

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT THIKA**  
**CIVIL APPEAL CAUSE NO. E243 OF 2023**

**(FORMERLY KIAMBU CIVIL APPEAL NO. 79 OF 2023)**

**MAGDALENE**  
.....**APPELLANT**

**WANJIRU**

**KANG'ARA.....**

**VERSUS**

**JOHN**  
**RESPONDENT**

**KARIUKI**

**KURIA.....1<sup>ST</sup>**

**ALICE**  
**RESPONDENT**

**WAIRIMU**

**WANJIRU.....2<sup>ND</sup>**

*(Being an appeal from the judgment of O. Wanyaga, Esq SRM dated 22<sup>nd</sup> February 2023 in Thika Civil Suit 312 of 2018 as consolidated with Divorce Cause No. 41 of 2020 and Kiambu Matrimonial Cause No. 8 of 2019)*

**JUDGEMENT**

1. The instant appeal was lodged vide a Memorandum of appeal dated 17<sup>th</sup> March 2023 on grounds that:
  - i. The learned magistrate erred in law and in fact in fixing the appellant's contribution at 35 % in light of overwhelming and tangible contribution at times exceeding 50 %***
  - ii. The learned trial magistrate erred in failing to pronounce whether 35 % applied to all listed assets.***
  - iii. The learned magistrate erred in ordering joint registration of the land parcel plot No. Gatuanyaga Dairy Farm plot no. 250 when it is clear that the 1<sup>st</sup> Respondent has established another home with the 2<sup>nd</sup> Respondent***
  - iv. The learned magistrate erred in law in making orders that Loc 16/ Gatura/ 1582 be registered in the name of the 1<sup>st</sup> Respondent where there***

**was evidence of Appellant's contribution and development of the property which had earlier on served as the parties home.**

- v. The learned magistrate erred in making orders that the 1<sup>st</sup> Respondent be registered as the owner of Makadara Ndalani phase 1/721 plot 7 and Machakos/ Ndalani phase 1/723 plot No. 8 and Thika Municipality Block 17/66 without regard to the Appellant's contribution to the assets.**
- vi. The learned magistrate erred in awarding motor vehicle registration number KBN 145P to the 1<sup>st</sup> Respondent when it was clear that it was matrimonial property.**
- vii. The learned magistrate erred in awarding Gatuanyaga Dairy farm plot No. 269 to the two Respondents when it was clear the 2<sup>nd</sup> Respondent's name was fraudulently inserted in the register and there was no evidence of her contribution.**
- viii. The learned magistrate erred in law and fact in distributing assets without considering their economic value.**
- ix. The learned magistrate erred in law as dictates to the matrimonial property disposed by one party without involvement of the other party.**
- x. The learned magistrate erred in alluding and considering the Magan plot which the Appellant bought in 2018 when parties were separated.**
- xi. The distribution by the learned trial court lacks any evidential basis**

2. Therefore, the Appellant prayed that the judgment of the trial court be set aside and substituted with a declaration that the properties are jointly owned by the parties on a ratio of 50:50 and that the assets be valued to ascertain

the properties that each party will take in the following manner:

- a. Gatuanyaga dairy farm plot no. 250**
- b. Machakos/ Ndalani/ phase 1/721 plot No. 7**
- c. Machakos/ Ndalani/ phase 1/723 plot No. 8**
- d. Hemwa plots No. 9 & 10**
- e. Loc 16/ Gatura /1582**
- f. Plot No. Thika Municipality 17/66**
- g. Plot no. Kiambu/ Gatuanyaga/2366**
- h. Gatuanyaga Dairy Farm Plot No. 269**
- i. Mitubiri Nanga Block 1c/15**
- j. Eight (8) plots bought from Embu Kuppet**
- k. Motor vehicle registration KBN 145P**

3. At the Appellant testified as PW1 that she is a teacher by profession and has been in employment since 1997. She got married to the 1996 and the two lived as man and wife until June 2017 when their marriage ended. She denied knowing the 2<sup>nd</sup> Respondent. She expressed shock at the 1<sup>st</sup> Respondent's claim that they were not married when in fact they had four children having met at the university and graduated in October 1996 when she was already expectant. She produced medical insurance card where the 1<sup>st</sup> Respondent had put her as beneficiary under the category of spouse. Regarding the properties in issue, she testified that she took the loans used to purchase plots 250 and 269. However, both plots were registered in the 1<sup>st</sup> Respondent's name. She maintained that she left the 1<sup>st</sup> Respondent on allegations of violence towards her.

