REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 170 OF 2008 (O.S)

RNM.....APPLICANT

VERSUS

JMN.....1ST RESPONDENT

RMM.....2ND RESPONDENT

EMM.....3RD RESPONDENT

SMK.....4TH RESPONDENT

JUDGMENT

Introduction:

1. In the Further Amended Originating Summons dated 21st May, 2010, filed pursuant to the provisions of Section 17 of the Married Women's Properties Act of 1882 *(England)*, the Applicant has sought for the following orders:

a) That it be declared that the properties (immovable and movable) acquired by joint funds and efforts of the Applicant and the 1st Respondent during their marriage and registered in the sole names of the 1st Respondent the same being land allocated by the Lukenya Ranching & Farming Co-operative Society Ltd through membership Number 172 acquired jointly by the Applicant and 1st Respondent in the names of the 1st Respondent by virtue of which land parcels Plot Numbers 506, 183, 86 and a commercial plot No. 83 measuring approximately 40, 20, 5 acres and 50 by 100 feet respectively, a land parcel measuring approximately 5 acres whose number is not known to the Applicant and a further land parcel whose number and size are not known to the Applicant, were allocated in the names of the 1st Respondent and which land parcels the 1st Respondent, without consent of and notice to the Applicant, caused to be registered to the exclusion of the Applicant and for the sole purpose of disentitling the Applicant of the same as follows:

i. Title Number Mavoko Town Block 3/1942 measuring approximately 7.990 hectares (approximately 20 acres) in the 1st Respondent's sole names;

ii. Title Number Mavoko Town Block 3/3538 measuring approximately 23.7 hectares (approximately 58 acres) in the names of the 2nd Respondent, the 1st Respondent's second wife, RMM;

iii. Title Number Mavoko Town Block 3/1941 measuring approximately 3.720 hectares (approximately 9 acres) in the names of the 3rd Respondent, the 1st Respondent's daughter by his said second wife, EMM;

iv.Title Number Mavoko Town Block 3/1940 measuring approximately 3.720 hectares (approximately 9 acres) in the names of the 4th Respondent, the 1st Respondent's son in law/husband to the 1st Respondent's said daughter, SMK;

v. Plot No. 83 in Lukenya Ranching & Farming Co-operative Society Ltd held in the 1st Respondent's names, and;

vi. Title Number Mavoko Town Block 3/485 registered in the 1st Respondent's names, are owned jointly by the Applicant and the 1st Respondent.

b) That it be declared that the properties (immovable and movable) given jointly to the Applicant and the 1st Respondent as a joint gift by the 1st Respondent's mother/mother in law of the Applicant the same being half share of each of Title Numbers Iveti/Mung'ala/155, 7, 150 and 1142 measuring approximately 9.3 hectares (approximately 23 acres), 11.6, hectare

(approximately 29 acres), 0.8 hectares (approximately 2 acres) and 1.1 hectares (approximately 3 acres) respectively and which parcels of land are registered in the joint names of the 1st Respondent and his deceased brother, WNN, in equal shares, are held by the 1st Respondent in respect of each half share thereof in trust for himself and the Applicant.

c) That the said properties be sold and the net proceeds of the sale be shared equally between the Applicant and the 1st Respondent (or in such other manner as the court may deem just to order).

d) That in the alternative to 3 above, the 1st Respondent do account to the Applicant the value of half share of the property (or such share as the court may deem just to order) and that the 1st Respondent do pay the Applicant the monetary value thereof.

e) That where the 1st Respondent has transferred the property to the 2nd, 3rd, and 4th Respondents, the titles thereof be revoked for the property to be shared between the Applicant and the 1st Respondent as herein sought and in the alternative the 1st Respondent be made to account to and pay the Applicant the value of half share thereof.

f) That this Honourable Court be pleased to grant the Applicant such further or other relief as may be just in the circumstances.

g) That the Respondents do bear the costs hereof and all incidentals thereto.

2. The Originating Summons is premised on the ground that suit property arising out of membership number 172 in the said Lukenya Ranching & Farming Co-operative Society Ltd is matrimonial property which was jointly acquired by the Applicant and the 1st Respondent but was caused to be registered by the 1st Respondent in the sole names of the 1st Respondent and the 2nd, 3rd and 4th Respondents.

3. The Originating Summons is further premised on the grounds that the Applicant put in substantial efforts and expended her personal income towards the acquisition of the said property; that the said property is the parties' matrimonial property which has been greatly improved through the Applicant's funds and efforts and that the 1st Respondent has disentitled the Applicant of all the property.

4. According to the Applicant, the marriage between her and the 1st Respondent has irretrievably broken down; that there are pending divorce proceedings instituted by the Applicant in Machakos CMCC No. 453 of 2005 and that it is just and fair for the Orders sought herein to issue. The Originating Summons proceeded by way of *viva voce* evidence.

The Applicant's case:

5. The Applicant, PW1, filed an Affidavit in support of the Originating Summons and also testified orally. In her Affidavit in support of the Originating Summons, the Applicant deponed that in or about 1952, she was married to the 1st Respondent under the Kamba Customary Law.

6. It was the deposition of the Applicant that after the said marriage, she lived and cohabited with the 1st Respondent as husband and wife in a matrimonial home constructed by both of them on title number Iveti /Mung'ala/155 measuring approximately 9.3 hectares *(approximately 23 acres)*.

7. The Applicant deponed that half of the said parcel of land was a gift to both of them by the 1st Respondent's mother, her father-in-law having died in or about 1944 and that currently, title number Iveti/Mung'ala/155, 150, 7 and 1142 are registered in the joint names of the 1st Respondent and his deceased brother, WNN, in equal shares.

8. The Applicant deponed that the marriage has nine (9) issues out of which eight (8) are living; that there is pending before the Resident Magistrate's Court at Machakos Divorce Case No. 453 of 2005 in relation to the marriage, the same having been instituted by her and that during the subsistence of the marriage with the 1st Respondent, they jointly acquired membership No. 172 in Lukenya Ranching and Farming Co-operative Society Ltd which membership was held in the name of the 1st Respondent.

9. According to PW1, out of the said membership number 172, several land parcels, among other benefits, were allocated and registered in the names of the 1st Respondent, the same being: Plot No. 506 of approximately 40 acres; Plot No. 183 of approximately 20 acres; Plot No. 86; a Commercial/Residential Plot of 50 by 100 feet; Plot No. 83, a Commercial Plot; a land parcel measuring approximately 5 acres whose number is unknown to her; and another parcel of land whose size and number is not known to her.

10. The Applicant stated in her Affidavit that the acquisition of the said parcels of land by virtue of being members of Lukenya Co-operative Society was made with the joint funds and efforts of both herself and the 1st Respondent and as such, she is entitled to equal share thereof.

11. According to the Applicant, during the subsistence of the marriage, she was growing coffee, green grams *(ndengu)*, coriander *(dhania)* and maize for sale on title number Iveti/Mung'ala/7 measuring approximately 11.6 hectares *(approximately 29 acres)*, half of which was given to her jointly with the 1st Respondent by her mother-in-law and that the other half was given to the 1st Respondent's deceased brother, WNN. It was the deposition of the Applicant that the said land is currently registered in the joint names of the 1st Respondent and his said deceased brother.

12. It is the Applicant's case that out of the proceeds of sale of the said crops, she contributed financially to the acquisition of the said membership number 172 in Lukenya Co-operative Society by virtue of which the mentioned parcels of land were allocated and that she also contributed to the improvement of title numbers Iveti/Mung'ala/155 and 7 where they put up their matrimonial home while farming,

respectively.

13. TheApplicant deponed that she contributed to the welfare of the family and brought up the children of the marriage single handedly, the 1st Respondent having abdicated his parental responsibility and that in or about June, 2005, she sued the 1st Respondent in Machakos CMCC No. 453 of 2005 and sought, *inter alia*, for the dissolution of the marriage and sharing of matrimonial property.

14. According to the Applicant, injunctive orders were issued in Machakos CMCC No. 453 of 2005 restraining the 1st Respondent from dealing with the property in any manner detrimental to her, and from evicting her and the children of the marriage from Title No. Iveti/Mung'ala/150 where they have been living with the 1st Respondent's mother till her death in or about 1983.

15. However, it was deponed, in October, 2007 she discovered that the 1st Respondent had secretly proceeded to have the said parcels of land which had been allocated by virtue of the membership number 172 in Lukenya Ranching and Farming Co-operative Society Ltd, registered and transferred for the sole purpose of disentitling her of the same as follows:

> *a. Mavoko Town Block 3/1942 measuring approximately 7.990 hectares (approximately 20 acres) and Mavoko Town Block 3/485, a Commercial/Residential Plot measuring approximately 50 feet by 100 feet registered in his sole name;*
>
> *b. Mavoko Town Block 3/3538 measuring approximately 23.7 hectares (approximately 58 acres) transferred to the 2nd Respondent, the 1st Respondent's wife;*
>
> *c. Mavoko Town Block 3/1941 measuring approximately 3.720 hectares (approximately 9 acres) transferred to the 3rd Respondent, the 1st Respondent's daughter by the said second wife;*
>
> *d. Mavoko Town Block 3/1940 measuring approximately 3.720 hectares (approximately 9 acres) transferred to the 4th Respondent, the 1st Respondent's son-in-law/husband of the 1st Respondent's daughter by the said second wife.*

16. It was the evidence of the Applicant that further to the above properties, gifts were made to her and the 1st Respondent in respect of half share of Title Numbers Iveti/Mung'ala/155, 7, 150 and 1142 by the 1st Respondent's mother; that the said Title numbers Iveti/Mung'ala/155, 150, 7 and 1142 are registered in the joint names of the 1st Respondent and his said deceased brother WNN in equal shares and that the 1st Respondent holds half shares thereof in trust for himself and her.

