Kimosop v Sugut & 4 others (Civil Suit 846 of 2012)
[2026] KEHC 2422 (KLR) (2 March 2026) (Judgment)

Neutral citation: [2026] KEHC 2422 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT 846 OF 2012

RN NYAKUNDI, J

MARCH 2, 2026

BETWEEN

JOYCE KIMOSOP ..... PLAINTIFF

AND

ELIUD KIPCHOGE SUGUT ..... 1ST DEFENDANT

BRIMIN KIPRUTO KIPROP ..... 2ND DEFENDANT

FELEX KIPCHOGE LANGAT ..... 3RD DEFENDANT

PETER KIPSIGEI SANG ..... 4TH DEFENDANT

DANIEL KIPNGETICH KOMEN ..... 5TH DEFENDANT

JUDGMENT

1. In order to put this case into perspective, it is important that I give a brief background of the case. The Plaintiff herein initially filed the instant suit against the Defendants at the Environment and Land Court at Eldoret being ELC No. 846 of 2012 (OS) wherein she sought to assert her rights over that parcel of land known as South East of Eldoret Municipality LR No. 8638/26 which claimed to have been acquired and developed by her joint effort with the 5th Defendant during the subsistence of their marriage but registered in the name of the 5th Defendant in trust for himself and her. The Environment and Land Court having appreciated that the Plaintiff and the 5th Defendant herein were still married found that it did not have jurisdiction to deal with matters under the *Matrimonial Property Act*. Consequently, the matter was then transferred to this Court for hearing and determination.

2. Now before this Court is the Plaintiff's Originating Summons dated 12/04/2012 brought under Section 17 of the Married Women Property Act (Repealed). The Plaintiff seeks the following orders:

    1. That the purported transaction and entries made on the register on 2/03/2012 is a nullity on account of fraud deceit and malpractice.

2. That the Plaintiff is an equal partner and the purported transaction done on 8/02/2012 without her knowledge is unconstitutional and unlawful.

3. That the property in question is an agricultural land subject to the requirements of the *Land Control Act* and the purported transaction violated the requirements of the law and therefore void for all intents and purposes.

4. That in the alternative and without prejudice to the above a declaration be issued that the Plaintiff is entitled to equal or half share of the suit property.

5. Costs of the suit.

6. Any other relief that the Honourable Court deems just and fit to grant.

3. The Originating Summons are further supported by the Affidavit sworn by the Plaintiff on the same date.

4. The Application is opposed by the 1st to 4th Defendants vide their respective Replying Affidavits dated 29/11/2013. The Application is also opposed by the 5th Defendant filed his Replying Affidavit dated 14/04/2012.

5. At this juncture, I find it proper to take judicial notice that this case was transferred to this Court as Matrimonial Cause as such, I find it necessarily to point out that this is one of a kind Matrimonial Cause involving third parties who should not have been parties before this Court. A clear reading of the *Matrimonial Property Act* denotes that matrimonial causes can only be between a person and a spouse or a former spouse of the person. Looking at the parties in the instant Cause, there is no doubt that the 1st to the 4th Defendants should not be parties before this particular forum. Further, looking at the how the Plaintiff has crafted part of her orders, it is evident she seeks orders that this Court cannot grant. This Court's jurisdiction is in fact limited to issues of matrimonial property between spouses and former spouses only.

6. Be that as it may, the Plaintiff herein chose to drag other parties before this forum in an effort to assert her rights over that property known as Eldoret Municipality Block 8638/26. A cursory look at the Plaintiff's pleading reveals that the issues raised with respect to the 1st to 4th Defendants touch on land ownership and as such this Court will not belabour to delve in them. This Court will only limit itself to issues concerning matrimonial property in this instance between the Plaintiff and 5th Defendant who should be the rightful parties before this Court. In regard to issues touching on the 1st to 4th Defendants, the Plaintiff is at liberty to approach the appropriate forum in order to determine the same. With that said, I will not be delving into issues in view the 1st to the 4th Defendants herein. This Court will not allow the Plaintiff in guise of seeking to assert her matrimonial rights to contend issues that outrightly should not be before this forum. This Court will therefore stop at determining whether the subject property is matrimonial property.

The Plaintiff's Case

7. The Plaintiff testified as PW1, she adopted her Witness Statement dated 30/05/2013 and proceeded to produce documents in her list of documents dated 21/05/2013 and her Supplementary list of documents in support of her case. She stated that she got married to the 5th Defendant on 28/11/1998 in a church wedding at ACK Eldoret and that their union was blessed with 3 children. She testified that during the subsistence of their marriage they acquired that property known as LR No.8638/26 measuring approximately 200 acres through joint efforts including taking bank loans wherein the proceeds of the loan were applied in settling the purchase price and that they completed payments in

2005 and that she and the 5th Defendant developed the suit property, established a home and a dairy farm and undertook farming thereon under the management of the Plaintiff since the 5th Defendant was away most of the time participating and preparing for international competitions as an athlete. She further testified that the suit property was then transferred to the 5th Defendant from the original owner on 22/07/2008 and that his registration was in trust for her. She stated that however in an attempt to defeat her interests the 5th Defendant sold the property to the 1st to 4th Defendants and caused the entire land to be registered in their names on 2nd March, 2012 in the ratio of 75: 75: 50 and 20 acres respectively without approval of the Land Control Board in total disregard of her spousal interests and without her consent and knowledge. She added that the said Defendants then forcefully evicted her in 2012 when she was in the process of preparing the suit property for planting and that they then proceeded to plant security officers to man the gates and prevent her from any form of access to the suit property. She further stated that the 1st and 2nd Defendants are proxies of the 5th Defendant and colluded and conspired to cause 30 acres not sold to be registered under their names for purposes of perpetuating fraud against her and defeat her interests.

The Defendant's Case

8. The 5th Defendant testified as DW1, he stated that the Plaintiff is his legal wife and that they got married on 28/11/1998 and that they were blessed with children. He stated that he is the registered owner of the suit property known as Eldoret Municipality LR No.8638/26 measuring approximately 89.03 Hectares. He testified that the Plaintiff and him jointly applied for a loan of Kshs.6,000,000/= to settle the outstanding balance of the purchase price of the said property to the former owners. He testified that that he sold the land to the 1st and 4th Defendants without the Plaintiff's Consent.

9. In view of my foregoing sentiments in regard to the 1st to 4th Defendants not being proper parties before this Court. I find no useful reason to reproduce their testimonies.

Submissions

10. The lead Counsel for the Plaintiff/Applicant was Mr. Kibii who canvased the issues by way of written submissions. The learned counsel's submissions as filed and dated 11/12/2025 formed the foundation of the issues at stake. Whereas the 1st to 4th Defendant/Respondents were represented by learned Counsel Mr. Ogongo and finally Mr. Mitey represented the 5th Defendant/Respondent who also happened to be the spouse to the Plaintiff/Applicant to this suit.