4. She highlighted that the following properties were acquired during the period of their long cohabitation between 1996 and June 2017:

- i. Thika Municipality Block 17/66
- ii. Machakos/ Ndalani Phase 1/721
- iii. Loc 16/Gatura/ 1582

- iv. Greystone Holding Co. Ltd Mitubiri Nanga BLOCK 1C/15
  - v. Two plots bought from Hemwa Land buying Companies
  - vi. Eight (8) plots bought from Embu Kuppet
  - vii. Motor vehicle registration KBN145P
5. The Appellant further testified that they celebrated a customary marriage in 1997 and had an affidavit of marriage to that effect. It was her testimony that she contributed to the acquisition of all the plots that were acquired prior to the breakdown of their Marriage in June 2017. She also claimed an interest in motor vehicle registration number KBH 145P.
6. John Kariuki Kuria testified as DW1 that the Appellant was his friend between 1997 to 2011 while the 2<sup>nd</sup> Respondent is his wife whom she married in July 2011. He stated that he acquired 1.5 acres of land in Gatura and Plot 250 by himself. He maintained that he bought the Hemwa plots by himself, without any contribution by the Appellant. He confirmed that all the assets were bought before 2017.
7. The 2<sup>nd</sup> Respondent testified by adopting her witness statement and bundle of documents. She stated that she contributed Kshs. 50,000.00 towards the purchase of Plot 26, nevertheless she clarified that she had not included any evidence of source of income or work or any receipt to demonstrate that she had sent money to the 1<sup>st</sup> Respondent towards such purchase. Although she met the 1<sup>st</sup> Respondent in 2011, it was her testimony that she had never met the 1<sup>st</sup> Respondent's children until December 2017. She clarified that her names were included in the assets in 2018.
8. At the end of the trial, the court determined that the Appellant and the 1<sup>st</sup> Respondent carried themselves as

married during the duration of their cohabitation, therefore they were presumed married and the said marriage was dissolved.

9. On the distribution of property, the court determined that:
  - a. Plot No Thika Municipality Block 21/250 be registered in the joint names of the Appellant and the 1<sup>st</sup> Respondent; Machakos/ Ndalani Phase 1/721 Plot no. 8 be registered in the name of the 1<sup>st</sup> Respondent.
  - b. Machakos Ndalani phase 1/721 plot 9 and Machakos Ndalani Phase I plot no. 10 be registered in name of the Appellant
  - c. Land parcel Loc 16/ Gatura/ 1582 be registered to the 1<sup>st</sup> Respondent
  - d. Plot No. Thika Municipality Block 17/66 to remain registered to the 1<sup>st</sup> Respondent
  - e. Plot no. Kimabu/ Gatuanyaga/ 2366, proprietorship details to remain as it is
  - f. Gatuanyaga dairy farm phase 1 part 1 plot no. 269, proprietorship details to remain as is.
  - g. Motor vehicle KBN 145P to remain in the 1<sup>st</sup> Respondent's name.
10. Aggrieved and dissatisfied with the decision of the trial court, the Appellant lodged the instant appeal.
11. The court ordered that the appeal be disposed through written submissions.
12. The Appellant submitted that despite the trial court finding that the appellant's contribution to the matrimonial property was at 35%, the trial court failed to determine the assets to which the 35 % contribution was applicable to. Nevertheless, the appellant invited this honourable court to disturb the finding of the court and substitute it with a finding of 50 % based on the long cohabitation

period of 27 years and the fact that all the assets were acquired during the said period.