17. It was the Applicant's deposition that she contributed through sheer hard labour and financially in the improvement of the value of land parcels Iveti/Mung'ala/155, 150, 7 and 1142 by putting up their matrimonial home on title No. Iveti/Mung'ala/155 and later another home on title No. Iveti/Mung'ala/150 where she lives with her children to date and that she has planted trees for timber and fruit trees thereon.

18. According to the Applicant, the 1st Respondent chased her out of the matrimonial home on Title No. Iveti/Mung'ala/155 forcing her mother-in-law, the 1st Respondent's mother, to allocate to her elder son a portion of Title Number Iveti/Mung'ala/150 measuring approximately 0.8 hectares *(approximately 2 acres)* where she was living, to construct a home for her *(the Applicant)* where she lives with the said elder son, his family and other children of the marriage to date.

19. It was the evidence of the Applicant that she lived with the 1st Respondent's mother/his mother-in-law on the said land Title Number Iveti/Mung'ala/150 nursing her and caring for her in her old age and ill health until 1983 when she died and was buried on the said land and that on the said portion of Title Number Iveti/Mung'ala/150 and on Title No. Iveti/Mung'ala/1142, she has put in a lot to develop the same by way of terracing the land, planting fruits, trees, grass and other crops.

20. The Applicant finally deponed in her Affidavit that her claim from the 1st Respondent is half share of all the land parcels held in his names or the monetary value thereof and that in respect of Title Numbers Mavoko Town Block 3/3538, 1941 and 1940 which the 1st Respondent wrongly registered in the names of the 2nd, 3rd and 4th Respondents respectively, she seeks for revocation of the titles and the transfer to her of half shares thereof and that in the alternative, the 1st Respondent to account to her and pay her the monetary value of the half shares of the said parcels of land.

21. In addition to her deposition, the Applicant, PW1, informed the court that she constructed their matrimonial home jointly with the 1st Respondent; that the said home is built of baked bricks, iron sheets roofing and has seven (7) bedrooms and a sitting room and that she actively participated in moulding the bricks and fetching water for the construction of their matrimonial house.

22. It was the evidence of PW1 that before they constructed their matrimonial home, they used to live in her mother in-law's home stead;that after she got married to the 1st Respondent, she was actively engaged in various activities to enhance the well-being of the family by farming green grams (*ndengu)*, coriander (*dania)*,maize, beans, coffee, bananas and other fruits on the Title Nos. Iveti/Mung'ala 150, 155, 7 and 1142 on areas where her mother in- law gave her to farm and that she would then sell the farm produce to feed the family.

23. It was the evidence of PW1 that out of the proceeds of the sale of the farm produce, they would buy cattle to increase the wealth of the family, pay school fees for the children, buy clothing and other necessities; that she also used to milk the cattle, feed the children with the milk and churn the excess milk to produce ghee which she used to sell in the market and that the money she received was used to cater for the family needs.

24. PW1 informed the court that after independence, the Lukenya land was offered for sell to the local community through buying of shares in a co-operative Lukenya Ranching and Farming Co-operative Society Ltd; that the registration fees was Kshs. 25 and a further sum of Kshs. 6,000 was payable and that where one could not afford to raise the money, cattle would be used as a mode of payment for the shares.

25. According to PW1, her, with the 1st Respondent, paid for the Lukenya shares by delivering to the society seven (7) cattle; that the seven cattle were from the herd of cattle that they had bought from the farm produce and that they were given share Number 172 in the name of the 1st Respondent as was the practice *(and still is)* where property was held in the names of the husband on his behalf, that of the wife and the whole family.

26. It was the evidence of PW1 that on 10th February, 1974, the 1st Respondent violently chased her away from the matrimonial home and she returned to her maternal home with two of her youngest children; that her mother in-law and elder children would visit her and that in 1979, she returned to the matrimonial home whereupon her mother in-law showed her son, John Mbithi, a portion on Title No Iveti/Mung'ala 150 to construct a house where she lives to date.

27. It was the evidence of PW1 that the 1st Respondent denied her access to and use of the cattle and the other farms where she had been farming and restricted her to Title No Iveti/Mung'ala 150 which is very small and that the 1st Respondent has also not given her or any of her children any share of the parcels of land allocated to them by the Society in respect of share number 172 but has instead given his second wife, his daughter and son in law the largest parcel of the land from the land allocated on the said share number 172.

28. PW2 informed the court that he is the third born son of the Applicant and the 1st Respondent; that he was born in 1956; that he was brought up in Iveti Location amongst nine (9) siblings and her parents' economic activity was farming and cattle rearing which they used to do together and that they were farming on parcels of land that their father had inherited from his grandmother which was Iveti/Mung'ala 150, 155, 7 and 1142.

29. It was the evidence of PW 2 that they were brought up in their grandmother's homestead but later on her parents moved into their own home which they jointly constructed on Title No. Iveti/Mung'ala/155; that it is his mother who used to fetch water and mould bricks for the construction of the house; that in 1974, her mother was chased away from the matrimonial home by the 1st Respondent and that she left with two of their youngest siblings and went to stay with her parents.

30. PW 2 stated that in 1979, his grandmother gave him land being Iveti/Mung'ala 150 and told him to build his house which he did; that she then sent for his mother and told here to live in the said house and that when his grandmother fell ill, they brought her to stay with them in the said house.

31. PW 2 stated that his parents bought a share in Lukenya Ranching and Farming Co-operative Society Ltd with the proceeds from the farming they use to do jointly; that share number 172 was issued in his father's name; that out of the share, his father was allocated 5 acres, 20 acres, 40 acres and 3 commercial plots and that the said parcels of land were registered in the name of his father in trust for his wife and the children as was the tradition.

32. PW 2 stated that neither his mother nor any of his siblings have ever been given a share of the said parcels of land by the 1st Respondent; that he has had the land registered in his name and in the names of other persons and that his mother is entitled to an equal share of the land with his father, having jointly participated in the acquisition of the property in Lukenya Ranching and Farming Co-operative Society. It was the evidence of PW2 that his mother is also entitled to a share of the land that was passed to her and his father by his late grandmother.

33. The Applicant's elder brother, PW3, informed the court that in 1943, his father and the 1st Respondent's father arranged for the Applicant to marry the 1st Respondent, as was the practice then; that after the said marriage, the Applicant gave birth to ten (10) children and that the Applicant and the 1st Respondent lived in the homestead of the 1st Respondent's mother until much later when she showed them a place where they jointly constructed their matrimonial home.

34. PW3 stated that the Applicant greatly contributed in the building of their matrimonial home; that the Applicant used to work on the farm to sustain her family and that all through, she was actively involved in farming of various crops like maize, beans, green grams, coffee and *dania.*

35. It was the evidence of PW3 that besides using maize and beans to feed the family, she would sell the other crops and that out of the proceeds, the family acquired a large herd of cattle; that part of the herd of cattle was used by the 1st Respondent and the Applicant to pay for a share in Lukenya Ranching and Farming Co-operative Society Ltd and that out of the said share, various parcels of land were allocated to the 1st Respondent.

36. It was the evidence of PW3 that in 1974, the Applicant was chased away from her matrimonial home by the 1st Respondent and went to live with them and that in 1979, the 1st Respondent's mother succeeded in persuading the Applicant to return to her matrimonial home where she lives with her children to date, save for those who have died *(three)* or got married. It was the evidence of PW3 that the Applicant has always been actively involved in various activities to enhance the well-being of her large family and acquisition of property for the family.

37. PW4 stated that he has been the village head-man since 1984; that he has known the Applicant and the 1st Respondent for many years as they are his neighbours and that he has always known them to be farmers, cultivating various crops and in particular coffee, coriander (*dania*), green grams, maize and beans on various parcels of land and keeping a relatively large heard of cattle.

38. PW4 stated that the couple always had high yields as the parcels of land were very large; that the Applicant also used to sell milk and ghee from the cattle in the local markets; that he saw the Applicant and 1st Respondent built their matrimonial home and that during the construction of the matrimonial home, it is the Applicant who used to fetch water and mould bricks with her adult children.

39. It was the evidence of PW4 that he was aware that the Applicant and the 1st Respondent, like other people in the area, including his

family, purchased a share in Lukenya Ranching and Farming Co-operative Society Ltd as a family and that the mode payment for the said share was by cash or cattle.

40. PW4 informed the court that every shareholder was allocated a total of 65 acres of agricultural land which was divided into various sizes of 4, 20 and 40 acres and 3 commercial plots; that he has always known the Applicant as a very hard working woman who combined bringing up her large family of 10 children with intensive farming activities and that the Applicant lived with and took care of the 1st Respondent's mother for a long time when she was ailing until when she died.

The Respondents' case:

41. The 1st Respondent, DW1, swore an Affidavit in opposition to the Originating Summons and also testified orally. DW1 deponed that the 2nd Respondent, RMM, is his wife; that the 3rd Respondent, EMM, is his daughter and that the 4th Respondent SMK, is his son-in-law.

