



REPUBLIC OF KENYA



**Malel v Malel (Family Originating Summons E003 of 2024)
[2026] KEHC 1119 (KLR) (5 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1119 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
FAMILY ORIGINATING SUMMONS E003 OF 2024
RN NYAKUNDI, J
FEBRUARY 5, 2026**

BETWEEN

VILLINE JEMELI MALEL APPLICANT

AND

KENNETH KIBICHI MALEL RESPONDENT

RULING

1. By way of Summons dated 24th April 2024, the Applicant seeks the following orders;
 - a. A declaration be and is hereby issued declaring that the Applicant is entitled to half share (or such other share as the court may award of the properties (movable and Immovable) acquired by the Applicant and the Respondent during the subsistence of their marriage and that the Respondent holds title, Interest, ownership and possession of the said properties in trust for himself and the Applicant in their respective shares as the legal owners and cestui que trust respectively namely;
 1. LR.NO. 12448/37 Measuring 0.04850 (Provisional Plot No, A)
 2. Pioneer/langas/block 1 (malel) 394
 3. Pioneer/langas/block I (malel) 385
 4. Pioneer/langas/block L (malel} 389
 5. Pioneer/langas/block 1 (malel) 412
 6. Pioneer/langas/block 1 (malel) 40i
 7. Pioneer/langas/block 1 (malel) 392
 8. Pioneer/langas/block L (malel) 391



9. Pioneer/langas/block I (malel) 390
10. Pioneer/langas/ Block 1 (malel) 408
11. Pioneer/langas/ Block 1 (malel)404
12. Pioneer/langas/ Block 1 (malel) 384
13. Pioneer/langas/ Block 1 (malel) 400
14. Pioneer/langas/ Block 1 (malel) 393
15. Pioneer/langas/ Block 1 (malel) 407
16. Pioneer/langas/ Block 1 (malel)383
17. Pioneer/langas/ Block 1 (malel)387
18. Pioneer/langas/ Block 1 (malel)405
19. Pioneer/langas/ Block 1 (malel)410
20. Pioneer/langas/ Block 1 (malel)397
21. Pioneer/langas/ Block 1 (malel)402
22. Pioneer/langas/ Block 1 (malel)388
23. Pioneer/langas/ Block 1 (malel)411
24. Pioneer/langas/ Block 1 (malel)398
25. Pioneer/langas/ Block 1 (malel)413
26. Pioneer/langas/ Block 1 (malel)386
27. Pioneer/langas/ Block 1 (malel)406
28. Pioneer/langas/ Block 1 (malel)409
29. Pioneer/langas/ Block 1 (malel)399
30. Pioneer/langas/ Block 1 (malel)403
31. Pioneer/langas/ Block 1 (malel)396
32. Pioneer/langas/ Block 1 (malel)395
33. Eldoret Municipality Blovk 13/337

- b. An order be and is hereby issued directing that the above mentioned properties be shared between the Applicant and the Respondent equally and/or in any other ratio as the court may deem just.
- c. The Respondent be and is hereby directed to disclose all properties acquired by both parties during the subsistence of the marriage.
- d. Upon grant of the foregoing prayers, permanent injunction be and is hereby issued restraining the Respondent by himself, his servants agents and/or employees from interfering with the Applicant's lawful enjoyment and quiet possession of the properties apportioned to her.



