1986, he was in the business of providing security to vehicles in the transport business. He testified that he registered the business as [Particulars Withheld] Enterprises Limited in the year 1988. The 1st Respondent testified that the company acquired several transportation trucks which he later sold and began to deal with lubricants under an agency arrangement with a company in Germany. The 1st Respondent testified that he procured a similar agency for another company in America until 1998 when he began to work with Kobil Petroleum Limited. He testified that during that time the Applicant had been ailing from breast cancer and could not work. He testified that she nonetheless drew a salary of between Kshs.50,000/- to 150,000/- from the company. The 1st Respondent refuted the Applicant's claim alleging that the matrimonial home was acquired through proceeds from [Particulars Withheld] Enterprises Limited. He claimed that although the matrimonial home is registered in both his name and that of the Applicant, he singlehandedly financed its purchase through a loan of USD 150,000 from one Mr. Tam Fook Yin in December 1996. The 1st Respondent claimed that the Applicant sold her share in the matrimonial home vide an agreement between himself and the Applicant on 19th March 2003 which he relied on. According to the 1st Respondent, the Applicant therefore has no claim to the matrimonial home. He further claimed that the Applicant also transferred her shares in [Particulars Withheld] Enterprises Limited pursuant to an agreement executed on 19th March 2003 which he also relied on. According to him, the Applicant therefore has no claim in [Particulars Withheld] Enterprises Limited. DW2 Peter Mwendwa Malonza, advocate testified that he witnessed the two agreements made between the Applicant and the 1st Respondent for the sale of the Applicant's share in Land parcel IR No. [Particulars Withheld] and [Particulars Withheld] Enterprises Limited to the 1st Respondent.

The 1st Respondent denied that land parcels Nos. [Particulars Withheld] and IR [Particulars Withheld] were obtained from proceeds of [Particulars Withheld] Enterprises Limited. He claimed that he singlehandedly financed their acquisition in 1995 and registered them in his name. He testified that he later sold the properties to the 2nd Respondent in the year 2005 as evidenced by the annexed sale agreements. He claims that the proceeds of the sale of the properties were paid to [Particulars Withheld] Enterprises Limited to liquidate the company's debts.

The 1st Respondent claimed that he purchased motor vehicle registration number [Particulars Withheld], Nissan Patrol, from [Particulars Withheld] Enterprises Limited and sold it to [Particulars Withheld] Lubricants Limited. He testified that motor vehicle registration number [Particulars Withheld], Land Rover was bought from someone who gave him a bad logbook and could not therefore transfer it to his name. The 1st Respondent testified that motor vehicle registration number [Particulars Withheld], Daewoo Saloon developed a mechanical problem and was sold to his mechanic one Mehta in the year 2005. He denied owning motor vehicle registration number [Particulars Withheld] Prado. The 1st Respondent denied having any financial interest in any of the bank accounts held by 2nd and 4th Respondents as claimed by the Applicant in her application. He conceded that he owned bank accounts in Hongkong & Shanghai Corporation but claimed that they were closed prior to the year 2005.

The 1st and 2nd Interested Parties did not adduce any evidence during the hearing in respect to their respective positions. The Applicant filed her written submission. The 1st Respondent filed his written

submission on 19th March 2014 whereas the 1st and 2nd Respondents filed their written submissions on 20th March 2014. In her submissions on behalf of the Applicant, Learned Counsel Mrs. Wambugu submitted that the Applicant had proved that the properties in which she has laid claim upon are matrimonial properties. Mrs. Wambugu submitted that motor vehicle registration Nos. [Particulars Withheld] and [Particulars Withheld] were acquired in 1995 and 1996 respectively and that motor vehicle registration Number [Particulars Withheld] was acquired in 2005. According to learned counsel for the Applicant this court has powers to trace these assets since they were registered in the 1st Respondent's name at the time the Applicant filed this suit. She submitted that this court also has jurisdiction to deal with shares in a company. In support of the Applicant's case, Learned Counsel, Mrs. Wambugu relied on cases of Z.W.N. –Vs- P.N.N (2012) eKLR, D.M. –Vs- M.M, Civil Appeal No. 26 of 1985, Cosmas K. Muthemba –Vs- Eunice Kyalo Muthembwa, Civil Appeal No. 74 of 2001, Hunker Trading Co. Limited –Vs- Elf Oil Kenya Limited, Civil Application No. 6 of 2010 (eKLR), Peter Mburu Echaria –Vs- Pricilla Njeri Echaria, Civil Appeal No. 75 of 2001 and Co-operative Bank of Kenya –Vs- Fenancio Marine Nderi and Osmond Nderi Marine.