The Plaintiff's Submissions

11. On whether the suit property constitutes matrimonial property, Counsel submitted that it is not in contention that the Plaintiff and 5th Defendant are spouses and have not divorced. Counsel also observed that it is also not in issue that the suit property was acquired during the subsistence of their marriage. Counsel submitted that the Plaintiff produced evidence to proof that the suit property was acquired through loans as demonstrated by PEXH 2 wherein the security was the title of that property known as Eldoret Municipality Block 8/459. Counsel observed that Plaintiff testified that she is a lecturer at Moi University and directly contributed in paying off the purchase price and continued to repay the loan facilities advanced to them for purposes of paying off the purchase price of the suit property. Counsel contended that the 5th Defendant acknowledged the Plaintiff's contribution and assistance during acquisition. Counsel maintained that none of the 1st to 5th Defendants challenged the Plaintiff's contribution. Counsel added that it is also not in question that upon purchase the Plaintiff and the 5th Defendant established the suit property and made developments thereon including establishing a dairy farm and undertook farming on the remainder under the management of the

Plaintiff who had also planted trees around the suit property. The Plaintiff produced a receipt dated 13/03/2012 for Kshs.300,000/= in favour of Jane Ngerigwony Kipkorir to demonstrate payment of costs of land preparation having hired tractors for the exercise.

12. Counsel thus urged that the Plaintiff has therefore demonstrated contribution in the acquisition of the suit property and that the 5th Defendant's registration was in her trust and his registration was subject to the interests and spousal rights of the Plaintiff. Counsel maintained that the 5th Defendant's registration was therefore subject to the overriding interest stipulated in Section 30(g) of the Registered *Land Act* (now repealed) and which rights included spousal right which accrued to the Plaintiff herein. Counsel mentioned that the said provisions of the law is a replica of the current provisions of Section 28 and section 93(2) of the *Land Registration Act* of 2012. Counsel reiterated that suit property was purchased with the full contribution of the Plaintiff and she had an equal right over the suit property as provided by Article 45(3) of *the Constitution* 2010. Counsel points out that the Plaintiff was well known to the 1st to 4th Defendants but they elected to bypass her on grounds of repugnant customs despite the fact that the suit property was matrimonial in nature and held in trust by the 5th Defendant for both of them, and that she enjoyed a 50% overriding interest and rights thereto. Counsel urged that the impugned agreements in the circumstances disregarded the Plaintiff's interests and violated her spousal rights in so far as the suit property is concerned. Counsel added that none of the Defendants challenged the Plaintiff's evidence that she was the one exclusively taking care of the general affairs and management of the suit property. Counsel submitted that the Plaintiff is entitled to equal protection and benefit of the law and equal rights in marriage as provided for by Articles 27 and 45 of *the Constitution*. He cited the Court of Appeal in Civil Appeal No. 128 of 2014, PN v ZWN [2017] KECA 753 (KLR). He also cited the case of Nairobi ELC NO.21 OF 2011, Esther Ruguru Njoroge & another v James Wakibi Mungai [2017] KEELC 1354 (KLR).

13. Learned Counsel maintained that the Plaintiff has proved and demonstrated that she made both financial and none-monetary contribution towards acquisition of the suit property and thereafter towards its improvements and development. Counsel mentioned that the Plaintiff candidly explained the source of her contributions towards the acquisition being from her gainful employment as a civil servant and from bank facilities. Counsel submitted that the suit property was the most prized possession. He cited the Court of Appeal in the earlier cited case of Civil Appeal No. 128 of 2014, P N v Z WN [2017] KECA 753 (KLR).

14. Learned Counsel contended that even though the suit property was registered in the name of the 5th Defendant, the same was in her trust having substantially contributed in its purchase and maintenance. Counsel urged that the Plaintiff has sufficiently demonstrated both monetary and non-monetary contribution in the purchase and as such he urged the Honourable Court to hold that indeed the 5th Defendant registration over L.R No. 8638/2 was in trust for the Plaintiff.

15. Learned Counsel submitted that the 1st and 2nd Defendant's agreements are dated 4/10/2011 for 40 acres and 24/01/2012 for 80 acres and the Plaintiff did not consent to any of the transactions and transfer thereto. However, Counsel argued that the 5th Defendant transferred 150 acres of the suit property in favour of the said Defendants which includes 30 acres which the said Defendants admit they never paid any consideration for. Counsel observed that the said Defendants during hearing alleged that they are jointly in occupation of the 120 acres although the titles read that each one of them owns 75 acres. Counsel thus questioned the circumstances under which the 1st and 2nd Defendants each holding 15 extra acres they never paid for if not in connivance and conspiracy with the 5th Defendant with the ulterior motive of defeating the Plaintiff's interest. According to Counsel, the 1st and 2nd Defendants' registration of the 30 acres they never paid for was clandestine in nature and aimed at not only to mislead but to defeat the protected interests of the Plaintiff. Counsel argued that the purported

Memorandum of Understanding between the 5th Defendant and the 1st and 2nd Defendants is of no value since first the Plaintiff was not a party to it and secondly it is illogical for the 5th Defendant to transfer a property he never sold only for the same to be re-transferred back to him at his own costs at a later stage which includes securing consent from land control board not to mention stamp duty payable. Counsel maintained that the Memorandum is not fictitious but purely manufactured for purposes of these proceedings in perpetuation of glaring fraud. He relied on the earlier cited case of Nairobi ELC NO. 21 OF 2011, Esther Ruguru Njoroge & Another v James Wakibi Mungai [2017] KEELC 1354 (KLR). Counsel urged that the foregoing citation is clearly in tandem with the instant suit since the 5th Defendant in secrecy disposed of 120 acres of the suit property to the 1st and 2nd Defendants and even caused transfer and registration of an extra 30 acres without the knowledge of the Plaintiff with a motive of defeating the Plaintiff's claim over the matrimonial property.

16. Regarding the issue raised by the 3rd and 4th Defendants who alleged that although the Plaintiff was not party to his agreement dated 15/03/2007 for 50 and 20 acres respectively the Plaintiff allegedly received part of the proceeds of sale to the tune of Kshs.2,000,000/= and a used motor vehicle registration number, KBB 781H which was the subject of trade in during the impugned sales, Counsel submitted that the Plaintiff in her evidence denied receipt of any amount from the 3rd Defendant or knowledge of the said motor vehicle and stated that she was shocked to learn of the alleged payment and motor vehicle through the suit herein. Counsel added that DW1 equally admitted that he never involved the Plaintiff in all the sales and that he did not instruct the Plaintiff to collect any amount from the firm of Kimaru Kiplagat & Co Advocates and that the said motor vehicle was his and had nothing to do with the Plaintiff. Counsel further submitted that upon being shown the impugned payments she stated that the impugned cheque and payment voucher were forgeries and prepared for purposes of these proceedings since the same were issued to Joyce Chebichii Komen whom is a stranger and unknown to her. Counsel added that Plaintiff went ahead and shared her national identity card with the Honourable Court which indicates that her name is Joyce Chebichii Kimosop and not Joyce Chebichii Komen. It shall be noted that the 3rd Defendant did not produce anything in court to demonstrate how the Plaintiff received the alleged cheque of Kshs.1,600,000/=. Counsel stated that nothing would have been hard for the 3rd Defendant to present either a deposit slip or payment voucher from Kimaru Kiplagat & Co. Advocates or call a witness from the said firm of Advocates to proof receipt of the said amount by the Plaintiff or at the very least present a bank statement to demonstrate debit and transfer of the alleged payments. Counsel therefore reiterated that the alleged cheque and payments are mere documents and papers prepared in furtherance of fraudulent schemes and conspiracies by the Defendant to mislead and to defeat the Plaintiff's interests. Counsel also submitted that the impugned cheque has alterations in the names of the Plaintiff and this further supports the Plaintiff's position that the said cheque and payment voucher of Kshs.400,000/=which bears a different name from the Plaintiff are fictitious. He cited Nairobi High Court ELRC No.1147 of 2017, Manyasa v Oriental Mills Limited [2022] KEELRC 3855 (KLR) and Nairobi Civil Misc. Application No. E300 of 2025, Chege t/a S. M. Chege &Company Advocates v Cannon General Insurance (K) Limited [2025] KEHC 16525(KLR).