- e. Pending the hearing and determination of this application, the respondent by himself, agents, servants and or employee, be restrained from selling, transferring and / or in any way disposing off the above mentioned properties.
 - f. Such other orders the court may deem fit, fair and just to grant in the circumstances.
 - g. Costs be awarded to the Plaintiff.
2. The Application is premised on the grounds on the face of it and the averments of the applicant in the affidavit sworn by Villine Jemeli Malel.
 3. The applicant deponed that she married the deceased in 12th September 2008 and during the subsistence of their marriage they bought a residential flat from Joseph Munyiri Gachanga for Kshs. 25,000,000 on 21st May 2012. That they built their matrimonial home on Pioneer/Langas Block 1 Malel 141 and they also resided in their residential house in Elgon view estate in Eldoret Municipality Clock 13/337. She urged that she made substantial direct and indirect financial contribution to the acquisition of the properties listed in the prayers. That vide a decree absolute issued on 7th June 2024, the marriage was dissolved, annexing the decree nisi as VJM2 (a) and (b). In view of her contribution, she urged that the respondent holds in trust for her. She urged that it is in the interest of justice that she be apportioned her equal share of the estate. In addition the Applicant Villine Jemeli Malel gave evidence on oath relying heavily on the supporting affidavit dated 24.4.2024. Before this court the Applicant reiterated that their marriage with the Respondent was blessed with 5 issues namely: Darius Kiprotich Bich, Jaylene Jepleting Bichii, Naomi Jertono Malel, Austine Kigen Malel and Mariella Jelagat Malel. According to the Applicant in her evidence, it was during the subsistence of the marriage when they jointly put resources and both a residential flat referenced as LR NO 12448/37 which formed part of a major asset of the union. In addition the Applicant further told the court that they did not stop their on acquisition of the properties as they proceeded to acquire many more as stated in the originating summons upon which she has placed reliance for an order and declaration that part of it be set aside for her own benefit.
 4. It was at the close of the Applicants testimony that learned counsel Mr. Yego canvassed the issues by way of written submissions and invited the court to be persuaded and guided by the following caselaw: PNN v ZWN(2017) eKLR, Echaria v Echaria (2007) eKLR, M v M (2006) eKLR, JOO v MBO (2023) eKLR It was learned counsel's contention that the Applicant has discharged the burden of proof on a balance of probabilities for the benefit of the estate to be passed to her under the provisions of the [matrimonial property Act](#).
 5. It was the case for the Respondent Mr Kenneth Marel that indeed he was married to the Applicant in the year 2008 but shortly after the celebration of the marriage acts of cruelty began to set in rendering the subsistence of the marriage untenable. It was further the evidence of the Respondent that the Applicant was also guilty of non-disclosure of material facts that prior to solemnisation of the marriage she had sired two other children from a previous relationship which indeed affected him due to lack of trust. The Respondent further told this court on oath that during the subsistence of the marriage the Applicant treated her with cruelty including denial of conjugal rights, a fundamental right experienced in the marital union. Therefore, on her own accord she deserted the matrimonial home in 2009 without any excuse or justification and started staying in a rental house. The Respondent acknowledged in his testimony that their marriage unfortunately was never blessed with any child which further aggravated the situation therefore forcing the Applicant to lead a separate life. It is also the testimony of the Respondent during the trial of this case that their marriage broke down irretrievably necessitating filing of divorce which was later granted by the court. He also denied that during the subsistence of the marriage the Applicant contributed any money towards the acquisition of the properties mentioned in



the originating summons. It was further the Respondents case all the properties I have ever owned are ancestral having inherited from my parents, the late Joel Kiptenai Malel and the late Priscilla chepkering Malel. The in fact, I lived at my parent's Malel home with the Applicant during the short stint of our marriage and we never established a matrimonial home of our own. The Respondent further alleged that during the subsistence of the marriage the Applicant took advantage of the relationship in which she siphoned some of the properties so that she could sell them to 3rd parties. This affected him emotionally, physically, culminating into ill health. In totality the Respondent told the court that there is nothing capable of being shared with the Applicant as matrimonial property or asset. He therefore prayed for originating summons to be dismissed with costs.