42. The 1st Respondent, DW1, deponed that the Applicant has no cause of action against the 2nd, 3rd and 4th Respondents who are not parties to the marriage between himself and the Applicant; that it is true and correct that he married the Applicant in 1952 under the Kamba Customary Law and were blessed with (3) children and that in 1957, he married his second wife, the 2nd Respondent herein.

43. It was the deposition of the 1st Respondent, DW1, that during the said period, he was living with his mother as his father had passed on in 1940; that the Applicant filed Divorce Cause No. 453 of 2005 on grounds of cruelty and the same is pending in court; that he filed a Defence and Counter Claim to the said divorce on the grounds of desertion and that the Applicant deserted the matrimonial home in 1975 for reasons that are unknown to him.

44. DW1 testified that at the time of desertion, he was bed ridden and on the verge of death; that the 2nd Respondent took care of him during the said period and that the Applicant did not contribute directly or indirectly to the acquisition of any shares at Lukenya Ranching and Farming Co-operative or at all.

45. It was the evidence of DW1 that in 1948, he started a business partnership in butchery with Mr. Ngunza Mua and Mr. Daniel Kavuthi at Kithanyoni Market; that in 1950, they jointly sent applications to various Institutions, so that they could get tenders to enable them supply meat and that the business was very successful.

46. According to the 1st Respondent he could not raise the funds to be a full member of Lukenya Ranching and Farming Co-operative Society back in 1975; that he paid for his share in the society so as to acquire land left behind by the white settlers through his partner Ngunza Muua and that he paid one hundred and twenty Kenya shillings *(Kshs. 120).*

47. DW1 informed the court that later on, the Government learned of the shadow scheme and fearing that some members would be exploited, ordered that there would be no shadow members and allowed people to register to be members with twenty-five shillings *(Kshs. 25)* as registration fee and six thousand shillings *(Kshs. 6,000)* for the acquisition of shares.

48. DW1 stated that he paid the twenty-five shillings *(Kshs. 25)* in 1977 and the full membership fee of Six Thousand Kenya Shillings *(Kshs. 6,000)* in installments of Four Thousand Kenya Shillings *(Kshs. 4,000)* in 1978 and cleared the balance later.

49. It was the evidence of DW1 that out of his membership with the Society, he was given Allotment Letters and Title Deeds for the following parcels of land:

a. 40 acres of land Parcel No. 506 on 21st February, 1991;

b. 20 acres of land Parcel No. 183 on 22nd December, 1992;

c. Commercial Plot measuring 50 x 100 Parcel No. 86 on 23rd July, 1996;

d. Commercial Plot measuring 50 x 100 Parcel No. 83 on 10th March, 2006.

50. It was his evidence that Lukenya Ranching and Farming Co-operative Society Ltd issued him with membership number 172 in 1977; that out of the said share, the Society allocated him plot No. 183 on 22nd December 1992 and that on his instructions dated 20th April 2004, he requested the Manager, Lukenya Ranching and Farming and Co-operative Society Limited to allocate 20 acres to the 2nd Respondent, as a gift to her for taking care of him when he was unwell in 1975.

51. DW1 deponed that the said share was issued to his wife, the 2nd Respondent, as per the said request; that the 2nd Respondent was issued with a Title pursuant to the said allotment being Mavoko Town Block 3/3538 and that in respect of plot No. 506 measuring, (40) acres, the same was allocated to him in 1991 by way of a letter dated 27th April 1999 and that in 1999, he subdivided the said property into three (3) plots of 10 acres, 10 acres, and 20 acres respectively.

52. According to the 1st Respondent, after the subdivision, three (3) Titles were issued for Mavoko Town Block 3/1940/1941 and 1942; that in 1993, he entered into an agreement on 1st May, 1993 with Mr. SMK, the 4th Respondent for sale of Mavoko Town Block 3/1941 and that the 4th Respondent paid him Kshs. 300,000 for the land.

53. DW1 deponed that in 1997, he entered into a second agreement with the 4th Respondent for the purchase of Mavoko Town Block 3/1940

with the said 4th Respondent for Kshs. 400,000; that the sale was also precipitated by lack of funds to treat his illness and that the said 4th Respondent has fenced and developed the property and is currently residing on the land with his wife, the 3rd Respondent and his children. Dw1 deponed that Title Mavoko Town Block 3/1942 is under his name and is currently under the care of the 3rd and 4th Respondents.

54. In respect of Plot No. 86, DW1 deponed that he balloted for the same and was issued with a letter of Allotment on 27th April 1999; that a Title in respect of the same was issued being Mavoko Town Block 3/485; that he also balloted for Plot No. 83 which is a commercial plot of 100 by 50 feet.

55. It was the evidence of DW1 that when his father died in 1940, he asked his uncle, Nguku Muua, to give him his father's share of land which he refused; that he sued him and the Tribunal Court subdivided the property between them in 1974; that he was allocated his portions of land being Plot Nos. 155, 150, 1142 and plot No. 7; that titles Number Iveti/Mung'ala/155, 150, 7 and 1142 were not gifted to him and the Applicant in any manner or at all and that the said properties were subdivided and issued to him by virtue of being the only son of his father.

56. It was the evidence of DW1 that they were all farming in the one acre of land for subsistence before the decision of the Tribunal; that since his income was small, the construction of the matrimonial home took him longer than he thought as he could not afford to pay the "*fundis*" and assembling the building materials was also a problem and that it took him seven years to get the house completed and habitable.

57. It was the evidence of DW1 that his family took control of the family land in 1973 and one year later, the Applicant left him and that when the Applicant left in 1974, they had not started farming on the said family land had not made any developments or improvements on the parcels since he had just acquired them.

58. According to the 1st Respondent, in 1976, his elder son Mr. Joanna, accompanied by his friend Mr. Kathuma approached and asked him for property where he could build his own house; that he took his son to Plot No. 150 and showed him where to build his house as per the customs and practices of the Kamba people and that it was after his son constructed on Iveti/Mung'ala/150 that the Applicant moved into the property. It was the evidence of DW1 that the Applicant and his children are living on the said property.

59. DW1 stated that it is false and incorrect that the Applicant has been cultivating on plot Number Iveti/Mung'ala/155 or established a matrimonial home on the said property and that it is absurd that the Applicant could have improved the value of the said property after deserting the said property and later settling on property known as Iveti/Mung'ala/150 with her children who do not recognize him as their father under Kamba Customary Law or at all.

60. The 2nd Respondent, DW2, stated that she is the second wife of the 1st Respondent; that she was married to the 1st Respondent in 1957; that the Applicant was the first wife of the 1st Respondent; that they were all living together in the 1st Respondent's mother's house, including his brother and his wife, the 1st Respondent's two sisters and two children of his husband's late sister.

61. It was the evidence of DW2 that her husband's uncle could not allow them to carry out any activity on the family land; that they only cultivated on a one (1) acre piece of land that belonged to the 1st Respondent's mother and that later the 1st Respondent constructed a house and the Applicant and herself moved in the said house. After relocating from her mother-in-law's house, it was the evidence of DW1 that the 1st Respondent gained courage and reported his uncle to the tribunal for grabbing their land in 1973.

62. It was the evidence of DW2 that the Applicant left in 1974 before the parcels of land were fully under her husband's control; that her mother-in-law did not own the family land; that in 1977, her husband became a member of the Lukenya Ranching Society in which he paid Kshs. 25 and that he was to pay the full amount of Kshs. 6,000 to become a full member which he did between 1977 and 1978 whereby he was given an Allotment Letter with membership No. 172.

63. DW3 informed the court that she is a sister to the 1st Respondent; that their father died when they were very young after which their uncle, Nguku Muua grabbed his land; that they could not carry out any activity on the land unless he personally consented to it and that they resided on a one (1) acre piece of land that belonged to their mother, with her two brothers, JMN and WN *(deceased)*, her younger sister and her deceased elder sister's two children, M and S.

64. It was the evidence of DW3 that the 1st Respondent married the Applicant, who also lived with them in their mother's house; that the two had nine children and that the 1st Respondent later married a second wife, Rosevella Malinda Mbithi the 2nd Respondent herein.

65. It was the evidence of DW3 that the house the 1st Respondent constructed was built on a small portion of land belonging to her mother; that her brother only had access to the small portion of the land because her late father's brother had forcefully taken all the land; that subsistence farming was practiced on the small portion and that the produce from the subsistence farming was so little that it was only enough to feed the family.

The Applicant's submissions:

66. The Applicant's advocate submitted that this suit was filed under Section 17 of the 1882 Married Women Property Act which allowed a spouse to apply to Court for a declaration of rights to any property which is contested between the two; that while the suit was pending in Court, the 2010 Constitution was promulgated with guarantees which underpin among others, the principles of equality and that Article 45 (3) of the Constitution provides for equality between the parties at the time of the marriage, during marriage and upon its dissolution.

67. It was submitted by the Applicant's counsel that in the implementation of this constitutional principle, the Matrimonial Property Act,

2013, and the Marriage Act, 2014 were enacted; that the 2010 Constitution and the two statutes apply to the claim herein and that Section 6 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 property jointly owned and acquired during the subsistence of the marriage"*.

68. Counsel submitted that Section 2 of the Act defines "*contribution"* with regard to acquisition of matrimonial property in terms of monetary and non-monetary contribution and includes: domestic work and management of the matrimonial home; child care; companionship; management of family business and property; and farm work.

69. The Applicant's counsel submitted that the material part of the Applicant's evidence is to the effect that she was married to the 1st Respondent in 1950 but separated in 1974 and that out of the marriage, 10 children were born, all during the period the Applicant cohabited with the 1st Respondent.