17. Learned Counsel further submitted that it is evident that the 5th Defendant neither sought for consent of the Plaintiff nor the land control board during the transfer notwithstanding the fact that the suit property is agricultural in nature and therefore falling within the provisions of section 6 of the Land Control Board Act which mandatorily requires that consent of the land control board must be granted before any transaction touching on agricultural land is completed and which transaction was further subject to the spousal rights of the Plaintiff. Counsel added that there is consensus in all the impugned agreements that the transactions were subject to approval by the Land Control board. Counsel argued that the 5th Defendant did not seek for the Plaintiff's consent during sale and subsequent transfer which

transfer included a portion of 30 acres he never received any consideration for. Counsel observed that Defendants relied on letter of consent to transfer dated 2/02/2012 pursuant to land control meeting held on the same date but the 5th Defendant admitted in cross-examination that he did not attend any Land Control Board. Counsel submitted that the Plaintiff produced the minutes of the Land Control Board of the said date which clearly demonstrate that the suit property was not listed as part of the agenda anywhere as demonstrated by PEXH 6. Counsel argued that the Plaintiff went further and availed the minutes of the land control board for the following month of March as demonstrated by PEXH 10 which also shows that no valid consent of transfer was ever issued in favour of the Defendants herein. Counsel asserted that the 1st to 4th Defendants never attended the land control board and none of them could explain how the impugned consent was procured. Counsel urged that in any event none of the Defendants was able to produce contrary minutes to the Plaintiff's if indeed the consent was valid and more so it is impossible for one to apply for land control board consent and obtain it on the same day. Counsel maintained that the alleged consent is an outright forgery and the transfer was premised on an illegal consent rendering the 1st to 4th Defendants' registration null and void ab initio. Counsel stated that 1st to 4th Defendants have a recourse of refund of the amounts they paid to the 5th Defendant under Section 7 of the *Land Control Act*.

18. According to learned Counsel, the clandestine and fraudulent manner of transfer of the suit property in favour of the 1st to 4th Defendants including the 30 acres they never paid a penny for on the strength of a forged letter of consent from the land control board lends credence to the Plaintiff's evidence that the sale and transfer of the suit property is shrouded in conspiracy and connivance calculated at defeating her legally protected spousal rights. Learned Counsel reiterated that there is no evidence in form of minutes from the Moiben Ainabkoi land control board to show that the 5th Defendant appeared before the Board on 2/02/2012 as purported in the letter of consent also dated 2/02/2012. Counsel relied on the decision in the High Court in Eldoret Civil Suit No.201 of 1997, Nandi Kipsaina Mursoi v Ezekiel Kiplagat Kiplel & 7 others [2017] KEHC 6323 (KLR).

19. In a rejoindersubmissions by the 1st 2nd 3rd and 4th Defendants/ Respondents dated 12th January 2026 Learned Counsel Mr. Ogongo delved into the following issues; first and foremost is to answer the question whether the matrimonial cause has been properly instituted against the 1st to 4th Defendants/ Respondents. With this issue in mind Learned Counsel invited the Court to make a finding that the standard and burden of proof as stipulated by the dictates of Section 106, 107, 108 and 109 of the *Evidence Act* remains in the horizon of remoteness which is deducible from both direct and circumstantial evidence admitted before the Court. In buttressing this point Learned Counsel placed reliance on the following case law: Dakianga Distributors (K) Ltd -v- Kenya Seed Company Ltd [2015] KECA 870 (KLR), Malawi Railways Limited -v- Nyasulu [1998] MWSC 3, Libyan Arab Uganda Bank for Foreign Trade and Development & Anor -v- Adam Vassiliadis [1986] UGCA 6, Jones v National Coal Board [1957] QB 55, Independent Electoral and Boundaries Commission & Another -v- Stephen Mutinda Mule & 3 Others, Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC SC 91/2002 and Macfov -v- United Africa Co. Ltd [1961] 3 ALL E.R. 1169.

20. In furtherance to this debate which is anchored in the cause of action by the Plaintiff/Applicant as against the 1st, 2nd, 3rd and 4th Defendants/ Respondents it was learned Counsel's contention that they have no stake or beneficial interest in the marriage union between her and the 5th Defendants/ Respondents to demand their involvement in private rights which do not transcend to their dominion. It was further learned Counsel's contention that within the fulcrum of the authorities cited and the provisions of the *Marriage Act* as ordained within Section 17 of the Married Women Properties Act 1882 which was a precursor of the current Legislation in the name and style of the *Matrimonial Property Act* of 2013 these are matters between a husband and wife and dragging the Respondents to

this litigation can be prescribed as an abuse of the Court process. This issue of locus standi as adverted to by the Plaintiff/ Applicant of joinder of the 1st, 2nd, 3rd and 4th Defendant/Respondents learned Counsel's summation implicitly can be described as misjoinder of parties likely to occasion prejudice and injustice on their part.

21. The next question of importance dealt with by the learned Counsel to the 1st, 2nd 3rd and 4th Defendants/ Respondents is whether the Plaintiff/ Applicant was aware of the sale transactions appertaining to the suit land. In this respect it was learned Counsel's contention that the Plaintiff/Applicant seemed to feign ignorance but the rebuttal evidence from the 1st – 4th Defendants/Respondents deconstructed that evidential material that some of the proceeds in the form of cash totaling to 2 million was disbursed to her for a individual benefit. This evidence fortunately can be affirmed from the record that the Plaintiff/Applicant did not demonstrate that some money happen to have been disbursed almost immediately thereafter or within the transactional events on the sale of the property which is now in contestation between her and the 5th Defendant/Respondent. I consider the issue of the bank cheque details with regard to the names of Joyce Chebichii Komen instead of Kimosop as a non issue in so far as the weight to be accorded to the whole of the issues which prompted the Plaintiff/Applicant to file a suit against the 1st, 2nd 3rd and 4th Defendants/Respondents. It was also the case for the 1st, 2nd, 3rd and 4th Defendants/Respondents drawn from the testimony of DW4 that the Plaintiff/Applicant was present during the preparation of agreement of sale dated 15th March 2007.