Respondent's submissions

6. The respondent counsel Mr. Kenei filed submissions in opposition to the originating summons. He reiterated that land parcel number LR NO. 12448/37 doesn't belong to the Respondent. That it is not in dispute that the Respondent entered into a Sale Agreement dated 21st May, 2012 with Joseph Muniyiri Gachanga with respect to this parcel of land. However, the parties did not complete the Sale transaction. The barter trading of the properties was never executed hence each party remained with his properties. The Respondent did not make payment of the top up of Kes. 1,000,000. The ownership of the subject property did not move to the Respondent. This is evident from the Certificate of Official Search produced by the Respondent before this Honourable Court. The previous owner Joseph Muniyiri Gachanga resold the property to Emmanuel Kibiwott and Michael Cheruiyot Chesum and effected a transfer in their favour. It is clear beyond peradventure that the property with which the Applicant Is pursuing belongs to Third Parties and not the Respondent lire property does not belong to the Respondent hence cannot be linked to the marriage for purpose of a matrimonial home.
7. Counsel cited the decision of the court of appeal on TKM vs SMW (2020) eKLR and urged that the applicant herein failed to adduce evidence to prove that parcel number LR NO. 12448/37 belongs to the Respondent. Further, that the applicant merely presented a long list of properties without any evidence of ownership thereby expecting this Court to make a presumption that the properties belong to the Respondent. During cross- examination she confirmed that the subject property was never transferred to the Respondent herein. She confirmed that she had no evidence to prove that the Sale Agreement dated 21st May 2012 was ever actualized. She confirmed that the Certificate of Official Search showed that Mr. Muniyiri transferred the land to third parties and not the Respondent. He additionally cited the case of RJ V MKC ALIAS MKI, (Matrimonial Cause H006 of 2024) [2025] eKLR in this regard.
8. Counsel cited section 107 of the *evidence Act* and submitted that the applicant failed to prove her contribution to acquisition of LR No. 12448/37 and additionally cited the decision of the court in ENK vs MNNNN (2021) KECA 219 KLR in this regard. Further, that the respondent didn't acquire any property either solely or jointly with the Applicant during the subsistence of their marriage. All the properties ever owned by the respondent were wholly inherited from his deceased parents including the properties that were to be bartered with LR No. 12448/37. He further stated that any development he ever undertook on his properties was courtesy of the proceeds of sale of portions of his inheritance and hence there was no nexus with the Applicant.
9. Counsel urged that it is important to note that during cross examination of the Applicant, she confirmed that she didn't make any direct contribution to the acquisition of subject property-. She claimed that she assisted the respondent in generating the income used to purchase the property which is an outright lie noting that the sale was based on barter trade of properties hence no money was ever exchanged .It is clear that the Applicant has not demonstrated either direct or indirect contribution to



the acquisition of the subject property other than the fact that the sale and purchased occurred during the pendency of the marriage.

10. Counsel urged the court to dismiss the application.

Analysis & Determination

11. The issue that arises for determination is; Whether the declaration that the applicant is entitled to a half share of the properties listed shall issue.
12. The threshold to be met by the Applicant is on a balance of probabilities that indeed all the parameters on sharing of the matrimonial properties have been satisfied evidentially. I therefore place reliance on the following provisions of the law and well established principles.

13. Sections 107(1), (2) and 109 of the Evidence Act are on the burden of proof. They provide as follows:

107 (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

14. 109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

15. The court in *Ahmed Mohammed Noor v Abdi Aziz Osman* (2019) EKLK where the court held that: “The foregoing analysis therefore settles the issues of burden of proof. For clarity, the legal burden of proof in a case is always static and rests on the claimant throughout the trial, it is only the evidential burden of proof which may shift to the Defendant depending on the nature and effect of evidence adduced by the claimant.

16. Further under the Black’s Law Dictionary (9th Edition, 2009) at page 1535 it defines the standard of proof as: The degree or level of proof demanded in a specific case in order for a party to succeed. The standard of proof in civil cases is proof on the balance of probability. In criminal cases the standard of proof is proof beyond any reasonable doubt.”

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone pte Ltd v Smith & Associates for East Ltd* “ The courts decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him. Since the terms proved disproved and not proved are statutory definition contained in the Evidence Act (Cap 97 1997 Rev Ed) (EA) the term proof wherever it appears in EA and unless the context otherwise suggest, means the burden to satisfy the court of the existence or non-existence of some fact that is the legal burden of proof. See as ss 103 and 105 of the EA.

17. It is also the position taken by Lord Denning in the case of *Miller v Minister of Pensions* (1947) 2 ALL ER 372 at 374,

“If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must



be given the benefit of doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as it required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability. But not so high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it more probably than not the burden is discharged but if the probabilities are equal it is not”.

18. In order for the court to determine whether the applicant is entitled to any properties, it must first be established that the claimed properties were registered in the name of the respondent and further, that they were acquired during the pendency of their marriage.
19. In Kenya the distribution of matrimonial property upon the dissolution of marriage by divorce or death is governed by the *matrimonial property Act* 2013 and interpreted through key decisions of the Superior Courts like the Supreme Court dicta in JOO V MBO (2023) eKLR. What one needs to prove on a balance of probabilities to be entitled to a remedy under the *matrimonial property Act* includes the follows:-
- Existence of a Valid Marriage: A legal customary, or Islamic marriage, or proof of long cohabitation giving rise to a presumption of marriage
 - Identification of Matrimonial Property: Evidence that the property (Land house vehicles) was acquired or improved during the subsistence of the marriage
 - Proof of Contribution (Direct or Indirect)

Direct Monetary Contribution: Bank statements receipts, loan repayments records, or cheques showing financial contribution towards purchase or construction

Non-monetary contribution: Evidence of domestic work, management of the matrimonial home, child care, companionship, management of family business/farm work or supervising construction

Trust Property Exception: If property is registered in the name of one spouse, the other must prove it is held in trust for them, or that they contributed to its improvement.