In conclusion, Mrs. Wambugu submitted that the 1st Respondent has no objection to the matrimonial property being sold and the proceeds therefrom divided equally between him and the Applicant after the loan has been repaid as stated in his replying affidavit. She was however of the opinion that the 1st Respondent had not demonstrated proof that the property was subject to a loan.

In his submissions on behalf of the 1st Respondent, it was Learned Counsel Mr. Koech's submission that the Applicant in this case is required to prove that the assets that she lays a claim to were acquired during the subsistence of their marriage and that she made monetary or non-monetary contribution towards their acquisition. To this end, counsel for the 1st Respondent relied on the case of Peter Mburu Echaria –Vs- Priscilla Njeri Echaria, Civil Appeal No. 75 of 2001 and Kamore –Vs- Kamore (2000) 1 E.A. 80. He submitted that the funds held in the various bank accounts claimed by the Applicant are not in the name of the 1st Respondent. He further maintained that motor vehicles registration [Particulars Withheld] and [Particulars Withheld] are also not registered in the 1st Respondent's name. As regards the Applicant's claim in Lacheke Enterprises Limited, it was submitted that the Applicant had sold her share in the company to the 1st Respondent. According to the 1st Respondent, this was corroborated by the evidence of DW2. That notwithstanding, counsel for the 1st Respondent submitted that shares in a company can only be dealt with in accordance with the **Companies Act**. To this end, learned counsel for the 1st Respondent placed reliance on the cases of David M.Mereka –Vs- Margaret Njeri Mereka Civil Appeal No. 236 of 2001 Pettit –Vs- Petit (1969) 2 A.E.R. 385, and Gissing –Vs- Gissing (1970) 2 A.E.R. 780.

Learned counsel for the 1st Respondent submitted that the Applicant's claims in respect to properties not registered in the 1st Respondent's name ought not to be subject of these proceedings. As regards the matrimonial property, Mr. Koech maintained that the 1st Respondent had demonstrated that he obtained a loan to purchase it. He submitted that the Applicant sold her share in the property to him. He submitted that the Applicant's allegation of fraud as against the 1st Respondent was not proved to the required standard of proof. For these reasons, the 1st Respondent urged this court to dismiss the Applicant's application

On her part, Learned Counsel Ms. Ouya made submissions on behalf of the 1st and 2nd Interested Parties. She relied on the 1st Respondent's replying affidavit filed on 22nd June 2007 and the 2nd Interested Party's replying affidavit sworn on 28th June 2010. Ms. Ouya submitted that land parcels No.IR No. [Particulars Withheld], IR No. [Particulars Withheld], motor vehicle registration number [Particulars Withheld] Nissan Patrol and [Particulars Withheld], Prado and shares in [Particulars Withheld] Lubricants Limited and [Particulars Withheld] Enterprises Limited ought not to be subject of these proceedings as they do not belong to either the Applicant nor the 1st Respondent. According to Learned Counsel Ms. Ouya, this court does not therefore have jurisdiction to entertain the Applicant's application with respect to the fore mentioned properties. In this regard, learned counsel relied on the case of Muthembwa –Vs-

Muthembwa EALR (2002) 1EA 186, Mbugua –Vs- Mbugua (2001) 2EA 445, Owners of Motor Vessel “Lillian S” -Vs- Caltex Oil (K) Limited (1989) KR 1, Muigai -Vs- Muigai (1995) LLR 405 (CAK), Beatrice Kimani –Vs-Evanson Kimani, Civil Appeal No. 79 of 1997.

Ms. Ouya submitted that the 1st and 2nd Respondent had adequately demonstrated their ownership in the properties through their bundles of documents filed in court. She submitted that the allegation of “*stealing a march*” as claimed by the Applicant was not proved to the required standard of proof. For these reasons, learned counsel for the 1st and 2nd Interested Parties urged this court to dismiss the Applicant’s claims in the properties.