22. In the next line of submissions Learned Counsel for the 1st, 2nd, 3rd and 4th Defendants/Respondents invited the Court to be persuaded with the answers in rejoinder to the submissions to the Plaintiff/ Applicant to this case in taking a panoramic view of the issue as to whether the registration of the 1st – 4th Defendants/Respondents as proprietors of the suit land was above board or the entries made on the Register of Lands on 8th March 2012 is or was fraudulent for this Court to declare it a nullity. In buttressing this issue Learned Counsel relied on the case of Desnoyer -v- Hereux, 1 Minn. 17 (Gil. 1), Section 2 and 6 of the *Matrimonial Property Act*, Peter Ndungu Njenga v Sophia Watiri Ndungu [2000] KECA 202 (KLR), Kuria Kiarie & Others v Sammy Magera [2018] KECA 467 (KLR), Kinyanjui Kamau v George Kamau [2015] eKLR, Ndolo v Ndolo (2008) 1 KLR (G & F) 742. Bearing this in mind learned Counsel urged this Court to find that the issues of spousal consent by the Plaintiff/Applicant have not been proven beyond reasonable doubt both as stipulated in the law and her material evidence given orally as supported by the documentary evidence. That in accordance to learned Counsel's contention invoking the provisions of the *Matrimonial Property Act* as read with the provisions of Section 28 of the *Land Registration Act* of 2012 and Section 79(3) and 107(7) of the *Land Act* the claim against the 1st, 2nd. 3rd and 4th Defendants/Respondents continue to ride on sinking sand and therefore the Court should be at liberty to find in their favor in terms of the declarations sort in the plaint or in more common parlance referenced as originating summons in Matrimonial Property Causes Act. The next line of defence adopted by the Learned Counsel for the 1st, 2nd. 3rd and 4th Defendants/Respondents is whether the Plaintiff/Applicant is entitled to the suit parcel after successful transfers executed in their favor by the Land Registrar of Uasin Gishu County. In answer to this issue learned Counsel contended that the proprietorship has already passed with all rights and interests registrable as tenured in our legal and regulatory framework. Learned Counsel strongly urged the Court that if such a remedy was to be granted it will be an outright infringement of the rights of the 1st, 2nd, 3rd and 4th Defendants/Respondents which are protected by Article 40 of the Kenyan Constitution. This to the learned Counsel's submissions the case for retransfer or cancellation of title has not been discharged for such a step to be taken by this Court. It was also the case by learned Counsel on behalf of the 1st, 2nd 3rd and 4th Defendants/ Respondents that this Court lacks both the constitutional and statutory jurisdiction to entertain the cancellation or declarations of any rights on

the suit land which had already been transferred by execution of the instruments by the 5th Defendants/ Respondents and those rights having been recognized by law can now not be said to be fraudulent or a forgery. The Court was therefore invited to be guided by the principles in the cases of: Macharia & Another -v- Kenya Commercial Bank Ltd & 2 Others [2021] KESC 8 (KLR), South Eastern University College -v- Registrar of Titles & 2 Others [2025] KEHC 6799 (KLR), Muli -v- Mbuli & Another [2025] KEHC 3745 (KLR), Ngugi -v- Attorney General & 5 Others [2025] KEHC 13947 (KLR). Learned Counsel underpinning his submissions on the principles developed over time and supplied by Courts agitated against this Court exercising any jurisdiction on the matter as regards the rights which have already crystalized in favor of the 1st, 2nd 3rd and 4th Defendants/Respondents.

23. Finally, learned Counsel as just a desert to the entire case and upon distilling it, he urged this Court to find that Trust as known in law was not pleaded by the Plaintiff/Applicant and on that basis no remedy can ensue in favor of the Plaintiff/Applicant. It is on this basis learned Counsel subsequently urged the Court to dismiss the suit as pleaded against the 1st, 2nd, 3rd and 4th Defendants/Respondents. As at the time of going to the authorship of this Judgment and even after sending reminders in compliance with Article 50 of *the Constitution*, the 5th Defendants/ Respondents was yet to release the written submissions from the legal baking oven for this Court's consideration. However, it is important that submissions are basically legal perspectives from learned Counsels to assist the Court in the development of jurisprudence. The written submissions can never be substituted to take the place of the evidential material which is a province of the standard burden of proof as stipulated in Section 107(1), 108 and 109 of the *Evidence Act*. That he did so during the trial within a trial of the case when evidence was tendered by each of the parties to this claim or suit. It is my singular duty to enter into the realm not necessarily within the cluster of the singular issues framed by the parties but predominantly to look at the case as a whole and answer the question whether the Plaintiff/Applicant has discharged the burden of proof on a balance of probabilities to secure her rights under the *Matrimonial Property Act* of Kenya.

Determination

24. The burden of proof at all material times lies on the Plaintiff/Applicant as against the Defendant/ Respondent that the suit so filed is capable of being justiciable and the remedies sought be granted by this Court. In my view it is a heavier burden than that which lies on a party or litigant to an ordinary civil claim or action. (See Mallison v Mallison [1986] EA. However, for now that higher pitch expected of the Plaintiff/Applicant on the threshold of burden of proof in disputes under the Matrimonial Causes or Property Act, is a question to be answered more candidly as to what scale in law it should be logically analyzed and applied in another forum. I say so for reasons that in our legal system the matrimonial causes of action still are dealt with as a claim under Civil Law. The Court of Appeal in Mumbi M'Nabea v David M. Wachira [2016] eKLR stated as follows:

"In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not ...."

This position in law on the standard and burden of proof in civil cases was further articulated by the Court in Maria Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Company Limited – Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

"Whereas under Section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof). The1 burden of proof lies upon the party who invokes the aid of the law and substantially asserts the

affirmative of the issue, Section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

25. In the case of Britestone Pte Ltd. v Smith & Associates Far East Ltd. it was held as follows:

"The Court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him." This is also the emphasis in the case of Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR it was held that:

"As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden ... is cast upon on party, the burden of proving any particular fact which he desires the Court to believe in its existence. That is captured in Section 109 and 112 of the law that proof of that fact shall lie on any particular person ... The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

26. The questions which would be answered logically fashioned within the pleadings and evidence by the Plaintiff/Applicant as against the Defendant/Respondent predominantly are whether indeed this suit property was matrimonial property jointly acquired pre-marriage or post-marriage and if so, the sale that so happened in the aforestated dates as captured in the transactional instruments between the 1st 2nd 3rd 4th and the 5th Defendants/Respondents can be rendered voidable. The ancillary to this is whether spousal consent withheld, or lack of it as known in law this Court has the jurisdiction to declare the registrable land rights in favor of the 1st, 2nd, 3rd and 4th Defendants/Respondents null and void. In the event there is touchstone of other secondary issues, it could be for the purposes of enriching the jurisprudential discourse on this public interest matter.

27. As a magnetic feature of this case, is overwhelming evidence that the Plaintiff/Applicant and the 5th Defendants/Respondents are still in a subsisting marriage with no intention now or in the future to procure a Decree Nisi or Decree Absolute in so far as their union is concerned. There is therefore prima facie evidence that the marriage is still subsisting. Their vision of acquisition of capital wealth either as an individual or partnership level by dint of their marriage is a going concern given their past status and as at the time of writing this Judgment.