70. It was submitted that the suit properties namely, the parcels of land arising from membership number 172 in the Lukenya Society registered as Mavoko Town Block 3/1941, 1942,1940, 3538 & 485 and the ancestral parcels of land registered as Iveti/Mung'ala/155, 1142, 150 & 7, are matrimonial properties as regards the Applicant and the 1st Respondent; that the Applicant contributed towards the acquisition of the Lukenya Society share which gave rise to the Lukenya land and that the 1st Respondent's mother/Applicant's mother-in-law gifted the Applicant and the 1st Respondent the ancestral parcels of land which she participated in developing.

71. Counsel submitted that the Applicant's contribution involved farming on parcels of land Iveti/Mung'ala /155, 7, 150 & 1142 now registered in the joint names of the 1st Respondent and his deceased brother, WN, in equal shares.

72. According to the Applicant's counsel, the acquisition of the Lukenya Society membership number 172 in the 1st Respondent's name at Kshs. 25 was a joint effort to which the Applicant contributed as the money came from the proceeds of the sale of the green grams and coriander which she participated in farming and harvesting. Further, that out of the farm produce proceeds, a herd of cattle was also purchased and out of the said cattle, seven cattle were surrendered to the Lukenya Ranching and Farming C-operative Society in lieu of Ksh. 6,000 that was needed to complete payment for the membership.

73. The Applicant's counsel submitted that the Applicant fetched water and molded bricks for the construction of the matrimonial home consisting of a house of seven rooms; that she resided in the said house up-to the time she separated with the 1st Respondent and that the 1st Respondent resides in the same house to-date with the 2nd Respondent and her children.

74. Counsel submitted that the Applicant took care of the large number of children, one of whom is physically disabled; that she did not have a house help for the children and that she used to milk the family cows, use some of the milk to feed the children and the remaining part she would churn in a gourd to make ghee which she would sell in Machakos town and the income would go towards development of the family.

75. Counsel submitted that the Applicant testified on how he cohabited with the 1st Respondent from their marriage from 1950 till their separation in 1974, a period of 24 years, during which she provided him with companionship, noting the large number of children they bore together.

76. The Applicant's counsel submitted that on the face of the Court record, it is clear that while the Applicant's evidence remained consistent and was not controverted by cross-examination, the Respondents' evidence is marred by glaring contradictions, inconsistencies and gaps on material particulars that lead to the conclusion that the defense was not being truthful.

77. Counsel submitted that the only explanation why the 1st Respondent was registering the parcels of land arising from the Lukenya Society share in the names of the 2nd, 3rd & 4th Respondents in 2005 was to disentitle the Applicant of her share in the Lukenya land and that thesame was done secretly and in blatant breach of the rights of the Applicant.

78. The Applicant's counsel submitted that the 1st Respondent was very unfair to the Applicant to deny her a portion of the land from the Lukenya Society share and instead gave the 2nd Respondent the largest parcel namely, Mavoko Town Block 3/3538 measuring approximately 58 acres and a further 10 acres to each of the 3rd and 4th Respondents who are daughter and son-in-law respectively, of the 2nd Respondent.

79. It was submitted by the Applicant's counsel that the Applicant is entitled to half share of the suit properties or such other share as this Court may determine fit and proper to serve the interest of justice in the suit. Counsel submitted that in ***Nairobi Civil Appeal No. 81 of 2017, M B O vs. J O O [2018] eKLR***, the Court upheld the principle that contribution towards the acquisition of matrimonial property can be both direct *(monetary contribution*) or indirect, unlike the holding in the ***Echaria*** case, and proceeded to order a sharing of the property at the ratio of 50:50.

80. It was submitted that should the Court find that parts of the matrimonial properties that it would find due to the Applicant have been disposed of, the Respondents ought to compensate the Applicant for the value thereof on the basis of the valuation reports produced by PW 2 as PEX 18, 19, 20, 21, 22 and 23 in lieu of a rectification of the registers.

The Respondents' Submissions:

81.The Respondents' advocate submitted that the Applicant's application is brought under the Provisions of Section 17 of the Married Women's Property Act of 1882, which provides that:

> "*In any question between husband and wife as to the title to or possession of property, either party may apply by summons or*

otherwise in a summary way to any judge of the High Court of Justice …. and the judge of the High Court may make such orders with respect to the property in dispute…."

82. It was submitted that Section 17 of the Married Women's Property Act of 1882 was never intended to confer proprietary rights from one spouse to another during their marriage. It is only where the marriage has been dissolved that the section could be invoked and that the Court of Appeal in ***Peter Mburu Echaria vs. Priscilla Njeri Echaria [2007] eKLR*** was apt on the application of Section 17 of the Married Women's Property Act of 1882.

83. The Applicants' counsel also cited the common law case of ***Pettitt vs. Pettitt [1969] 2 WLR 966*** where the House of Lords, while recognizing that the 1882 Act gave Married Women full proprietary rights to the properties that they may acquire held that Section 17 of the 1882 Act was purely a procedural provision which did not entitle the court to vary the existing proprietary rights of the parties.

84. It was submitted that the House of Lords in ***Gissing vs. Gissing [1970] 2 All ER 780*** made it clear that where both spouses contribute towards the purchase of a matrimonial home, but the house is registered in the name of one spouse alone, the question whether the contributing spouse is entitled to a beneficial interest in the matrimonial home is a matter dependent on the law of trust *(Resulting Trust).*

85. Counsel submitted that it is not in dispute that the 1st Respondent married the 2nd Respondent in 1957, five years after marrying the Applicant and that in determining whether the Applicant has a valid cause of action or any beneficial interest in the subject properties, this court should bear in mind that as at 1957, the 2nd Respondent was also a wife of the 1st Respondent.

86. The Respondents' counsel submitted that membership no. 172 in Lukenya Ranching and Farming Co-operative Society Ltd was issued to the 1st Respondent in 1977 after the Applicant had deserted the 1st Respondent and that the Applicant neither pleaded nor gave evidence how membership to this society was acquired and how she contributed towards acquisition of this membership, directly or indirectly. Counsel cited the Court of Appeal decision in ***PWK vs. JKG [2015] eKLR*** where the court held as follows:

"We think that this is an appropriate case where, subject to what we shall say hereafter, a distribution of 50:50 would have been appropriate. This would not be on account of any compelling legal principle that spouses must share equally in matrimonial property but rather, as was succinctly put by a five-judge bench of this Court in Echaria vs. Echaria (Supra) "Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property."

87. Counsel submitted that Kiage JA, in ***P N N vs. Z W N [2017] eKLR*** responded in the negative when answering the question whether the marital equality recognized in the Constitution meant that matrimonial property should be divided equally.

88. It was submitted that the Applicant deserted the 1st Respondent sometime in 1974; that the 1st Respondent was allocated the suit property by Lukenya Ranching and Farming Co-operative Society Ltd in 1977 and that the burden of proof was on the Applicant to establish direct or indirect contribution or otherwise in purchasing the shares in the society, at the point of acquisition.

89. It was submitted that the Applicant's marriage to the 1st Respondent cannot in itself and without more, constitute 50% contribution. Counsel relied on Justice Kiage's holding in the ***P N N vs. Z W N*** case (*supra*) where he held as follows:

"A spouse may be so uncooperative, so wasteful, so distant, so all-over that he or she has hardly provided the warmth of companionship on the basis of which it might be said they made a non-monetary contribution to matrimonial property. In such instance it may well be that the one spouse achieved all they did and acquired not because, but rather in spite of their lazy, selfish, wasteful, wayward, drunken or draining mate.

90. Counsel submitted that as stated in the case of ***Muthembwa vs. Muthembwa***, properties inherited by the 1st Respondent can only become subject of adjudication under Section 17 of the Married Women Property Act, if the Applicant can prove improvements using family funds during the course of marriage; that the Applicant admits to have moved in Iveti/ Mung'ala/150 in 1980, six years after deserting the 1st Respondent and that any improvements on that property cannot have been made using family funds.

91. It was submitted that the other three properties, to wit, Iveti/Mung'ala 155,7 and 1142 were acquired lawfully by the 1st Respondent after the date of desertion in 1974; that no improvement was done on either of them by the Applicant and could not in any event be made, by virtue of the desertion in 1974, and acquisition after 1974 and that this Court cannot overlook the fact that the four properties, to wit, Iveti/Mung'ala 150, 155, 7 and 1142 are jointly owned.

92. It was submitted that the Applicant was under duty to prove improvement of the portion belonging to the 1st Respondent during her marriage between 1952 and 1974. It was submitted that the 1st Respondent was not under any notice or inquiry of any dispute prior to disposing off the following properties:

a) Sale of Title No. Town Block 3/1941 to EM on 1/5/1993.

b) Sale of Title Mavoko Town Block 3/1942 to SMK on 1/5/1993 and 12/11/1997.

c) Gift of Title Number Mavoko Block 3/3538 to RMM in the year 2006.

93. It was submitted that the discretion of the Court under Section 17 of the Married Women Property Act follows the Principles of Law and Equity; that the Applicant has not proved fraud, capable of invoking the jurisdiction of this Court to *(revoke)* the said Titles and that such a discretion cannot be invoked under the said Act.