This court has carefully considered the evidence that was placed before it by the parties to this case. It has also considered the submission made by learned counsel and also the authorities that they relied upon in support of their respective clients’ cases. There is essentially one issue for determination in this case: whether the Applicant has established that the properties she listed in her suit constitute matrimonial property and if so, what orders should be given by the court regarding the division of the same. There are certain facts that are not in dispute in this case. It is not disputed that the Applicant and the 1st Respondent are husband and wife. They were married for more than 25 years before they separated. There are divorce proceedings pending before this court. The Applicant was therefore entitled under **Section 17** of the **Married Women’s Property Act 1882** (now repealed) to bring the present suit before this court.

The first issue for determination by this court is whether the properties listed by the Applicant constitute matrimonial property. The Applicant listed several properties in her suit. The said properties can broadly be divided into two: there is a property LR. No. [Particulars Withheld] which both the Applicant and the 1st Respondent concede is matrimonial property. The same is registered in the joint names of the Applicant and the 1st Respondent. The second sets of properties are LR. No. [Particulars Withheld] and LR.No.209/4965 [Particulars Withheld] which the Applicant claim is matrimonial property while the 1st Respondent deny that the said properties are matrimonial property. This dispute extends to the motor vehicles and bank accounts which the 1st Respondent alleged either belong to limited liability companies or to third parties. The Applicant conceded that although the two properties may have been registered in the name of limited liability companies, the same constitute matrimonial property because she was a shareholder in the two companies namely [Particulars Withheld] Enterprises Limited and [Particulars Withheld] Lubricants Limited. It was the Applicant’s case that all the properties purchased by the two companies (in which she is a shareholder), and where she had actively participated in its operations, should be considered as matrimonial property and therefore should be divided between herself and the 1st Respondent. On his part, the 1st Respondent argued that any property that is not registered in his name should not be considered as matrimonial property. It was the 1st Respondent’s case that if the Applicant laid claim on any property owned by a limited liability company, then she should do so under the provisions of the **Companies Act**.

This court has carefully considered the question whether the properties registered in the name of companies in which the Applicant and the 1st Respondent were shareholders should be considered as matrimonial property. This court takes the following view of the matter: there are several decisions by the High Court and the Court of Appeal which clearly point to the fact that any property registered in the name of a company, even though the sole shareholders of the company maybe the married couple, should be dealt with in accordance with the **Companies Act**. In **Mereka –Vs- Mereka Civil Appeal No.236 of 2001**, the Court of Appeal held that shares in a company where the couple were shareholders should be dealt with in accordance with the respective shareholding of each individual. However, the careful reading of the decision leads this court to the conclusion that the court was prepared to consider making a declaration to the effect that the husband held certain shares in respect of a property in a company in favour of the wife if the wife was able to establish firstly, that the particular property was acquired during the subsistence of the marriage and secondly, the wife established that she indirectly or directly contributed towards the acquisition of the same. In the above case, the situation was different in that the husband was able to establish that he had purchased the particular property after he had separated from the wife. The wife was unable to prove that she either directly or indirectly contributed to the acquisition

of the particular property. The court held thus at page 16 of the judgment:

“In these circumstances, we do not consider that the wife is entitled to a declaration that any of the husband’s shares in Dee EM investment Limited are held by the husband in trust for the wife. She is the registered owner of one share in the company which remains hers and entitles her to a proportionate share in any dividends or payments due to the shareholders upon liquidation of the company or upon any sale of Maragwa land and any other asset of the company.”

In **Mbugua –Vs- Mbugua [2001] 2 EA 445** at page 454, Visram J (as he then was) held as follows:

“It must be remembered that an application under section 17 of the Act deals with the property held by the husband and not that of third parties. Such an application cannot therefore, cover property owned by a limited liability company which is a separate entity. That is perfectly clear. At this point, it is opportune to ask whether an application under section 17 of the Act can cover shares of a party held in a limited liability company. The Respondent’s advocate argued that that cannot be the case. In this regard, he relied on the case of Mungai –Vs- Mungai [1995] LLR (CAK) (Kwach, Tunoi and Shah).....if shares are the property of the husband, what would prevent them from being the subject of an application under section 17 of the Act? In my view, shares in a limited liability company are subject to an application under section 17 of the Act notwithstanding the fact as to whether both parties are shareholders in that company or only one of them. In fact, although the decision of this court in the Mungai case (supra) was reversed by the Court of Appeal, a close reading of it reveals that it supports the proposition that shares in a limited liability company can be made a subject of an application under section 17 of the Act.”