28. I would be conducting a discretionary exercise, which I must take into account all the relevant factors including in particular the source of the funds and whether it can be said that they were wholly invested as a contribution in acquiring the impugned asset pre-date the marriage or post subsistence of the marriage. That is the million-dollar question in this suit. Here are the key constitutional and statutory provisions including the National Law which forms the trite law on matters of equality in Matrimonial Rights. As an opening statement property acquired during the subsistence of a marriage is presumed to be joint property unless and until rebuttable admissible evidence both direct and indirect by the Respondent/Defendant to disapprove the claim. The distribution must still be just and equitable but based on the specific circumstances of each case, digging in on the parameters of monetary and non-monetary contribution by either of the spouses. That is what tilts the presumption in favor of equal sharing.

29. The matrimonial property distribution has its foundation in Article 27 (1) & 4 of *the Constitution* which provides as follows:

i. Every person is equal before the law and has the night to equal protection and equal benefit of the law (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms (3) Women and men have the right to equal treatment including the right to

equal opportunities in political economic, cultural and social spheres (4) The State shall not discriminate directly of indirectly against any person on any ground including race, sex, pregnancy, mental status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth

In the very Supreme Law of the Land the Kenyan constitution in Article 45 it provides as follows: (i) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state (2) Every adult has the right to marry a person of the opposite sex based on the free consent of the parties (3) 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 (4) Parliament shall enact legislation that recognizes:- (a) marriage concluded under any tradition, or system of religious, personal or family law and (b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion.

30. One needs to emphasize that Article 45 of *the constitution* does guarantee equality before, during, and after the dissolution of marriage but this is not similar or identical or synonymous with automatic equal marital estate entitlements. It is trite law in Kenya which flows from this constitution that sharing of the property acquired during the marriage is based on the contribution. There has been a robust debate within the jurisprudential discourse amongst the Jurists both at the bench and at the bar that contribution must be assessed based on monetary and non-monetary contributions. The other dimensional discussion in the various authorities is the question of property acquired before the marriage but the enhancement of its value in terms of development did take place during the subsistence of the marriage.

31. The legal regime regarding the distribution of matrimonial property in Kenya upon divorce is also supported by International law under Article 2 (5) & (6) of *the constitution*. The regulatory regime under International Law is not governed by a single universal convention or treaty, but instead it is a combination of Human Rights treaties emphasizing gender equality, private International Law (Conflict of laws) (Principles) and Regional Instruments that guide how our National Courts should distribute the Assets within the ambit of the governing Statutes. Some of the key provisions on principles under the International Standards in this branch of law include:

    a. Equality and Non-Discrimination: Instruments like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), particularly Article 16 and the Maputo Protocol (Protocol to the African Charter on Human and peoples Rights on the /rights of Woman in African, Article 7) emphasize that spouses have equal rights to property, both during and upon the dissolution of marriage.

    b. Recognition of Non-Monetary Contribution: International Standard increasingly dictate that housework, child-rearing and other non-financial contributions should be recognized as having equal value to monetary contributions when dividing property.

32. In furtherance of these rights Article 16 (1) of CEDAW provides for the right to equality between men and women in marriage. It states that: (a) The same right to enter into marriage (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent (c) The same rights and responsibilities during marriage and at its dissolution (d) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property whether free of charge or for a valuable consideration.

33. With regard to the Maputo Protocol's right to property in marriage, Article 6&7(d) does emphasize equitable sharing of joint assets upon divorce and a woman's right to manage her own property. This

question which is being canvased by the parties is an infusion within the marital union and the rights which accrue as a result of that relationship including but not limited to the right to acquire and own property. In Kenya the main legislation on this subject matter is the *Matrimonial Property Act* 2013 governing the ownership and division of matrimonial property. Some key guiding principles which have been developed over time since the dawn of the Act include equal rights, essentially that both spouses generally have equal rights to Matrimonial Property regardless of financial or non-financial contributions. However, when it comes to contribution, acquisition and ownership is determined by each spouse's contribution which is assessed on application of legal tools to establish the weighted measure of monetary and non-monetary contribution. It must also be understood by the citizens of this Republic that even the literal or purposive interpretation of the *matrimonial property Act* there is no automatic 50: 50 split of the matrimonial estate. There is nothing like equal split in the *Matrimonial Property Act* and not even the provisions of *the constitution* promotes such a canon on sharing of the marital estate between a husband and wife.

34. Whether in an originalist, actualist or a value essentialist manner when seeking to secure adherence to the legal scheme on matrimonial distribution to keep in view the principle of equitable distribution in line with *the constitution* standard of equity the courts are clothed with wide discretion to divide the marital estate in a just and equitable manner. This litigation on matrimonial property distribution transcends the Republic of Kenya, the African Continent, the Asian, European and American Continental Regimes. Fortunately, each has a positive contribution towards enhancement and growth of our very own jurisprudence. For instance, Article 112 of the Women's Charter of Singapore sets out a non exhaustive list of factors to be considered when dividing matrimonial property, including the monetary contribution of the spouses towards the matrimonial assets, and the contribution of the spouses towards the welfare of the family,7 The division of such property is hardly a mathematical exercise owing to the wide discretion granted to the court.178 Further, the list of considerations during the exercise is non-exhaustive, opening the court to a myriad of factors to assess during the division of matrimonial assets.179 Finally, judges are guided by three main principles when dividing matrimonial property. First, any asset that was acquired during marriage is taken to be a matrimonial asset. 180 Second, judges are encouraged to apply broad discretion when dividing the property. 181 Third, the aim of such division is to arrive at a fair and reasonable result for each party. 182 In the case of AJR v AJS, the High Court of Singapore designed a mathematical formula to guide itself in dividing the matrimonial assets of the parties concerned.183 This formula was developed in line with the discretion of the court to divide the property in a just and equitable manner' Copy 112 of the Women's Charter.184 The judge behind this novel idea clarified that the formula was not meant to replace the judicial exercise of division or matrimonial assets. Rather as a result the formular would only be applicable at the end of the exercise of the division to confirm whether the judge had applied their discretion currently. Before outlining the formula, it is imperative to explore the principle behind Article 112 of the Charter. Matrimonial property is divided on the basis of equitable division. This is in recognition of marriage as an equal co-operative partnership of efforts. Thus the role of breadwinning and homemaking are given similar weight and when the marriage ends, these contributions are transformed into economic interest in the matrimonial assets. While Singaporean courts used to consider financial contributions to be the prima-facie starting point, the courts now have to contemplate other non-financial factors on a similar footing. This is because financial contribution in itself is not determinative. Additionally, the courts in Singapore discourage the scrutiny of the conduct and efforts of the spouses as this may disadvantage that spouse whose contribution is difficult to evaluate in financial terms. Therefore, in the absence of documentary evidence the court should make a rough and ready approximation of shares to apportion to each spouse. Besides the court has to avoid falling into the dichotomy of direct and indirect contributions as there are other vital factors to take into account during the division exercised.

35. In the context of our interpretation on disputes filed in the various Matrimonial Courts this comparative dicta in the case of AJR VAJS presents a locus classicus example of a typical working class married couple in Kenya. The brief facts are that: " Prior to their divorce both of them were earning income until the husband became a househusband in 2001. The wife continued to earn income; nut she was also majorly responsible for taking case of their children. Six years later, the couple sought a divorce and an interim order was issued to that effect. Before the marriage was finally dissolved, the wife purchased a considerable number of assets, changing the value of the matrimonial assets drastically. Further the court opined that the wasteful dissipation for the matrimonial assets by one spouse should be taken into account when dividing the property at the dissolution for the marriage.