94. It was submitted by the Respondents' counsel that the Court in ***Muthembwa vs. Muthembwa (2002) 1 EA 186*** *(which the Applicant has cited)* capped the interest of the Appellant to the date of last cohabitation; that the value of the properties was also capped to the date of cohabitation which was 1992 and that in this case, any right will date back to 1974. In its order, it was submitted, the Court states as follows:

> *"We therefore vary the decree by excluding the same, and also direct that the date of reference for valuation and distribution purposes should and be subject to the settlement of existing loans under the changes and mortgages, be the date when cohabitation ceased viz December 1992."*

95. It was submitted that the valuations submitted to this Court showing the current values of the properties in issue are not applicable under the principle of ***Muthembwa vs. Muthembwa***; that in any event, this Court can only determine the interest *(if any)* of the parties and that the valuation of the properties is not in the jurisdiction of the Court under Section 17 of the 1882 Act.

96. On the question of the existence of the marriage at the time of filing the case, counsel adopted the finding of Justice Waki, in ***PNN vs. ZWN (2017) eKLR*** where he held as follows:

> *"On the main purpose of the Act of 1882 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 the marriage was to result in any common ownership or co-ownership of the property. All this in his view negatives 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 'which shall it be given."*

97. While relying on the case of ***HWN vs. WNM (2015) eKLR*** counsel submitted that the Applicant did not produce any evidence to prove fraud or deceit on the part of the 1st Respondent in settling and gifting the three properties in this matter.

98. It was submitted that the Applicant has not provided indirect or direct evidence of contribution in acquisition of Share No. 172 of Lukenya Ranching and Farming Co-operative Society Ltd and the properties thereof to wit; Mavoko Town Block 3/1940, 1941, 42, Mavoko Town Block 3/3538 and Mavoko/Block 3/485 and that the Applicant has not proved that she developed or improved Title No. Iveti/Mung'ala 7, 150, 155, 1142, using family funds during the period of marriage, which was 1952-1974.

99. Counsel submitted that by virtue of the uncontroverted evidence that the Applicant voluntarily left her matrimonial home in 1974, any legal rights are limited to the year 1974; that the properties that were disposed off prior to the filing of this suit, Mavoko Town Block 3/1940 and 1941 to the 3rd and 4th Respondents and the gift of Mavoko Town Block 3/3538 to Rosevella Malinda Mbithi *(2nd Respondent)* cannot be subject of this dispute having been conveyed before the suit.

Analysis and findings:

100. The issues that arise from the pleadings, the evidence and the submissions are as follows:

a) What is the law applicable in these proceedings;

b) Did the Applicant contribute in the acquisition of the land from the Lukenya Farmers Co-operative Society Limited, the same being Mavoko Town Block 3/1941, 1942, 1940, 3538 and 485.

c) Were the Applicant and the 1st Respondent jointly given land parcels numbers Iveti/Mung'ala/ 155, 7, 150 & 1142 by the Applicant's mother- in- law/mother of the 1st Respondent and did the Applicant contribute in developing the same?

d) Are the said properties matrimonial properties for purposes of the claim herein?

e) Is the Applicant entitled to half share or any other share of the property?

f) Who bears the costs of the suit?

(a) The Applicable law

101. The Amended Originating Summons dated 21st May, 2010 was filed pursuant to the provisions of Section 17 of the Married Women's Properties Act of 1882 *(England)*. In the Application, the Applicant has sought for a declaration that the properties acquired by the joint funds and efforts of the Applicant and the 1st Respondent during their marriage and registered in the sole names of the 1st Respondent, and transferred to the 2nd, 3rd and 4th Respondents, are held in trust for the 1st Respondent and the Applicant.

102. The Amended Originating Summons is premised on the ground that the suit properties arising out of membership number 172 in Lukenya Ranching & Farming Co-operative Society Ltd *(the Society)* is matrimonial property which was jointly acquired by the Applicant and the 1st Respondent but was caused to be registered by the 1st Respondent in the sole names of the 1st Respondent and the 2nd, 3rd and 4th Respondents.

103. The Originating Summons is further premised on the grounds that the Applicant put in substantial efforts and expended her personal income towards the acquisition of the said property; that the said property is the parties' matrimonial property which has been greatly improved through the Applicant's funds and efforts and that the 1st Respondent has disentitled the Applicant of all the property.

104. While the suit was pending in Court, the 2010 Constitution was promulgated with guarantees which underpin among others, the principles of equality. Article 45 (3) of the Constitution provides for equality between the parties at the time of the marriage, during marriage and upon its dissolution. In the implementation of this constitutional principle, the Matrimonial Property Act, 2013, and the Marriage Act, 2014 were enacted.

105. Section 6 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 property jointly owned and acquired during the subsistence of the marriage.

106. Section 2 of the same Act defines *"contribution"* with regard to acquisition of matrimonial property in terms of monetary and non-monetary contribution and includes: domestic work and management of the matrimonial home; child care; companionship; management of family business and property; and farm work.

107. Section 7 of the Act provides that 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. On the other hand, Section 17 of the Act provides as follows:

> ***"(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."***

108. Section 17 of the 1882 Married Women Property Act allowed a spouse to apply to Court for a declaration of rights to any property which is contested between the two. The Applicability of the Act was informed by the provisions of Section 3 (1) of the Judicature Act. The jurisdiction of this court and the High court in respect of Section 17 of the 1882 Married Women Property Act and Sections 7 and 17 of the Matrimonial Property Act has been settled by the Court of Appeal in numerous decisions.

109. In the case of ***R.M.M vs. B.A.M [2015] eKLR***, the Court of Appeal, comprising of five Judges, stated as follows:

> *"In this matter, the **Essa case** was ignored by the trial court. The Originating summons pleaded Section 17 of the Married Women's Property Act, 1882. In the leading judgment, Omolo, JA, with whom Lakha, JA (a Muslim by faith, we might add!) agreed, quoted Lord Morris of Borthy-Guest **in Pettit v. Pettit [1970] AC 777,** stating thus:-*
>
> *"...one of the main purposes of the Act of 1882 was to make it fully possible for the property rights of the parties to a marriage to be kept entirely 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, negatives any idea that section 17 was signed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to the title to property, the question for the court was whose is this" and not "to whom shall this be given."*

110. In the case of ***P B W vs. J W C [2017] eKLR,*** the Court of Appeal stated as follows:

> *"The summons leading to this appeal was filed on 21st October, 2011 under the Married Women's Property Act, 1882, which was a statute of general application in Kenya (See **I v. I [1971] EA 278** and **Karanja v. Karanja [1976-80] 1 KLR 389)**. During the pendency of the summons, Parliament enacted the Matrimonial Property Act, 2013 which came into effect on 16th January, 2014. By Section 19 of that Act, the Married Women's Property Act ceased to apply in Kenya.*
>
> *By dint of Section 7 ownership of matrimonial property is vested 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. On the other hand, section 2 defines "contribution" to mean monetary and non-monetary contribution and includes domestic work and management of the matrimonial home; child-care; companionship and management of family business or property. (See VWN v. FN, CA No. Sup 3 of 2014). Section 14 (a) of the Act is also relevant to this appeal. Under that provision, where matrimonial property is acquired during marriage in the name of one spouse, there is a rebuttable presumption that the property is held in trust for the other spouse.*
>
> *It is common ground that the appellant acquired his 40% shares in the company during the subsistence of the marriage when the respondent was busy looking after him and the children. In our view, by remaining home looking after the children and the appellant while the latter was working and acquiring the shares, the appellant was contributing indirectly to the acquisition of the shares*

within the meaning of the Matrimonial Property Act.

Turning to the [particulars withheld] property, the appellant readily conceded that it was matrimonial property and that he sold and transferred it to a third party for Kshs 1.6 million during the pendency of the summons. The evidence on record indicates that prior to the sale, the respondent had planted in it 100,000 eucalyptus trees. Ideally the learned judge should have sought a valuation report, but given the peculiar circumstances of this appeal, his dilemma is readily apparent."

111. In ***DM vs. MM, (2008) 1 KLR 263,*** the Court held as follows:

*"The law is now correctly stated in the **Muthembwa** case (supra). If there are disputes between husband and wife as to their respective rights to shares in a company registered in the name of one spouse, then, the court like, in the case of any other property in dispute between husband and wife has power to ascertain the respective beneficial rights of husband and wife to the disputed shares. It can declare, like the learned CA did in this case, that one spouse holds a certain number of shares in trust for the other spouse. What the court cannot do under section 17 of the 1882 Act, like in respect of all other properties, is to order the transfer of the legal title to property or in other words to pass proprietary interest from one spouse to the other...Had the learned CA ordered that the allotment of shares in the register of the company be varied and the wife be registered as proprietor of a half of the share registered in the name of the husband then it could be said that he exceeded his jurisdiction under section 17 of the 1882 Act."*

112. The provisions of the 1882 Act, the Matrimonial Property Act and Article 45 of the Constitution were further examined in detail by the Court of Appeal in ***P N N vs. Z W N [2017] eKLR.*** In the said matter, Waki JA stated as follows:

*"4. 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."

*Speaking for myself, I would find little, if any, utility in applying the **Echaria case** post the provisions of the **Constitution** and the **Matrimonial Property Act** examined above. The former is loud on equality while the latter has an expansive definition of "contribution". As stated earlier, those provisions lay a new basis for the future which will generate its own jurisprudence. The **Echaria case** had, of course, considered and strictly applied pre-1970 English precedents on the interpretation of Section 17 of the Matrimonial Property Act 1882…An inquiry may thus be made under Section 17 and declarations may be issued, the subsistence of the marriage notwithstanding. As stated by Lord Morris of Borthy-Guest in **Pettit v. Pettit [1970] AC 777:***

"One of the main purposes of the Act of 1882 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 his view negatives 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 this be given?"