Registration: in one spouse's name creates a rebuttable presumption of trust for the other.

Equitable Division: The court will weight the peculiar circumstances of each case rather than applying a strict mathematical formula

Non-monetary value: The court now accord high value to homemaking and child rearing as contributions.

Inherited property: Inherited property does not generally form part of matrimonial property unless it was improved during the marriage

20. The above principles have been articulated in the various decisions as exemplified herein below:
- a. JOO v MBO Federation of Woman Lawyers (FIDA Kenya & Another (2023) KESC 4(KLR) Supreme Court. The landmark case that clarified that Article 45(3) of *the constitution* does not entitle spouses to an automatic 50:50 share Distribution must be based on proven contribution.
 - b. Peter Mburu Echaria v Priscilla Njeri Echaria (2007) eKLR Affirmed that a spouse does not acquire a beneficial interest solely by marriage, specific contribution must be proven.
 - c. LWG V GGW (Civil Case E008 of 2021) (2025) KEHC 3188 Highlighted that even with joint registration, a spouse must prove contribution to determine if the 50:50 share is appropriate.



- d. FEO V ACO (2023) KEHC 14889 (Discussed the contentious issue of whether matrimonial property rights survive death, holding that such rights are personal and meant for dissolution of marriage (divorce) though some courts have allowed them in succession.
 - e. JNN v PMN (Civil Appeal 259 of 2019) (2025 KECA 1267: Confirmed that where a spouse gives up their career to take care of the family and properties, they are entitled to a high share (e.g 50%) based on substantial non-monetary
21. In matrimonial property discourse one must draw the foundation from Article 43(3) and Article 2 (5) &(6) of *the constitution* which primarily provides as follows respectively: That parties to a marriage are entitled to equal rights at the time of marriage, during the marriage, and at the dissolution of the marriage. In so far as Article 2(5)&(6) is concerned it is about the general rules of International law and all the International Legal instruments such as the Universal Declaration of Human Rights, African Charter on Human and People's Rights, which points to equality of sharing of matrimonial property upon divorce.
 22. However, the *matrimonial property Act* 2013 which is the main statute governing the distribution of the marital estate proceeds on the presumption that trust property including property held in trust under customary law does not form part of matrimonial property. This therefore begs the question whether or not this statute affords an opportunity to spouses aware of an imminent suit and for that matter one can create one in order to avoid passing any shares to another spouse. This area of law as seen from the cases cited above has been litigated in various courts and all the way to the Supreme Court.
 23. The fight between spouses is on these two doctrines or maxims thus: Equal and equitable theory of distribution. This approach has since been settled in Kenya when the court rendered itself that there is no settled formula of 50:50 ratio on distribution of the marital estate. With that position in mind, the governing principles to be applied in exercising discretion include the financial situation of either spouse, the length of the marriage, the income or property brought into the marriage by each spouse, the prenuptial agreements made by the spouses before celebration of the marriage or during the marriage concerning property distribution acquired or to be acquired by anyone of them or jointly. In essence the scheme of matrimonial property distribution must differentiate between marital and non-marital properties before they engage in the legal battle on distribution of the matrimonial property.
 24. In this dispute, what was required of the Applicant is to demonstrate through her labour, income, non-monetary contribution she caused or enhanced the acquisition of the marital assets during the subsistence of the marriage. In my considered view, the marital assets are those acquired by both spouses and also in the course their value was enhanced and appreciated resulting from their efforts. In the case of *Kamore v Kamore* (2001)EA81. Where the court held that property that is acquired during the course of coverture and is registered in the joint names of both spouses, it is taken that the property is acquired in equal shares. In the same strength of the law in *Nderitu v Nderitu* (1997) eKLR. "It was held that where property is registered under the name of one spouse, the disputing spouse must prove that he/she directly or indirectly contributed towards the acquisition of the assets. Justice Kwach noted that the contesting spouse has to provide evidence that shows the contributions he/she made towards the property's acquisition. It is not enough for the spouse to simply show that he/she was the doting spouse.
 25. It is trite law in our legal system that a spouse must discharge the standard and burden of proof that she or he contributed to the acquisition, appreciation, or enhancement of the marital estate in question and through that the rights of ownership or beneficial interest accrued requiring a declaration to that effect. It should not be lost that the letter, the spirit and the ghost of the *matrimonial property Act* envisaged both monetary and non-monetary contribution from either of the spouse for a declaration



of an interest in the property in question which then culminates in its distribution conditioned upon the ratio of that contribution.