13. The Appellant further submitted that the property Gatuanyaga dairy farm Plot No. 250 had been improperly described a Thika Municipality Block 21/250. Thus, the appellant sought to have the error corrected.

14. It was finally submitted that the court makes a finding that the properties are matrimonial property and that they be sold and distributed at 50:50.

15. The Respondents submitted that the Appellant had failed to sufficiently prove that all the listed properties were matrimonial property and that she was entitled to an award of 50:50. Also, there was no any legal dispute between the Appellant and the 1<sup>st</sup> Respondent regarding the ownership of the suit properties. Therefore, the appellant could not therefore turn around and claim properties that she knew had been registered in the 1<sup>st</sup> Respondent's name. In any case, the properties that had been registered in her name she managed to sell without regard to the 1<sup>st</sup> Respondent while the case was still ongoing.

16. Ultimately, it was submitted that no party had been denied what each deserved. There was no need to fault or temper the finding of the trial court as it was well reasoned.

17. **Section 78(2) of the Civil Procedure Act**, grants the appellate court the same powers and nearly the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted herein.

18. Being a first appeal, the court relies on a number of Principles as set out in **Selle and another vs.**

**Associated Motor Boat Company Ltd & others  
(1968) 1 EA 123:**

***“this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence.”***

19. I have considered the pleadings; submissions and the judgment appealed from and the issues that commend themselves for determination are:

- i. Whether the Appellant and the 1<sup>st</sup> Respondent were in a marriage relationship
- ii. Whether the assets listed comprise matrimonial property;
- iii. How should the properties be distributed

20. Whereas the Appellant alleges that there existed a customary marriage between the 1<sup>st</sup> Respondent and herself. The 1<sup>st</sup> Respondent insisted that the two were merely friends and that it is the 2<sup>nd</sup> Respondent who is his wife. It is common ground between the Appellant and the 1<sup>st</sup> Respondent that they started cohabiting in 1997. However, the Appellant alleges that she left the 1<sup>st</sup> Respondent in June 2017. The 1<sup>st</sup> Respondent on the other hand maintains that the relationship ended in 2011 when he met the 2<sup>nd</sup> Respondent.

21. Evidently, though the existence of the marriage has been contested, it is admitted that they cohabited for the period

between 1997 and 2011, a period of about fourteen years (14 years). They bore four children together.

22. The course of action herein arose in 2017 and the instant file was lodged in 2018. Therefore, the applicable law and the Marriage Act, CAP 150.

23. A declaration of whether any property is a matrimonial property is informed by the answer to the question whether those contending for its ownership were or are married in the first place.

24. The link between marriage and matrimonial property is certainly **section 6(1)(a) as read with section 2 of the Matrimonial Property Act, CAP 152. According to section 6(1)(a) 'matrimonial property' means, inter alia, matrimonial home or homes; a 'matrimonial home' is itself defined in section 2 of this Act to mean 'any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.'** In the same section, a spouse is defined to mean 'a husband or a wife'.

25. Thus, one cannot talk about a matrimonial property without reference to a marriage. Logically, therefore, if the court was to find that the Appellant was married to the 1st Respondent irrespective of whether the marriage was solemnised under the Kikuyu customs or was a marriage by presumption, then the next question for determination would be whether the suit properties should be declared matrimonial properties. Conversely, this latter question would be moot if the court was to find that there was no marriage of any sort between the disputants.

26. The appellant's approach to the first question of her alleged marriage to the 1st Respondent is two-pronged.

On the one hand, she posits that her marriage was solemnised under Kikuyu customs. On the other hand, she puts forth the argument that having cohabited with the defendant for a long time (about 27 years), a presumption of marriage between her and the 1st Respondent ought to be inferred.