36. The case is important for it would be open to a court to find that a spouse who had made no contribution to the marriage and should therefore no longer be able to rely on the partnership concept.

37. For an ideal marriage to bring itself within these provision(s) certain key values and governance principles have been crafted by scholars and do include: Mutual Respect: valuing each other's thoughts, feelings and boundaries. Trust: Relying on each other emotional support and honesty, Communication:Openly sharing thoughts, feelings and desires, Emotional and Physical Intimacy: Connecting on a deep emotional level and naturing a healthy physical connection. Shared Values: Aligning on core- values and life goals. Conflict Resolution: Resolving disagreements in a healthy constructive way. Independency:Maintaining individual Identities and interests. Support: Encouraging each other's growth and Wellbeing. It is from these circumstances and characteristics the right to acquisition of matrimonial property can arise by virtue of an existing valid marriage being navigated within the stewardship of the above elements to ensure the enjoyment of the Right to life under Article 26 of *the Constitution*.

38. The legislative framework and the constitutional imperative do not provide for a formular giving rise to an automatic 50%: 50% in the distribution of the marital estate in Kenya.

    It is therefore necessary to bring to the fore the legislative framework provisions besides the ones cited elsewhere in this ruling on distribution and division of Matrimonial Property upon divorce or as a declaration in a marriage which is considered a going concern.

39. Section 17 of the *Matrimonial Property Act*, provides for the jurisdiction of courts on matters touching on matrimonial property 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."

40. The Court of Appeal discussed the jurisdiction of the High Court with regards to declaration of rights of spouses in matrimonial property in AKK v PKW [2020] eKLR as follows:

    " Whilst the Respondent argued that the suit offended Section 7 of the *Matrimonial Property Act*, 2013 on the basis that the remedy sought for division of property was not available until divorce or dissolution of marriage, the appellant, relying on Section 17 of the same

Act argued that the court is not limited in respect to the declaration of rights of a spouse's interest in matrimonial property. Section 7 states:

"... 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."

Section 17 states that:

(1) A person may apply to a court for declaration of rights to any property that is contested between that person and a spouse.

(2) An application under subsection (1) –

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes."

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. It can be discerned from the appellant's pleadings in the High Court that she sought not only division but also orders from the court that the listed property was matrimonial property and a further finding that she had proprietary and pecuniary interests in the same. 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. However, in view of the order sought by the appellant extensively detailed above, it cannot categorically be said that the appellant's prayers fell solely within the ambit of Section 7 of the Act. It is our opinion that the learned Judge erred in limiting the court's jurisdiction to the provisions in Section 7 of the Act. In failing to address itself to the nature of reliefs sought by the appellant and the enabling provisions under Section 17 of the Act, the trial court did not proceed to determine whether the appellant satisfied the provisions under Section 17 of the Act in order for the court to make the declaratory orders sought.....

We find that the trial court was clothed with the requisite jurisdiction to entertain those aspects of the appellant's prayers that did not involve the division of matrimonial property and the superior court was in error to limit its jurisdiction on the basis of the provisions of Section 7 of the Act.

In our opinion, the trial court had jurisdiction to make declarations in so far as the interest in the property during the pendency of a marriage is concerned. The issues of distribution of the property would then only be determined upon dissolution of a marriage....."

41. The above case demonstrates that a declaration under Section 17 of the Act is not necessarily pegged on the subsistence of a marriage. 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

my 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.

42. In the present case, from the Applicant's prayers in the Originating Summons, it is clear that, the Applicant not only seeks that the suit property be declared as matrimonial property but also seeks for division of the same. These two remedies giving a purposive interpretation of the applicable statute cannot be availed at the same time. The matrimonial causes as known in law even before the enactment of the 2013 Act division of Assets of the marriage is on the basis of the marriage union being considered to have been dissolved so that the spouses can start a lifetime in denovo. The principle that has to be distilled in this case in my view if the Plaintiff discharged the burden of proof on this single property on a balance of probabilities, this court cannot close its eyes as what is the position of the other inventorized Assets which have been acquired jointly or individually, between the Plaintiff/Applicant and the 5th Defendant/Respondent. Can the court be allowed to interpret the Act in a piecemeal manner whenever any of the spouses feel disgruntled over an issue and resorts to apply for a declaration notwithstanding that there is no intention to dissolve the marriage or permanently constructively seen or known to have deserted the Matrimonial Home for long periods of time.

43. Being guided by the above decision, this Court cannot pronounce itself with regard to issues of division of the said one matrimonial property without compelling evidence as to that decision to adjudicate on individual Assets or until parties have divorced. I am alive though that courts have taken this rout of making declarations in one way or another with regard to such petitions or claims made by various Applicants/Petitioners. This a unique provision and this tentative distinction between schematic and isolated declaration of Matrimonial Properties for the benefit of any of the spouses to me is incompatible with the overall scheme of the *Matrimonial Property Act* 2013 when read as a whole. When a court is called upon to construe legislation, ascribes a meaning and effect to the legislation pursuant to the preamble and objectives of that primary Act, it is important that the court should identify clearly the particular statutory provision or provisions whose interpretation is in consonant with the letter, spirit and ghost of the statute. It is difficult to comprehend that the object of the Act primarily is for distribution of the marital estate upon divorce of that marriage but again sensibly the same court be asked in a continuum manner in- situ to the marriage be approached to make declarations by either of the Applicants on acquisition and ownership. It is therefore necessary that at this stage the provisions of Section 6(1) be stated as follows: the *Matrimonial Property Act* defines matrimonial property as- the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

44. In a nutshell, for property to qualify as matrimonial property it has to be acquired during the subsistence of the marriage unless otherwise agreed by the parties that a particular property does not form part of the matrimonial property. It is not contested herein that the Plaintiff and the 5th Defendant conducted a Christian Marriage on 28/11/1998. However that marriage alone is not equated with acquisition and ownership of property. This is a legal evidential threshold to be met in the event the matter has been triggered by the parties for adjudication under Article 50 (1) of *the constitution* as interpreted with the *Matrimonial Property Act*.

45. The other provision of Significance is Section 2 of the Act, 'Matrimonial home' has been defined as:-

> " 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. Whereas Section

7 of the Same Act provides for ownership of matrimonial property it states that: " Subject to Section 6(3) ownership of the 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. The other relevant provision which touches on this dispute between the Plaintiff/Applicant and the Respondents is Section 9 which states as follows:- Where one spouse acquire property before or during `the marriage or property acquired during the marriage does not become matrimonial property but the other spouse makes a contribution towards the improvement of the property the spouse who makes contribution acquire a beneficial interest in the property equal to the to the contribution made. As per Section 12 of the *matrimonial property Act*, Spousal consent is only necessary where properly is classified as matrimonial property Section 13 goes ahead to further clarify that marriage does not affect the ownership of property other than matrimonial property to which either spouse may be entitled, or affect the right of either spouse to acquire, hold or dispose any such property."

46. From the various exhibits presented before this Court, it is apparent that the suit property was acquired during the subsistence of the marriage but what would be in contention is the nature of the contribution maintainable by the Plaintiff/Applicant deducible from the evidence and thereafter controverted by the Defendants/Respondents. This discussion would be incomplete without a mention of section 14 of the Act which provides that:

> " Where matrimonial property is acquired during marriage-
>
> (a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
>
> (b) In the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal."