The purpose of the Section is not to defeat rights but to provide a machinery for ascertaining rights and once ascertained, then the register would be changed to take account of them.

Generally, however, the Constitution ought to be given a broad and purposive interpretation that enhances the protection of fundamental rights and freedoms. The right to equality, for example, is inherent and indefeasible to all human beings. It would therefore matter not that the cause of action accrued before the current constitutional dispensation. In sum, I do not fault the High Court in this matter for seeking guidance of the Constitution 2010 and the Covenants which Kenya has ratified to inform its application of Section 17, MWPA."

113. On his part, while agreeing with the majority decision in ***P N N*** case *(supra)*, Kiage JA opined as follows:

"First, while I take cognizance of the marital equality ethos captured in Article 45 (3) of the Constitution, I am un persuaded that the provision commands a 50:50 partitioning of matrimonial property upon the dissolution of a marriage. The text is plain enough

"45(3) Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage."

To my mind, all that the Constitution declares is that marriage is a partnership of equals. No spouse is superior to the other. In those few words all forms of gender superiority-whether taking the form of open or subtle chauvinism, misogyny, violence,

exploitation or the like have no place. They restate essentially the equal dignity and right of men and women within the marriage compact. It is not a case of master and servant. One is not to ride rough shod over the rights of the other. One is not to be a mere appendage cowered into silence by the sheer might of the other flowing only from that other's gender. The provision gives equal voice and is meant to actualize the voluntariness of marriage and to hold inviolate the liberty of the marital space. So in decision making; from what shall be had for dinner to how many children (if any) shall be borne, to where the family shall reside or invest- all the way to who shall have custody of children and who shall keep what in the unfortunate event of marital breakdown, the parties are equal in the eyes of the law. Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally" I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement. The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts. I would repeat what we said in ***Francis Njoroge vs. Virginia Wanjiku Njoroge,*** *Nairobi Civil Appeal No. 179 of 2009; … a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the Court of Appeal of Singapore in LOCK YENG FUN VS. CHUA HOCK CHYE [2007] SGCA 33;*

*'It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and, by its very nature cannot be – a precise mathematical exercise'***."**

I think that it would be surreal to suppose that the Constitution somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economics, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say the Constitution gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words "50 per cent." Thus it is that the Constitution, thankfully, does not say equal rights "including half of the property." And it is no accident that when Parliament enacted the Matrimonial Property Act, 2013, it knew better than to simply declare that property shall be shared on a 50:50 basis. Rather, if set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition...Our new constitutional dispensation is no safe haven for those spouses who will not pull their weight. It cannot be an avenue to early riches by men who would rather reap from rich women or women who see in monied men an adieu to poverty. What the Matrimonial Property Act has done is recognize at ***Section 2*** *that contribution towards acquisition of property takes both monetary and non-monetary forms which essentially opens the field of contribution to both spouses without distinction on the basis of remunerative employment, especially so in an urban setting…"*

114. In a recent decision of ***AKK vs. PKW [2020] eKLR,*** the Court of Appeal stated as follows:

"Section 7 refers to division of matrimonial property whilst Section 17 refers to a declaration of rights in any property contested between a person and a spouse… The trial court found that it had no jurisdiction under Section 7 to make orders as to the division of property. It is also correct that the orders concerning division of matrimonial property pursuant to Section 7 of the Matrimonial Property Act was unavailable to the appellant until the determination of Divorce case 867 of 2017 between the parties hereto…. A plain reading of Section 17 enables a spouse, subsistence of a marriage notwithstanding, to make an application for declaratory orders. It further states that that application may be made as part of a petition in a matrimonial cause and notwithstanding that a petition has not been filed under any law relating to matrimonial causes. It is our opinion that the divorce cause does not prevent a party from bringing an action for declaration of rights to property in the High Court under Section 17 of the Act. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce. It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of Section 7, the High court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved."

115. In ***Muthembwa vs. Muthembwa [2002] 1 KLR***, the court found:

"In assessing the contribution of spouses in acquisition of matrimonial property each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness. The jurisdiction of the court is to determine a question or questions between husband and wife principally as to title to or possession of property. In the instant case, where matrimonial property is intertwined with company property the court cannot decline jurisdiction under Section 17 to deal with the whole property as this would be unjust. In application under Section 17 the court has wide and unfettered discretion to make such order or orders as justice may demand…"

116. In ***Edwin Gatonye Mucai vs. Bernadette Mbaire Mucai, Civil Appeal No. 231 of 2018,*** the Court of Appeal held as follows:

"Equality of spouses does not involve the re-distribution of property rights at the dissolution of marriage. The learned judge missed the mark on his interpretation of spousal equality as enshrined in that sub-Article.

This Court espoused the meaning of that equality in ***M E K vs. G L M [2018] eKLR*** *as follows;*

"Equality in marriage is not a principle to be applied blindly nor is it intended to encourage dependency by one spouse. It is a

situation where each party makes a contribution. In other words, it is not shifting the burden, but the sharing of responsibilities and benefits taking into account the gender limitations."

We think it was erroneous for the learned judge to assume and hold that the Constitution gives spouses an automatic 50% share of the matrimonial property simply by being married. The stated equality means no more than that the Courts to ensure that both parties at the dissolution of a marriage get their fair share of the property. This has to be in accordance with their respective contribution. It does not involve denying a party their due share or unfairly a party by giving such party more than he or she contributed… The learned judge committed a reversible error and misdirected himself in not applying the relevant provisions of the Matrimonial Property Act, 2013. Far from being inconsistent therewith, the statute in fact effectuates the principle entrenched in Article 45 (3). The Act reflects the equality of both parties before, during and at dissolution of a marriage. It clearly provides in Section 6 (3) that parties may enter into a pre-nuptial agreement before getting married in order to determine their property rights. Section 7 then provides that ownership of matrimonial property, at the dissolution of a marriage, is vested to parties according to their respective contribution. It is the duty of the courts to fairly and accurately determine such distribution and the learned judge but abducted that duty. His blanket of a 50:50 formula ostensibly on the basis of Article 45(3) of the Constitution effectively made the distributive scheme of the statute completely of no effect and orchestrated a failure of justice."

117. From the above decisions of the Court of Appeal, and the provisions of the Constitution, Section 17 of the Women's Property Act, 1882 and Sections 7, 14 and 17 of the Matrimonial Property Act, 2013, it is safe to state that Sections 17 of the Women's Property Act, 1882 and the Matrimonial Property Act, 2013 were not designed for the purpose of enabling the court to pass property rights from one spouse to another.

The only question that the court is required to address as to title to property under section 17 is *"whose is this and not to whom shall this be given."*

118. The purpose of Section 17, under which this suit was filed, is not to defeat rights but to provide a machinery for ascertaining rights and once ascertained, then the register would be changed to take account of them. Whilst Section 7 of the Matrimonial Properties Act refers to division of matrimonial property upon dissolution of a marriage, Section 17 refers to a declaration of rights in any property contested between a person and a spouse.

119. The effect of Section 17 is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce, which is the case in this matter. By virtue of Section 7 of the Matrimonial Property Act, this court, or the High court, cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved.

120. The Matrimonial Property Act recognizes at Section 2 that contribution towards acquisition of property takes both monetary and non-monetary forms, which essentially opens the field of contribution to both spouses without distinction on the basis of remunerative employment.

121. The non-monetary forms of contribution towards the acquisition of matrimonial property by a spouse includes domestic work and management of the matrimonial home; child-care; companionship and management of family business or property.

122. Section 14 of the Matrimonial Property Act provides that where matrimonial property is acquired during marriage in the name of one spouse, there is a rebuttable presumption that the property is held in trust for the other spouse. That being the case, it was for the 1st Respondent to show that the suit properties were not acquired during the subsistence of the marriage between himself and the Applicant or that the Applicant did not make any contribution, monetary or non-monetary, in the acquisition of the suit properties.

***b)* Whether Mavoko Town Block 3/1941, 1942, 1940, 3538 and 485 and Iveti/Mung'ala/155, 1142, 150 & 7 are matrimonial properties**

123. It is not in dispute that the Applicant was married to the 1st Respondent in 1950. In 1957, the 1st Respondent married his second wife, the 2nd Respondent. The Applicant and the 1st Respondent were blessed with ten (10) children, who were all born between 1950 and 1973. In 1974, the Applicant separated with the 1st Respondent and moved to her parents' home until 1979 when she returned to a house that had been put up for her by her on one of the suit properties.

124. It is not in dispute that the suit properties namely, Mavoko Town Block 3/1941, 1942, 1940, 3538 & 485 arose from membership number 172 in the Lukenya Society and land registered as Iveti/Mung'ala /155, 1142, 150 & 7 is ancestral land.

125. The Applicant's case is that she contributed towards the acquisition of the Lukenya Society share which gave rise to the Lukenya land and that the 1st Respondent's mother gifted her and the 1st Respondent the ancestral parcels of land which she participated in developing.

126. It was the evidence of the Applicant that on the four parcels of family land, she participated in farming maize and beans for consumption by the family and green grams and coriander/*dhania* which were sold to the Asians in Machakos town after harvesting in which she also participated.