27. Regarding the Kikuyu customary law marriage. No evidence was led in proof of this. But even assuming that the necessary customary rites were performed to the extent that the appellant would consider herself as having been married under these customs, the applicant is caught out by **section 96(2) and (3) of the Marriage Act, CAP 150** which require that customary marriages contracted before the commencement of the Act to be registered within three years of the date of commencement of the Act. That section reads as follows:

***“96(1)...***

***(2) Parties to a marriage contracted under customary law, the Hindu Marriage and Divorce Act (Cap. 157) (now repealed) or the Islamic Marriage and Divorce Registration Act (now repealed) before commencement of this Act, which is not registered shall apply to the Registrar or County Registrar to assistant Registrar for the registration of that marriage under this Act within three years of the coming to force of this Act.***

***(3) The parties to a customary marriage shall register such a marriage within three years of the coming to force of this Act.”***

28. In the absence of proof of a customary marriage through any of the means prescribed in this section, the plaintiff's claim that she was married to the defendant under Kikuyu customary law is wanting both in fact and in law.

29. As far as presumption of marriage is concerned. Section 119 of the Evidence Act provides that:

***“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”***

30. Presumption of marriage is a well-settled common law principle that long cohabitation of a man and woman with a general reputation as husband and wife raises a presumption that the parties have contracted marriage. However, a presumption of marriage is a rebuttable presumption and can disappear in the face of proof that no marriage existed.

31. According to **Halsbury’s Laws of England, Matrimonial and Civil Partnership Law (Volume 72) 5<sup>th</sup> Edition 2015:**

***“Where a man and a woman have cohabited for such a length of time, in such circumstances, as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed even if there is no prior evidence of any marriage ceremony having taken place, particularly where the relevant facts have occurred outside the jurisdiction and this presumption can be rebutted only by strong and weighty evidence to the contrary.”***

32. **Section 2 of the Marriage Act** defines the word cohabit, in its technical term, as follows: "cohabit" means to live in an arrangement in which an unmarried couple

lives together in a long-term relationship that resembles a marriage.”

33. Three things that stand out of this definition are, one, regardless of what the intentions of a cohabiting couple may be, they do not acquire any other status than that of being unmarried and, two, perhaps to drive the point home, the relationship of the cohabiting couple only ‘resembles’ a marriage. In other words, it is not a marriage. The third aspect of this definition is, regardless of how long the couple lives together, the status of its legal relationship will not change.
34. When this section is read alongside **sections 6 and 59 of the Marriage Act**, it is reasonable to conclude that presumption of marriage by cohabitation no longer stands on a solid foundation in our marriage law infrastructure.
35. **Section 59 of the Act** also provides the manner in which a marriage may be proved:
- A marriage may be proven in Kenya by—***
- (a) a certificate of marriage issued under this Act or any other written law;***
  - (b) a certified copy of a certificate of marriage issued under this Act or any other written law;***
  - (c) an entry in a register of marriages maintained under this Act or any other written law;***
  - (d) a certified copy of an entry in a register of marriages, maintained under this Act or any other written law; or***
  - (e) an entry in a register of marriages maintained by the proper authority of the Khoja Shia, Ith'nasheri, Shia imam, Ismaili or Bohra' communities, or a certified copy of such an entry.***

36. No provision has been made for proof marriage by cohabitation. It has been noted that as much as much as it is a presumption, certain facts must be demonstrated to exist before such a presumption of marriage by cohabitation can be inferred. The Kenya **Marriage Act** neither makes reference to the presumption nor the facts which ought to be proved for the marriage to be presumed to exist.

37. The Supreme Court in **MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) [2023] KESC 2 (KLR)** remarked that the presumption of marriage was first applied in Kenya in **Hortensia Wanjiku Yawe v The Public Trustee Nairobi [1976] eKLR**. The principles distilled from this former Court of Appeal (Wambuzi P, Mustafa VP and Musoke JA) for East Africa decision were outlined in **Mary Njoki v John Kinyanjui Muthuru & 3 others, (Mary Njoki) [1985] eKLR** by Kneller JA as follows:

***Cohabitation and repute do not always constitute a marriage. They can be part of a mode of proving one in that they are substituted for some missing element or elements. One of the earliest put it this way. Cohabitation, with habit and repute, in the absence of countervailing proof to the contrary, establish a marriage on the ground that the cohabitation as husband and wife is proof that the parties have consented to contract that relationship.***

38. Before presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. Since the presumption is in

the nature of an assumption it is not imperative that certain customary rites be performed.