47. It is however clear that contribution need not necessarily be in financial terms since according to Section 2 of *Matrimonial Property Act*, 2013

> " contribution" means monetary and non-monetary contribution and includes—
>
> (a) domestic work and management of the matrimonial home;
>
> (b) child care;
>
> (c) companionship;
>
> (d) management of family business or property; and
>
> (e) farm work."

48. From the facts of this case and the evidence although the reliefs are grounded under the *Matrimonial Property Act* 2013 of Kenya there are distinct features surrounding this cause of action. First, the Plaintiff is seeking declarations and remedies on the suit property in question while at the same time the marriage union is still intact and enjoying all the primary and ancillary rights surrounding this great institution, we are told from the theologian point of view and its genealogy based in the book of Genesis 2 v 18-25 which states as follows: " And the Lord God said, it is not good that man should be alone, I will make him a helper comparable to him, Out of the ground the Lord God formed every beast of the filed and every bird of the air, and brought them to Adam to see what he would call them and whatever Adam called each living creature, that was its name, so Adam gave names to all cattle, to the

birds of the air and to every beast of the field. But for Adam there was not found a helper comparable to him, And the Lord God caused a deep sleep to fall on Adam, and he slept and He took one of his ribs and closed up the flesh in its place, Then the rib which the Lord God had taken from man he made into a woman and he brought her to the man, And Adam said, this is now home of my bones and flesh of my flesh, she shall be called woman, because she was taken out of man, Therefore, a man shall leave his father and mother and be joined to his wife and they shall become flesh, and they were both naked the man and his wife and were not ashamed."

49. This philosophical foundation of creation and the right to life of our being can be contradistinguished with the philosophy of atheism which is fundamentally a rejection of theism. This essentially means that atheism is based on lack of belief in any gods including the creator of the universe and God the supreme Alpha and Omega. This other philosophy of life is grounded in skepticism, reason, and scientific materialism. Their reality is defined by natural, physical processes rather than supernatural or metaphysical forces often focused on humanism, ethics derived from human empathy and the importance of this life. (See the Philosophy of Atheism-Emma Goldman 1916- Marxists. Org)

50. This marriage institution as celebrated by the Plaintiff/Applicant, and either the union draws its anchor from the book of Genesis or the philosophy of Atheism is terminable by death or divorce. This being a matrimonial property cause of action as between the Plaintiff/Applicant and her spouse the 5th Defendant/Respondent if anything is being adjudicated presumably may be under existence of divorce proceedings or on the other hand there is a Decree Nisi or Decree Absolute. There is however a very distinct provisions under Section 17 of the Act where Courts are invited to make declarations on matrimonial property. This to me seems to be the gist of the claim filed by the Plaintiff/Applicant against her spouse the 5th Defendant/Respondent. The interesting thing in this provision is that the court must have at the back of its legal mind that the issue of contribution becomes the core of the decision-making process.

51. Generally, one of the major contexts in which a matrimonial court has got to address the issues of declarations and substantive distribution of the marital estate is the significance on financial claims by the parties to the dispute. Therefore, a court is required to distribute assets acquired by either spouse during the marriage on their permanent separation, or upon divorce, but I think it was never contemplated that either of the spouses would sue for a declaration under Section 17 of the Act while the marriage union is still subsisting and each of them is enjoying the fruits that accrue and secured by virtue of the union. In law the divorced spouses would invoke the Court's jurisdiction for financial support based on the properties or Assets acquired and owned by either spouses during the subsistence and life time of the marriage. It is trite in the Kenyan Legal System therefore the courts when distributing the matrimonial Assets to the claimant spouse his or her contribution towards its acquisition have to be taken into consideration as well as the factors and circumstances regarding this acquisition have to be extensively and evidentially considered as a matter of procedural and substantive law.

52. The Plaintiff/Applicant herein claims to have made both monetary and non-monetary contribution. On his part the 5th Defendant admitted to have jointly acquired the suit property with Plaintiff. He in fact testified that they jointly acquired a loan with the Plaintiff for the purchase of the suit property. However it did not turn out very clearly or ascertained from the evidence given that she made any substantial contribution thereof. Therefore, her case remained in the borderline on the threshold issue on existence of proven facts for her to secure Judgement in her favor.

53. There is no doubt that the *Matrimonial Property Act*, 2013 has indeed made great strides in law in view of the rights of parties a marriage in relation to matrimonial property portfolio. The debate surrounding the division of matrimonial property both movable and immovable is a discussion that

seemingly is yet to be fully settled by the various jurisprudential decisions from the Superior Courts. This is with respect as to whether Article 45 (3) provides for an absolute division of matrimonial property in the ratio of 50:50. The Supreme Court appreciated the two school of thoughts with respect to the interpretation thereof in the case of JOO V MBO [2023] KESC. On one hand, the Supreme Court noted that there has been an argument that Article 45 (3) ought to be construed to mean a division of property down the middle, through the literal application of the 50:50 division ratio. On the other hand, proponents of the second approach argue that the term 'equal' as established in the said Article means that a party obtains an equivalent of what one contributes, monetarily or otherwise. The key aspects of the Ogentoto Decision by the apex court include the following:

a. Contribution-Based Division: The court upheld the principle that ownership of matrimonial property vests in spouses according to their respective contributions.

b. Definition of Equality: Equality in the context of Article 45(3) of *the Constitution* does not imply a rigid 50/50 division, but rather ensures a fair, equitable share based on the circumstances of each case.

c. Non-Monetary Contribution: The ruling acknowledges that non-monetary contributions (such as domestic work and child care) are crucial and must be considered, yet the ultimate division must be equitable.

d. Case-by-Case Assessment: The court emphasized that courts retain the discretion to determine the formula for dividing assets on a case-by-case basis.

54. The contextual link on the institutional marriage and the changing face of that marriage understanding perceptions which is the cardinal issue in this case where the court must strike a balance on the power relations between men and women particularly those who have solemnized the marriage with a vow that until set it asunder. The apostolic letter Mulieris Dignitatem by John Pau the Second sums it all in 1988 as follows:

> " In our times the question of "women's rights" has taken on new significance in the broad context of the rights of the human person. The biblical and evangelical message sheds light on this cause, which is the object of much attention today, by safeguarding the truth about the "unity" of the "two," that is to say the truth about that dignity and vocation that result from the specific diversity and personal originality of man and woman. Consequently, even the rightful opposition of women to what expressed in the biblical words "He shall over you" (Gen. 3:16) must not under any condition lead to the "masculinization" of women. In the name of liberation from male "domination," women must not appropriate to them selves male characteristics contrary to their own feminine "originality." There is a well-founded fear that if they take this path, women will not "reach fulfilment," but instead will deform and lose what constitutes their essential richness."