127. It was the evidence of PW1 that out of the proceeds of the sale of the farm produce, they would buy cattle to increase the wealth of the family, pay school fees for the children, buy clothing and other necessities; that she also used to milk the cattle, feed the children with the milk and churn the excess milk to produce ghee which she used to sell in the market and that the money she received was used to cater for the family needs.

128. It was the evidence of the Applicant that the four (4) parcels of land which she developed by farming are Iveti/Mung'ala /155, 7, 150 & 1142 now registered in the joint names of the 1st Respondent and his deceased brother, WN, in equal shares measuring approximately 9.3

hectares *(23 acres),* 11.6 hectares *(29 acres),* 0.8 hectares *(2 acres)* and 1.1 hectares *(3 acres),* respectively.

129. The total acreage of the four parcels is 57 acres, out of which the 1st Respondent has allowed the Applicant to use parcel number Iveti/Mung'ala/150 measuring approximately 2 acres.

130. Other than farming on the four parcels of land, it was the evidence of the Applicant that their matrimonial home with seven rooms, and which she was involved in building, is situated on parcel of land Iveti/Mung'ala/155 measuring approximately 53 acres. It was the evidence of the Applicant that after constructing the said matrimonial home, her, together with her co wife and the children of the marriage lived in the said house before the 1st Respondent chased her in 1974.

131. The Applicant's eldest son, PW2, her brother, PW3 and the village head man, PW4, concurred with the evidence of the Applicant, and specifically on how she used to farm all the four parcels of land. PW4 stated that the couple always had high yields as the parcels of land were very large; that the Applicant also used to sell milk and ghee from the cattle in the local markets; that he saw the Applicant and 1st Respondent built their matrimonial home and that during the construction of the matrimonial home, it is the Applicant who used to fetch water and mould bricks with her elder children.

132. The Applicant's co-wife, the 2nd Respondent, in cross-examination stated that *"…among the Kamba, women were laborers in the farms and they used to cultivate with the Applicant, and that their work as women included cultivating the land."*

133. The evidence of DW1 was that when his father died in 1940, he asked his uncle, Nguku Muua, to give him his father's share of land which he refused; that he sued him and the Tribunal Court subdivided the property between them in 1974 and that he was allocated his portions of land being Plot Nos. 155, 150, 1142 and plot No. 7.

134. It was the evidence of DW1 that they were all farming in the one (1) acre of land for subsistence before the decision of the Tribunal; that since his income was small, the construction of the matrimonial home took him longer than he thought as he could not afford to pay the *"fundis";* that assembling the building materials was also a problem and that it took him seven years to get the house completed and habitable. According to DW1, his family took control of the family land in 1973 and one year later, the Applicant left him.

135. The 1st Respondent's evidence that his entire family used to cultivate only one acre out of the four parcels of land is not believable. I say so because the 2nd Respondent contradicted that testimony by stating that the family used to cultivate five (5) acres before the 1st Respondent repossessed all the four parcels of land from their uncle who had grabbed the said land.

136. In any event, the Applicant did not produce any proceedings of the Tribunal to show that there existed a dispute between him and his late uncle, and in respect to which land. Furthermore, if there was any dispute between the 1st Respondent and his late uncle in respect to the ancestral land, the first port of call would have been the clan elders, and the village headman. However, no evidence was called from the clan elders or the village headman to allude to any dispute between the two.

137. Considering that the 1st Respondent's mother built her house on what is now parcel number 155 measuring approximately 23 acres, and the 1st Respondent having confirmed that he married his two wives in 1950 and 1957 respectively and lived with them in his mother's house, before he constructed his seven roomed house on the same land, it cannot be true that all along, the 1st Respondent's family, together with his brother and his family, who were all living under one roof, were cultivating on one acre piece of land.

138. As was held in the case of ***Muthembwa vs. Muthembwa,*** (*supra*), properties inherited by the 1st Respondent can only become subject of adjudication under Section 17 of the Married Women Property Act, if the Applicant can prove improvements using family funds during the course of marriage.

139. Having found that there is no evidence of the existence of any dispute between the 1st Respondent and his late uncle in respect of parcels of land Iveti/Mung'ala /155, 7, 150 & 1142, it is my finding that the Applicant, together with the 1st and 2nd Respondents jointly farmed half of all the four parcels of land and developed the same using the proceeds of the said farming exercise, while the 1st Respondent's brother farmed and developed the other half.

140. Indeed, using the funds from the proceeds of the sale of the farm produce, the Applicant, jointly with the 1st and 2nd Respondents, painstakingly developed their seven bedroomed house which is still being occupied by the 1st and 2nd Respondents. According to the 1st Respondent's statement, because of lack of funds, it took him seven years to complete the said matrimonial home.

141. Having not had funds to pay the *fundis* and to buy building materials, a fact admitted by the 1st Respondent, it follows that the Applicant would not have just sat doing nothing. She must have assisted, in one way or the other in the construction of the said house.

142. In addition, the Applicant did provide the much needed companionship to the 1st Respondent while he developed the four parcels of land, which is evidenced by the fact that the 1st Respondent made the Applicant a proud father of ten (10) children between the year 1950 and 1973. There could never be any better definition of *companionship* than in a situation where a spouse gives birth to children like in this case.

143. That being the case, it is my finding that half of the parcels of land known as Iveti/Mung'ala 150, 155, 7 and 1142 which are registered in the name of the 1st Respondent *(the other half being in the name of the 1st Respondent's brother, WNN)* are matrimonial property. The said properties are being held by the 1st Respondent in trust for the Applicant and the 2nd Respondent who are his wives.

144. I will now turn to the issue of parcels of land arising from the Lukenya Ranching and Farming Co-operative Society Limited share, namely, Mavoko Town Block 3/1941 *(approximately 10 acres),* Mavoko Town Block 1942 *(approximately 10 acres),* Mavoko Town Block 1940 *(approximately 20 acres),* Mavoko Town Block 3538 *(approximately 58 acres)* & Mavoko Town Block 485 *(approximately 50 by 100 feet).*

145. PW1 informed the court that after independence, the Lukenya land was offered for sell to the local community through buying of shares in Lukenya Ranching and Farming Co-operative Society Ltd; that the registration fees was Kshs 25; that a further sum of Kshs 6,000 was payable to the Society and that where one could not afford to raise the money, cattle would be used as a mode of payment for the shares.

146. According to PW1, her, together with the 1st Respondent, paid for the Lukenya shares by delivering to the Society seven (7) cattle; that the seven cattle were from the herd of cattle that they had bought using proceeds from the farm produce and that they were given share Number 172 in the name of the 1st Respondent as was the practice *(and still is)* where property was held in the names of the husband on his behalf, that of the wife and the whole family.

147. The 1st Respondent testified that at the time the Applicant deserted him in 1974, he was bed ridden and on the verge of death; that the 2nd Respondent took care of him during the said period and that the Applicant did not contribute directly or indirectly to the acquisition of any shares at Lukenya Ranching and Farming Co-operative or at all.

148. It was the evidence of DW1 that in 1948, he started a business partnership in butchery with Mr. Ngunza Muua and Mr. Daniel Kavuthi at Kithanyoni Market; that in 1950, they jointly sent applications to various institutions, so that they could get tenders to enable them supply meat and that the business was very successful.

149. According to the 1st Respondent, he could not raise the funds to be a full member of Lukenya Farmers Society back in 1975; that he paid for his share in the society so as to acquire land left behind by the white settlers through his partner Ngunza Muua and that he paid one hundred and twenty Kenya shillings *(Kshs. 120).*

150. DW1 informed the court that later on, the Government learnt of the shadow scheme and fearing that some members would be exploited, ordered that there would be no shadow members and allowed people to register to be members with Twenty Five Shillings *(Kshs. 25)* as Registration fee and Six Thousand Kenya Shillings *(Kshs. 6,000)* for the acquisition of shares; that he paid the Twenty Five Shillings *(Kshs. 25)* in 1977 and the full membership fee of Six Thousand Kenya Shillings *(Kshs. 6,000)* in installments of Four Thousand Kenya *shillings (Kshs. 4,000)* in 1978 and cleared the balance later.

151. It was the evidence of DW1 that out of his membership with the Society, he was given Allotment Letters and Title Deeds for the following parcels of land:

a) 40 acres of land Parcel No. 506 on 21st February, 1991;

b) 20 acres of land Parcel No. 183 on 22nd December, 1992;

c) Commercial Plot measuring 50 x 100 Parcel No. 86 on 23rd July, 1996; and

d) Commercial Plot measuring 50 x 100 Parcel No. 83 on 10th March, 2006.

152. It was his evidence that Lukenya Ranching and Farming Co-operative Society Ltd issued him with membership number 172 in 1977; that out of the said share, the Society allocated him plot No. 183 on 22nd December 1992 and that on his instructions dated 20th April 2004, he requested the Manager, Lukenya Ranching and Farming Co-operative Society Limited to allocate 20 acres to the 2nd Respondent, as a gift to her for taking care of him when he was unwell in 1975.

153. The 1st Respondent stated that the said share was issued to his wife, the 2nd Respondent**,** as per the said request; that the 2nd Respondent was issued with a Title pursuant to the said allotment being Mavoko Town Block 3/3538 and that in respect of plot No. 506 measuring, (40) acres, the same was allocated to him in 1991 by way of a letter dated 27th April 1999 and that in 1999, he subdivided the said property into three (3) plots of 10 acres, 10 acres, and 20 acres respectively.