In the present case, the Applicant was able to establish that the properties that referred to as IR No. [Particulars Withheld] and IR [Particulars Withheld] were purchased by the 1st Respondent during the subsistence of the marriage to the Applicant. The properties were later transferred to the 2nd Respondent before an attempt was made to transfer the said properties to F A C during the pendency of these proceedings. An order was issued by this court stopping the transfer of the said properties to the said F A C . It was not clear from the proceedings the nature of the relationship between the said F A C and the 1st Respondent JAC.

What was apparent from the evidence is that the said F A C appeared to be acting under the control of the 1st Respondent. It was clear to this court that the said properties were transferred first to the 2nd Respondent and later an attempt was made to transfer the same to 2nd Interested Party to defeat the Applicant claim over the same. It was instructive to note that the transfer to the 2nd Respondent (who incidentally did not file any papers in opposition to the Applicant’s suit) was made after the Applicant had been separated from the 1st Respondent. The fact that the 2nd Interested Party did not attend court to defend the alleged ownership of the two parcels of land supports this court’s finding that the 2nd Interested Party was supposed to hold the two properties as a trustee of the 1st Respondent. The 2nd Interested Party’s conduct in the context of this suit was not therefore surprising. The 2nd Interested Party had no interest capable of being defended in the present proceedings. This court’s evaluation of the evidence clearly points to the fact that the 1st Respondent put in motion legal maneuvers to transfer the said properties that were in his name into the names of third parties in order to defeat any claim that may later be lodged by the Applicant. It was apparent that the 1st Respondent intended to put the properties beyond the reach of this court when it is called upon to divide the matrimonial property between the Applicant and the 1st Respondent. It was also clear that the 1st Respondent did not part with the equitable ownership of the two properties. In attempting to transfer the two properties to the 2nd Interested Party (a person who is under his control), the 1st Respondent disclosed his real intention.

Having carefully considered the decisions in **Mereka -Vs- Mereka** and **Mbugua -Vs- Mbugua** (supra), in light of the evidence that was adduced during the hearing of this case, this court holds that the two properties are matrimonial property available for division by this court. This court holds that the 1st

Respondent is the equitable and actual owner of the two properties. The 2nd Respondent held in trust the said properties in favour of the 1st Respondent.

In respect of LR.No. [Particulars Withheld], it was common ground that the property is matrimonial property. The property was registered in the names of the Applicant and the 1st Respondent as joint tenants. The 1st Respondent adduced evidence to the effect that he purchased from the Applicant the share belonging to the Applicant in property by paying the sum of USD 70,000. An agreement to that effect was produced in court. The advocate who witnessed the agreement Mr. Malonza testified in court. However, he told the court that he did not see the 1st Respondent actually pay the said sum of USD 70,000 to the Applicant. Nothing would have been difficult than for the 1st Respondent to produce documentary evidence in support of his assertion that he transferred the said sum of USD 70,000 to the Applicant or called a witness who saw the actual transfer of the said sum of money.

PW2 Mackenzie Mweu, a Forensic Document Examiner examined the signatures in the agreements that the 1st Respondent produced in court in support of his claim that the Applicant had transferred her share in LR.No. [Particulars Withheld] to him. Upon examination of the signatures and comparing the same with the specimen signature of the Applicant, PW2 reached the conclusion that the signature in the agreement was not that of the Applicant. The 1st Respondent did not call any expert evidence to controvert this evidence. This court therefore holds that an attempt was made by the 1st Respondent to forge the signature of the Applicant in the agreement with the sole purpose of dispossessing the Applicant of her share in the said property. In light of the events that took place at the material time i.e. the attempt by the 1st Respondent to transfer properties to third parties to defeat the Applicant's claim, this court is unable to reach a finding that indeed the Applicant on her own free will executed the said agreement transferring the said properties to the 1st Respondent. This court holds that the property is still matrimonial property held by the Applicant and the 1st Respondent.

Having found that the three parcels of land the subject of these proceedings are matrimonial properties, the next issue for determination is in what proportion the three properties should be divided. It was the Applicant's case that she was entitled to 50% of the two properties held in the name of the 2nd Respondent while LR. No. [Particulars Withheld] Valley should be divided at the ratio of 75:25 in her favour. On his part, it was the 1st Respondent's case that the Applicant is not entitled to any of the above properties firstly, because she had not proved direct contribution and secondly, because he solely purchased the particular properties without any contribution from the Applicant. In respect of the Kibagare property, the 1st Respondent stated that he had purchased the share held by the Applicant in the particular property and therefore the Applicant was entitled to nothing.