39. In **Mary Wanjiku Githatu v Esther Wanjiru Kiarie** [2010] eKLR Bosire JA held as follows:

***“The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by long cohabitation or other circumstances evinced an intention of living together as husband and wife.”***

40. Bearing in mind the above case law, did the instant relationship possess the constitutive elements of presumption of marriage, that is, long cohabitation and repute of marriage absent cogent evidence to the contrary? In other words, is it safe in the circumstances of this case to presume a marriage?

41. The appellant argued that she was married to the 1st Respondent and had an affidavit of customary marriage as evidence of the said marriage. It was her contention that the 1<sup>st</sup> Respondent had even included her in his NHIF in the category of spouse. The 1<sup>st</sup> Respondent on the other hand contended that the appellant was merely his friend and there was no marriage relationship between them. The trial court upon considering this issue determined that there was presumption of marriage based on the long cohabitation. I recognize that the trial court did not

advance any reasons for rejecting the 1st Respondent's contention that there was no marriage between the appellant and the 1<sup>st</sup> Respondent.

42. It is a cardinal principle of the civil process that he who alleges must prove. It is the appellant who came to court claiming that the 1<sup>st</sup> Respondent was her husband. It was therefore incumbent upon her to prove that assertion. When the 1st Respondent countered the claim by asserting that the appellant was merely his friend and that it is the 2nd Respondent who was his wife, from the appellant ought to have sought to disprove that, especially given that the Appellant had disposed certain properties that had allegedly been acquired during the cohabitation period without reference or consent of the 1<sup>st</sup> Respondent.

43. Notwithstanding the long cohabitation between the appellant and the 1<sup>st</sup> Respondent, no evidence was led to demonstrate the existence of general repute as husband and wife. Therefore, the main question is whether the long cohabitation is sufficient to warrant a presumption of marriage.

44. The Supreme Court in *the MNK Case (supra)* observed that the following principles must exist for a presumption of marriage to be made:

- i. The parties must have lived together for a long period of time.**
- ii. The parties must have the legal right or capacity to marry.**
- iii. The parties must have intended to marry.**
- iv. There must be consent by both parties.**
- v. The parties must have held themselves out to the outside world as being a married couple.**
- vi. The onus of proving the presumption is on the party who alleges it.**

- vii. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.**
- viii. The standard of proof is on a balance of probabilities.**

45. The court further remarked that:

***The above notwithstanding, we are of the view, that the doctrine of presumption of marriage is on its deathbed of which reasoning is reinforced by the changes to the matrimonial laws in Kenya. As such, this presumption should only be used sparingly where there is cogent evidence to buttress it.***

46. Applying the above principles to the instant case, it is evident that both the appellant and the 1st Respondent had admittedly cohabited for a long period of about fourteen (14) years. Also, they both had the capacity to marry as they were both adults and not encumbered by any other prior marriage. On the requirement that the parties must have held themselves out to the outside world as being a married couple. I find that there was no evidence led to prove this point other than the fact that the 1st Respondent had included the appellant in his NHIF as a spouse. On the issue of consent of the parties, the 1st Respondent having denied the marriage, it cannot be said that there was consent to the marriage to warrant a presumption of marriage by the parties. The appellant having alleged the existence of a marriage ought to have led evidence to prove the existence of the marriage, including by presumption.

47. Long cohabitation in and of itself is not sufficient to warrant a presumption of marriage since the Marriage Act is clear that to cohabit merely resembles a marriage but is not in and of itself a marriage.

48. In **Mary Njoki vs. John Kinyanjui Muthuru (1985) eKLR**, the court in addressing the aspect of general repute stated thus:

***"Acts of general repute, are synonymous with the impression, or assessment of the couple as perceived by the general public, including relatives and friends. By their very nature they are a determinant of whether a presumption of marriage can be found to exist."***

49. The appellant did not call any relative or friend to lend evidence to the fact that the parties carried themselves out to the world as being married. I am not satisfied that the mere fact that the parties had cohabited for long and had four children was sufficient to warrant the presumption of marriage by long cohabitation and general repute.