154. According to the 1st Respondent, after the sub-division, three (3) Titles were issued for Mavoko Town Block 3/1940/1941 and 1942; that in 1993, he entered into an agreement on 1st May, 1993 with Mr. SMK, the 4th Respondent for sale of Mavoko Town Block 3/1941 and that the 4th Respondent paid him Kshs. 300,000 for the land.

155. The 1st Respondent deponed that in 1997, he entered into a second agreement with the 4th Respondent for the purchase of Mavoko Town Block 3/1940 with the said 4th Respondent for Kshs. 400,000; The 1st Respondent deponed that Title Mavoko Town Block 3/1942 is in his name and is currently under the care of the 3rd and 4th Respondents.

156. In respect of Plot No. 86, DW1 deponed that he balloted for the same and was issued with a letter of Allotment on 27th April 1999; that a Title in respect of the same was issued being Mavoko Town Block 3/485 and that he also balloted for Plot No. 83 which is a commercial plot of 100 by 50 feet.

157. The evidence before the court shows that all the Lukenya parcels of land, to wit, parcels of land known as Mavoko Town Block 3/3538; 1940; 1941; 1942; 485 and Plot No. 83 emanate from share number 172 which was issued to the 1st Respondent by the Society. Although the

membership certificate or card should in possession of the 1st Respondent, he did not produce the same in evidence.

158. The 1st Respondent produced in evidence a receipt for Kshs. 25 dated 1st December, 1977 issued by Lukenya Ranching & Farming Cooperative Society Limited being payment for *"entrance fee"* and another receipt for Kshs. 120 dated 4th April, 1975 being payment for *"plot demarcation."* The two receipts do not tally with the evidence of the 1st Respondent. While the receipt for Kshs. 25 was to come first before the receipt for demarcation would be issued, it would appear that the 1st Respondent paid the entrance fee in 1977, way after paying for the demarcation of the land in 1975

159. Indeed, the failure by the 1st Respondent to produce a copy of his membership card or the share certificate leads me to conclude that he became a member of the society before he made the payment of Kshs. 120 on 4th April, 1975. It is only upon becoming a member of a society that one would pay for the demarcation of the land.

160. In any event, the 1st Respondent deponed that in 1975, he was bedridden, and did not have funds to pay for his share. The 1st Respondent did not produce any agreement to show that it is Mr. Ngunza Muua who loaned him the Kshs. 120 to pay for the share or that indeed they were partners in any business.

161. The receipt of Kshs. 120 dated 4th April, 1975 was issued way after the 1st Respondent had become a shareholder of the Society. Being sick and broke, the payment for the membership of the Society must have been from the produce of the family land which the Applicant tilled and reared cattle. The acquisition of the share number 172 in the Society was acquired during the marriage between the 1st Respondent and the Applicant, and the subsequent payment of Kshs. 6,000 for the share was made by way of cattle belonging to both the Applicant and the 1st and 2nd Respondents in lieu of cash.

Conclusion and findings:

162. The evidence before me shows that the Applicant contributed in the acquisition of all the suit properties directly and indirectly by farming on half of the four (4) expansive parcels of family land by growing maize and beans for consumption by the family and green grams and coriander/*dhania* which were sold in Machakos town after harvesting.

163. During farming, her, together with the entire family, used oxen and the plough and sowed seeds on the half of the said four parcels of land which are Iveti/Mung'ala /155, 7, 150 & 1142, now registered in the joint names of the 1st Respondent and his deceased brother, WN, in equal shares, all measuring approximately 28.5 acres (being half of 57 acres).

164. In addition, the Applicant contributed to the development of the said parcels of land by assisting in the construction of their matrimonial home on parcel number 155, which construction took seven years to be completed.

165. Further, I am convinced by the Applicant's evidence that out of the farm produce proceeds, a herd of cattle was purchased and out of the said herd of cattle, some cattle were surrendered to the Lukenya Ranching and Farmers Co-operative Society in lieu of Ksh. 6,000 needed to complete payment for the membership of the 1st Respondent in the Society, which enabled the 1st Respondent acquire share number 172, and which gave rise to the Lukenya parcels of land.

166. The Applicant had 10 children with the 1st Respondent. She took care of the large number of children, one of whom is physically disabled.

The Applicant's co-wife, the 2nd Respondent, in cross-examination admitted that she and the Applicant could farm or go to the river with babies strapped on their backs. In addition, the Applicant used to milk the family cows, use some of the milk to feed the children and sell the remaining portion to raise money for use by the whole family.

167. The Applicant cohabited with the 1st Respondent since their marriage in 1950 till their separation in 1974, a period of 24 years, during which time she provided him with companionship, noting the large number of children they bore together. All these amount to non-monetary contribution that the Applicant made in the acquisition of the suit properties.

168. The 1st Respondent gifted his second wife, the 2nd Respondent, with Mavoko Town Block 3/3538 "*for taking care of him when he was sick in 1975.*" However, the title was registered in the name of the 2nd Respondent in 2006 after the Applicant sued the 1st Respondent for divorce in a suit that initially also sought for a share of the matrimonial property.

169. It was the evidence of the 1st Respondent that he sold a total of 20 acres of the *(Lukenya)* land to the 4th Respondent, husband to the 3rd Respondent, who is a daughter of the 2nd Respondent, to settle his hospital bills, yet in his evidence, he stated that he was sick in 1974-1975 but the transfer of the land which became Mavoko Town Block 3/1941 and 1940 to the 3rd and 4th Respondents respectively was done in 2005.

170. The only conclusion that I can arrive at as to why the 1st Respondent was registering the parcels of land arising from the Lukenya Ranching and Farming Co-operative Society's share in the names of the 2nd, 3rd & 4th Respondents in the year 2005 was to disentitle the Applicant of her share in the Lukenya land after she filed the divorce case, in blatant breach of the rights of the Applicant.

171. The 1st Respondent unfairly denied the Applicant a portion of the land from the Lukenya Ranching and Farmers Co-operative Society's share and instead gave the 2nd Respondent the largest parcel, namely, Mavoko Town Block 3/3538 measuring approximately 58 acres, and a further 10 acres to each of the 3rd and 4th Respondents who are daughter and son-in-law respectively, of the 2nd Respondent.

172. Indeed, the 3rd and 4th Respondents did not testify in this matter to explain the circumstances under which they obtained the titles herein. To the extent that the purported sales of the suit property were meant to defeat the Applicant's claim, and were transferred without the knowledge of the Applicant to the members of the 1st and 2nd Respondent's family during the pendency of the divorce case, the said transfers are fraudulent in nature and were effected by misrepresentation of material facts.

173. Having evaluated the law and evidence, it is my finding that the ancestral parcels of land herein were gifted jointly to the Applicant and the 1st and 2nd Respondents by the 1st Respondent's mother**,** nowregistered as Iveti/Mung'ala /155, 7, 150 & 1142 in the joint names of the 1st Respondent and his deceased brother, WN, in equal shares, and the Applicant, together with the 1st and 2nd Respondents have developed the share registered in favour of the 1st Respondent substantially.

174. Further, the parcels of land arising from the Lukenya Ranching and Farming Cooperative Society Limited's share, namely, Mavoko Town Block 3/1941, Mavoko Town Block 3/1942, Mavoko Town Block 3/1940, Mavoko Town Block 3/3538 and Mavoko Town Block 3/485 are matrimonial properties for purposes of the claim herein, and the purported gifting and sale of Mavoko Town Block 3/3538, Mavoko Town Block 3/1942 and Mavoko Town Block 3/1941 to the 2nd, 3rd, and 4th Respondents respectively was fraudulent.

175. Considering that Section 17 of the 1882 Married Women's Property Act *(repealed)* and Section 17 of the Matrimonial Property Act, 2013 allow a spouse to apply to the Court for a declaration of rights in respect of any property which is contested between the two, without declaring in whose favour the said properties should be registered until the two spouses divorce or dissolve their marriage, I shall not make any order regarding the division of the said property.

176. For those reasons, the Amended Originating Summons dated 21st May, 2010 is allowed as follows:

a) It is hereby declared that Title Number Mavoko Town Block 3/1942 in the 1st Respondent's name; Title Number Mavoko Town Block 3/3538 in the name of the 2nd Respondent; Title Number Mavoko Town Block 3/1941 in the name of the 3rd Respondent; Title Number Mavoko Town Block 3/1940 in the name of the 4th Respondent; Plot No. 83 in Lukenya Ranching & Farming Co-operative Society Ltd in the 1st Respondent's name, and; Title Number Mavoko Town Block 3/485 registered in the 1st Respondent's name, are matrimonial property as between the Applicant and the 1st Respondent.

b) Title Number Mavoko Town Block 3/3538 in the name of the 2nd Respondent; Title Number Mavoko Town Block 3/1941 in the name of the 3rd Respondent and Title Number Mavoko Town Block 3/1940 in the name of the 4th Respondent are hereby cancelled by this court.

c) It is hereby declared that the properties given as a gift/inheritance by the 1st Respondent's mother to the 1st Respondent the same being half share of each of Title Numbers Iveti/Mung'ala/155, 7, 150 and 1142 and which parcels of land are registered in the joint names of the 1st Respondent and his deceased brother, WNN, in equal shares, are matrimonial property as between the Applicant and the 1st Respondent.

d) The division of the above properties between the Applicant and the 1st Respondent to be determined by the court upon divorce, or when their marriage is otherwise dissolved.

e) Each party to bear his/her own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 7TH DAY OF DECEMBER, 2020

O.A. ANGOTE

JUDGE