26. In the instant case, this marriage having broken down irretrievably and a divorce having been granted, the matter indeed ripened for purposes of *matrimonial property Act*. The only burden vested with the Applicant is to demonstrate whether during the subsistence of the marriage what was the extent of her contribution in the acquisition and appreciation over the inventory of assets listed in the originating summons.

This is the touchstone of Section 7 of the Act which states 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.

27. The question that lingers in the mind of this court is whether indeed the evidence before this court as adduced by the Applicant is capable of granting any such remedies on the distribution of shares of the assets to her own benefit. In my considered view, the answer is really in the negative based on the evidential material so far presented before this court which falls short of the threshold set under Section 107 (1), 108 & 109 of the *Evidence Act*. I take judicial notice that Section 2 of the *Matrimonial Property Act* provides that contribution includes monetary and non-monetary contributions. With regard to non-monetary contributions, it includes and not limited to domestic work, management of the matrimonial home, child care, companionship, management of family business or property and farmwork.
28. From the analysis of the evidence by the Applicant, this marriage did not last long although she presented evidence that they were blessed with 5 children. However there is a counter rebuttal from the Respondent that during the subsistence of the marriage none of the issues so named were from his lineage or what I describe as consanguinity and affinity of the Malel bloodline. On the face of it, the evidence by the Applicant in a measure of a score can hardly on assessment attain an average mark that a marriage consummated in such a short period can meet the parameters of non monetary contribution to acquire the inventorised assets named in the originating summons.
29. In the first limb of Section 2 of the Act there was a rebuttal from the Respondent that during the subsistence of the marriage the Applicant was never there as a companion or as a home maker, or bore any children and he went as far as being very candid that he was denied conjugal rights during that marriage. This evidence by the Respondent was never deconstructed during the intense cross examination by the legal counsel for the Applicant. What did this mean, it became difficult for this court to give any weight to these factors to influence the framework of contribution in favor of the Applicant. The law contemplates that the yardstick of equality be applied in equal measure between non-monetary and monetary contributions. However, with a rider that monetary contributions in acquisition of property might not sit on the same fulcrum with non-monetary contribution. This statement should not be misconstrued that distribution of the marital estate should be influenced by one spouse’s financial muscle. However, it must be understood that non of the spouses should stay at home doing nothing and when it comes to matrimonialized estate she demands an equal share. It might sound that the other stay at home spouse has been discriminated within the provisions of Article 27 of *the constitution* but in my view, that is not the case. I need to reiterate homemaking, child bearing, companionship etc in a marriage union are legally considered as being of value if in essence it paves way for the other spouse to endeavour in wealth creation or income generation for the family. I am of the strong view that the jurisprudence in Kenya to have equal sharing conceptual framework of the marital estate be departed from is good law more so, where one spouse to a marriage which has since now broken down made a truly exceptional or Stellar contribution to the acquisition of the assets subject