50. Considering the totality of the evidence I am not satisfied that the appellant has provided evidence on a balance of probabilities that she cohabited with the defendant and if she did the cohabitation was of such prolonged period in circumstances that would have led an objective observer to the conclusion that she was married to the 1st Respondent.

51. Although the Appellant testified that they had lived together from 1997 to 2017, the 1st Respondent insisted that they had been friends till 2011 before he met and married the 2nd Respondent. Any prevarication on when cohabitation took place would justify the conclusion that either there was no cohabitation or that it was not of such a period that is necessary to presume the parties as a married couple. It must always be remembered that marriage is a voluntary union. As such, courts should shy away from imposing 'marriage' on unwilling persons.

52. In the **MNK case supra**, the Supreme court while appreciating that the concept of presumption of marriage was on its death bed remarked thus:

***...we would be remiss if we did not point out that marriage is an institution that has traditional, religious, economic, social and cultural meaning for many Kenyans. However, it is becoming increasingly common for two consenting adults to live together for long durations where these two adults have neither the desire, wish nor intention to be within the confines of matrimony. This court recognizes that there exists relationships where couples cohabit with no intention whatsoever of contracting a marriage. In such contexts, such couples may choose to have an interdependent relationship outside marriage. While some may find this amoral or incredible, it is a reality of the times we live in today.***

53. The Supreme court further remarked thus:

***In our ever-changing society, current statistics reveal that a man and a woman can choose to cohabit with the express intention that their cohabitation does not constitute a marriage. The pervasiveness of having interdependent relationships outside marriage over the past few decades means that no inferences about marital status can be drawn from living under the same roof. 'Interdependent relationships outside marriage' is not a new concept. (emphasis mine)***

54. I therefore find that the circumstances of the parties herein does not warrant the presumption of marriage. Presumption of marriage is the exception and not the rule.

55. Since the presumption of marriage does not exist in this case, is the appellant entitled to a share of the suit property?

56. Although the appellant urges that at all material times, the two parties contributed to its acquisition and development of the suit properties, on analysis of the evidence before the trial court, the appellant's and respondent's financial contribution in purchasing and developing the property were not ascertained. Nevertheless, the trial court in considering the totality of the issues assessed the appellant's contribution at 35%. Further the trial court directed the distribution of property in the following terms:

- a. Plot No Thika Municipality Block 21/250 be registered in the joint names of the Appellant and the 1<sup>st</sup> Respondent; Machakos/ Ndalani Phase 1/721 Plot no. 8 be registered in the name of the 1<sup>st</sup> Respondent.
- b. Machakos Ndalani phase 1/721 plot 9 and Machakos Ndalani Phase I plot no. 10 be registered in name of the Appellant.
- c. Land parcel Loc 16/ Gatura/ 1582 be registered to the 1<sup>st</sup> Respondent.
- d. Plot No. Thika Municipality Block 17/66 to remain registered to the 1<sup>st</sup> Respondent.
- e. Plot no. Kiambu/ Gatuanyaga/ 2366, proprietorship details to remain as it is.
- f. Gatuanyaga dairy farm phase 1 part 1 plot no. 269, proprietorship details to remain as is.
- g. Motor vehicle KBN 145P to remain in the 1<sup>st</sup> Respondent's name.

57. The appellant alleged the contributions she made towards acquisition of the properties. However, she did not provide any proof of financial transactions towards the purchase of the said properties. The 1<sup>st</sup> Respondent on the other hand, while admitting that the properties were

acquired between 1997 and 2017 alleged that he purchased the properties without any help from the Appellant.