In his submission, the 1st Respondent relied on the case of **Peter Mburu Echaria Vs- Priscilla Njeri Echaria Civil Appeal No.75 of 2001** where the Court of Appeal held that in order for a wife to succeed in her claim for division of matrimonial property, she must establish direct contribution. This decision is however no longer good law. Two developments have taken place since the filing of the present suit and the hearing of the same. One was the promulgation of the **2010 Constitution** which provided under **Article 45(3)** thus:

“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.”

The second development is the enactment of **Matrimonial Property Act 2013**. **Section 2** of the Act recognizes indirect contribution in form of non-monetary contribution to include domestic work and management of the matrimonial home, child care, companionship, management of family business or property and farm work.

The Court of Appeal in sitting at Mombasa in **C.A. No.127 of 2011 Agnes Nanjala William -vs- Jacob Petrus Nicolas Vander Goes** held that despite the fact that the case before it was filed before the **2010 Constitution** was promulgated, nevertheless, its provisions as it relates to human rights were applicable

because the recognition of such rights by the **Constitution** did not imply that such rights did not exist prior to its specific pronouncement by the **Constitution**. The court was therefore of the view that such rights were inherent and were not granted by the State. At page 22 of its judgment, the Court rendered itself thus:

“We all know that the purpose of the bill of rights is to recognize and protect the fundamental rights and freedoms and to preserve the dignity of individuals and communities and more so, to promote social justice and the realization of the potential of all human beings. Human rights are universal for all persons and have several main characteristics. One of them is that they are:-

Inherent – This means that they belong to every person by virtue of birth. All human beings are born free and equal in dignity and rights.”

The new Constitution of Kenya captures this aspect in:-

“Article 19(2) which states that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities. Further Article 19(3)(a) provides that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State.”

The Appellant in the instant case is no exception in as far as the enjoyment and protection of her fundamental rights and freedoms are concerned. These are her inherent rights that she was born with and are not granted to her by the State.

Article 27(1) deems every person to be equal before the law and has the right to equal protection and equal benefit of the law. Article 27(3) states that:-

“women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.””

The above decision was rendered before the **Matrimonial Property Act 2013** was enacted. **Section 4 of Matrimonial Property Act** reiterates the principle of equal status of spouses in a marriage.

In the present case, it was clear to this court that the Applicant contributed to the business that she was engaged with the husband and was even paid a monthly salary before their relationship soured. It was the 1st Respondent himself who told the court that the Applicant used to receive a monthly salary from the business. The question that this court asked itself is *why would the Applicant be paid a salary if she was not working for the good of the business?* The answer to that is clear: the Applicant directly contributed towards the growth of the business. Any profit that the business made, and any investment that the business made, was due to the joint efforts of the Applicant and the 1st Respondent. Although the 1st Respondent vehemently argued that the Applicant made no financial contribution towards acquisition of the matrimonial property, the Applicant pointed out that she sold her house in Nairobi so that she could improve the matrimonial property where they lived. No evidence was adduced by the 1st Respondent to controvert the evidence that was adduced by the Applicant in that regard. It was clear to this court that the Applicant put her own funds towards improving the asset base of the family.

Taking into consideration the totality of the evidence adduced in this case and the applicable law as analyzed by this court, this court makes the following determination regarding the division of matrimonial property:

I. LR. No. [Particulars Withheld], LR. No. [Particulars Withheld] and LR. No. [Particulars Withheld]

This court hereby declares that the Applicant is entitled to half the values of the three properties.

II. Shares held by the 1st Respondent in [Particulars Withheld] Enterprise Limited and [Particulars Withheld] Lubricants Limited.

The court hereby declares that the Applicant is entitled to half the value of the shares held by the 1st Respondent in the two companies. In that regard, the Applicant shall be entitled to any properties held by the two companies subject to half the value of the shares held by the 1st Respondent. That includes the motor vehicles and any funds held in the name of the two companies.

III. The Applicant shall have the costs of this suit.

It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2017

L. KIMARU

JUDGE