- matter of the *matrimonial property Act*. This is what may have brought about the maxim in one of the celebrated cases of classes of spouses who fall within remote controllers in their matrimonial homes. Notwithstanding that Marriage should not be seen as a business transaction on divorce.
30. It is from these guiding principles various perspectives of the law have been developed to underpin the discretion of the court dependent upon the specific circumstances of the case.
 31. The court is alive to the possibility that the applicant was unable to access the documents of title. However, a certificate of official search would have even been sufficient. Given that there are 33 properties that are the subject of the application, and the applicant has provided not a single title, it follows that this court cannot delve into determining whether they are to be divided between the parties herein. In the event that the court orders that they be divided, the fact that there is no proof of the ownership of the same, such orders may be in vain. The Applicant having failed to provide any evidence on the ownership and registration of the properties, the only action this court can take is to dismiss the application for lack of merit. The court cannot interrogate contribution to acquisition of properties whose ownership is not clear.
 32. As a legal system guided by the provisions of Article 10, 27, and the Bill of Rights in our constitutional architecture, we need to contradistinguish the meaning and context of ownership in the context of commercial life which is absolutely different from the context of marriage. That is why the property acquired in the cause of a marriage by spouses is often referred to as marital, matrimonial, or spousal property. There is so much debate under the *matrimonial property Act* distribution metrics that where a spouse had substantial value to his or her spouse's family property such a spouse does not automatically become a joint owner of the family property. He or she on equitable basis may be entitled to his or her own contribution upon divorce. It is the very basic structure of our law that property acquired before marriage continues to belong to the spouse who acquired and owned it before marriage, but if value is enhanced and the character of property changes in terms of appreciation and value, the spouse who had a substantial value in terms of monetary contribution only acquires a beneficial interest. In law the Principle of substantial contribution in *matrimonial property Act* is rooted in the maxim of equality is equity unless equities of a particular case would render its application unfair.
 33. It must also be appreciated that the marriage union does not limit the individual rights and fundamental freedoms. The two spouses to a marriage have a right to own individual properties and this question of matrimonial property should be debunked on the basis that either of the spouses can acquire his or her own individual property without the assistance of any one of them.
 34. In the traditional African set up where customary law and culture abides, it is the responsibilities of the mother to the home or the wife for that matter with the children of that household to assist in carrying out duties and responsibilities to create wealth either through business or farming for the sustenance of the Social Economic Rights during their lifetime. The proceeds of this joint effort within the basic structure of a family as known in customary law are utilised for the upkeep and maintenance of their basic survival rights. Hence, it's the right of the wife and the children to look up to the husband to make financial provisions for their needs may it be Medicare, education, housing, clothing, or food etc.
 35. As just deserts in this area of law I am inspired by the words of the Chief Justice of Ghana as he then was in the case of Gladys Mensah v Stephen Mensah 2012 SCGLR 1077 in leading that bench of the Supreme Court remarked as follows: "We do not think this court's thinking on the status of property acquired during the existence of any marriage is shrouded in confusion. Indisputably, during the existence of the marriage union, it is most desirable that the couple their resources together to jointly acquire property for the full enjoyment of all members of the nuclear family in particular. But,



the decided cases envisage situations where within the union parties may still acquire property in their individual capacities as indeed is their guaranteed fundamental right as clearly enshrined under article 18 of the 1992 Constitution, in which case they would also have the legal capacity to validly dispose of same by way of sale, for example, as happened in this instant case. No court in such clear cases would invalidate a sale transaction on the sole legal ground that the consent and concurrence of the other spouse was not obtained. We would however subject these views we have expressed to this sound caution. Since, the peace, tranquillity, harmony, stability and indeed the health and general wellbeing of any marriage union thrives best in the environment of mutual affection, trust and respect for each other as well as transparency; we think a spouse in such a case is under a moral obligation at any given time, (indeed it is most expedient and fair) to apprise the other spouse of the intention to acquire and dispose of self-acquired properties at all material times. This is clearly implicit from this court's view expressed in *Quartson v Quartson* (supra), namely that: "The Supreme Court's previous decision in *Mensah v Mensah* ..., is not to be taken as a blanket ruling that affords spouses unwarranted access to property when it is clear on the evidence that they are not so entitled. Its application and effect will continue to be shaped and defined to cater for the specifics of each case".

36. It is therefore left to the courts adjudicating matrimonial property rights to decide what would be appropriate relief in any particular case as pleaded by the parties what remains is to give effect to the purpose of the legislation bearing in mind the breadth of *the constitution*. I am satisfied in the facts of this case that the centuries old maxim on a balance of probabilities has not been discharged by the Applicant to comfortably proceed to grant any of the remedies crafted in the summons.
37. Given this background, what would be the final typology on the facts to this case scrutinized holistically? Evidently, I hold the view that in absence of probative credible evidence on the part of the Applicant, the property so listed for distribution fails the evidential test that it was acquired with her assistance or a joint effort with the Respondent. There is no evidence in this case which can raise a presumption that all the properties itemised in the originating summons were the joint properties of herself and the Respondent. The position taken by the Applicant on acquisition of the marital state remains in the realm of remoteness in so far as the standard and burden of proof on a balance of probabilities absolutely vested with the Applicant.
38. In the premises, the application is dismissed for lack of merit. Each party shall bear its own costs.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 5TH DAY OF FEBRUARY 2026

.....

R. NYAKUNDI

JUDGE