58. Upon evaluating the totality of the evidence, I am persuaded that the two parties contributed to the acquisition of the suit properties which led to their proprietary rights. These proprietary rights arose out of a constructive trust. **The Black's Law Dictionary 9th Edition at pg 1649** defines a constructive trust as:

***“The right, enforceable solely in equity, to the beneficial enjoyment of property which another person holds the legal title.”***

59. The Supreme Court of Kenya in the **MNK case (supra)** cited with approval the decision of the Court of Appeal of England and South Wales in *Eves v Eves* [1975] 1 WLR 1338 where Lord Justice Browne quoted with approval the decision in *Cooke v Heard* [1972] WLR 518 where it was held;

***“... whenever two parties by their joint efforts acquire property to be used for their joint benefit, the courts may impose or impute a constructive or resulting trust. The legal owner is bound to hold the property in trust for them both. This trust does not need any writing. It can be enforced by an order for sale, but in a proper case the sale can be postponed indefinitely. It applies to husband and wife, to engaged couples, and to man and mistress, and maybe to other relationships too.”***

60. The Supreme Court further cited with approval Bromley's Family Law 10th Edition, on methods of addressing disputes between cohabitants where it is stated that:

***“... disputes between cohabitants or former cohabitants over ownership, occupation, or use of the property must be resolved, generally speaking by applying ordinary legal rules applicable to strangers. This is due to the fact that legislation that enables courts to allocate or reallocate beneficial interests in the assets following a divorce does not apply to cohabiting couples.”***

61. While appreciating that Kenya has no legal framework for protecting parties to cohabitation whenever a dispute arises over a property acquired in the course of such cohabitation. The Supreme Court underscored that lack of a framework to address the issue might result in an injustice which may bar a party from accessing his property or reward a party who contributed less to the acquisition of the said property.
62. Constructive trusts are premised on Section 38 of the Land Act. Therefore, applying the principles set out in the MNK case on constructive trust. The common intention of the parties at the time of purchase of the suit property gave rise to a constructive trust between the appellant and the respondent.
63. From the evidence on record, the appellant and the 1st Respondent had been cohabiting since 1997, and the suit properties were purchased during the subsistence of the said cohabitation. The appellant admitted that she disposed some properties that were acquired during the cohabitation that were hers. This shows that there was some certainty in the minds of the parties as regards properties that were to be jointly owned versus those that belonged to each of them. It is on this basis that the appellant contends that awarding the 1st Respondent

properties that the appellant contributed to their acquisition amounts to unjust enrichment.

64. I find that common intention of the parties to hold the suit properties could be inferred based on their conduct during the subsistence of their relationship. The appellant took the loans that were used to purchase the properties which were subsequently registered in the name of the 1st Respondent.

65. Having established that there was a common intention and that both the appellant and the 1st respondent should have a beneficial interest in the property, it follows that we need to proceed and quantify the beneficial interest to the parties.

66. In assessing the beneficial interests due to the parties, we cannot only be primarily focused on the direct financial contribution to the acquisition of the property but also interrogate other forms of contribution such as actions of the parties in maintaining and improving such properties.

67. The record shows that the appellant and the 1st respondent jointly contributed to the acquisition of the suit properties and the two jointly invested in the properties for the duration of their cohabitation. Therefore, I am of the view that the appellant did prove her case on a balance of probabilities that the suit properties were acquired through joint efforts and/or contribution of the parties.

68. I therefore make a finding that the share of the parties is apportioned as 50% for the appellant and 50% for the 1st respondent for the following properties:

- i. Thika Municipality Block 17/66
- ii. Machakos/ Ndalani Phase 1/721
- iii. Loc 16/Gatura/ 1582

- iv. Greystone Holding Co. Ltd Mitubiri Nanga Block 1C/15.
- v. Two plots bought from Hemwa Land buying Companies
- vi. Eight (8) plots bought from Embu Kuppet
- vii. Motor vehicle registration KBN145P

**69. The upshot of the matter is that the appeal is disposed in the following terms**

- a. The instant appeal partially succeeds.**
- b. A presumption of marriage between the appellant and the 1st respondent does not exist.**
- c. Both parties having a beneficial interest in the suit properties, the share is 50% for the appellant and 50% for the 1st respondent as in paragraph 68 above**
- d. Each party to bear their own costs.**

**DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 6<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**HON. T. W. Ouya  
JUDGE**