55. As it is stated elsewhere in other scholarly works presumably in the marriage union the contrast between dignity and equal Human Rights as applicable in the division of the assets acquired and owned by spouses jointly or individually and being a subject of the *Matrimonial Property Act* is still alive debate in our courtrooms. During the hearing of this case, there is clear evidence time has come for married couples to distill and delineate on what exactly is individual property visavis joint or common tenancy rights to the Assets under their protection. It is extremely significant that those desirous of sustaining the marriage union clarify from the onset the dimension of non-matrimonial assets, pre-marital wealth or inheritance from parents and with precision the assets acquired from the moment they solemnized the marriage and started cohabiting together as man and wife. The basis of

this is that Assets both movable and immovable acquired before the marriage or by gift of inheritance are generally not subject to the sharing principles under the *Matrimonial Property Act*. In the event the characterization of non-matrimonial property is transformed with a long intention between the spouses to have it classified as Matrimonial hence by law it will become "matrimonialised"

56. The evidence is clear that the Applicant is in gainful employment as a lecturer at Moi University. She tendered evidence to show that she obtained loan facilities for purposes of paying the purchase price of the suit property. She also testified to the effect that she was the one who exclusively took care of the general affairs of the suit land. In respect of non-monetary contribution, I take the view that the Plaintiff made her contribution in the manner defined under Section 2 of the *Matrimonial Property Act*.

57. In Federation of Women Lawyers Kenya (FIDA) v. Attorney General & another [2018] eKLR the court stated that:-

> "The law recognizes equal worth and equal importance of the parties in marriage. Thus, the beneficial share of each spouse as the law on the division of matrimonial property stands in Kenya ultimately depends on the parties proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. First, the Act recognizes monetary and non-monetary contribution which is clearly defined. By providing that a party walks out with his or her entitlement based on his or her contribution, the section entrenches the principle of equality in marriage."

58. It is clear to this court that the *Matrimonial Property Act* of 2013 recognizes and formalizes both the monetary and non-monetary contribution of parties in a marriage. The same position is captured in authorities including NWM v KNM [2014] eKLR where it was stated that the court must give effect to both monetary and non-monetary contributions that both the Applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property. The same position was held by the House of Lords in White v White (200) UKHL 54 where the Court alluded to the greater awareness of the value of non-financial contributions to the welfare of the family.

59. Notably in this case there were no arguments advanced that the Plaintiff/Applicant contribution was non-monetary but there was some pieces of evidence of monetary contribution which was not very clearly crystalized within the provisions of Section 107(1), 108, & 109 of the *Evidence Act*. This is a matter of evidential material both direct, documentary and circumstantial evidence. In rebuttal the defense did demonstrate that the Plaintiff/Applicant during the period of transactional purchase and sale events between the 5th Defendant/Respondent as the seller and the 1st – 4th Defendants/ Respondents jointly and severally acknowledge receipt of a total of Kshs two (2) million whose source is apparently is traceable during the purchase and sale period as to whether this was compensation being shared with the Plaintiff/Applicant as a beneficial interest holder of the suit land or his financial resources being ploughed back for a capital investment in the family business did not come out very clearly.

60. It is also evident from the testimony of the Plaintiff/Applicant and the 5th Defendant this suit property was not the actual site in which the matrimonial home of the married couples had been developed. The Plaintiff/Appellant and the 5th Defendant/Respondent were in concurrence there was some farming activities involving crop and animal husbandry which was a going concern as part of their wealth creation. There is no dispute about the sale of the suit land subject matter of this dispute and the initiation of the process came from the 5th Defendant/Respondent. There is nothing on record from the Plaintiff/Applicant that the contract of sale of land was tainted with fraud, misrepresentation,

duress or mistake for this court to render it null and void. In my view, the 1st-4th Respondent/ Respondents are bonafide purchasers for value within the tenured legal system of Kenya and the very reason why they secured the registration and titling under the *Land Registration Act* and the *Land Act* 2012.

61. As the Plaintiff/Applicant approach this court on the basis of nullifying the sale for reason of being voidable that spousal consent was not sought within the provisions of the law as it was then that evidential material capable of discharging the standard and burden of proof within the threshold of a balance of probabilities remains in the realm of suspicion given that this are matters sometimes falling within the rights to privacy as between a husband and wife as they enjoy their cordial and happy moments in sustaining the life wire of the marriage. One legal scholar a legal practitioner in CFL Advocates in her contribution to this controversial doctrine on spousal consent as a double edged sword: essential for protection where applicable but risky and a tinderbox if used without necessity, The key lies in proper legal assessment of the nature of the property legal assessment of the nature of the property and thoughtful use of alternatives like spousal waivers in business contexts. The court in Lysagh v Edwards (11875) 2 CH b 499 the ch. B 499 the court made the following observations:

> " What is the effect of the contract? It appears to me that the effect of a contract for sale has been settled for more than two centuries. Certainly, it was completely settled before the time of Lord Hardwicke who speaks of the settled doctrine of the court as to him what is the doctrine? It is that moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser the vendor having a right to the purchase money, and a right to retain possession of the estate until the purchase money is paid in the absence of express contract as to the time of delivering possession"

62. This contract on the sale of land in which the Plaintiff/Applicant is claiming a declaration under the *matrimonial property Act* has since been perfected and the purchasers becomes the owners in the eyes of the law and equity. The titles in question remain unimpeachable on grounds that spousal consent was not sought by the 5th Defendant/Respondent. There is overwhelming evidence by the suit property was acquired in the name of the 5th Defendant/Respondent and the same was not jointly registered with the Plaintiff/Applicant. Although we are being told some money exchanged hands between the Plaintiff/Applicant and the 5th Defendant in a marriage partnership such internal dealings and borrowings cannot be always be steady to be is for the objective of purchase of the matrimonial property as known in law.

63. In my considered view, the 5th Defendant /Respondents had the right and the power to dispose off the suit property in the circumstances of this case and no cogent evidence has been presented before this court that he acted contrary to the values and principles of governance guiding their marriage union. There is indeed no evidence that this property sold by the 5th Defendant/Respondent had qualified within the definitional evidence of matrimonial property that could not be interfered with by way of sale as the 5th Defendant/Respondent did in this case. What is startling in this case is the fact that the Plaintiff/Applicant has not tendered evidence within the prism of the evidence law that the 5th Defendant/Respondent kept her in the dark when he sold the property to the 1st and 4th Defendant/ Respondent. This is not one property that formed part of the matrimonial residence of both the Plaintiff /Applicant and the 5th Respondent. Whether the 5th Defendant Respondent acquired the proprietary rights in the suit property and if so if the property was subject to the written consent to the Plaintiff/Applicant for sale my answer from the evidence is in the negative. The comparative jurisprudence in Bi Hawa Mohamed v Ally Sefu CA NO 9 OF 1983 the Court of Appeal of Tanzania

remarked as follows: On the acquisition of the matrimonial assets: The phrase "family assets has been described as a convenient way of expressing an important concept it refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. The family assets can be divided into two parties (1) those which are of a capital nature such as the matrimonial home and the furniture in it (2) those which are of a revenue- producing nature such as the earning power of husband and wife.

64. In so far as the *matrimonial property Act* requires spousal consent for properly transactions, the transactions prima-facie which have been concluded and property rights passed to the purchaser cannot be said to be automatically void without credible evidence of a lack of consent. (See CKS v SOL & Another (2025) KECA 103) There is something unique about the matrimonial institution. It is the intersection of the right to privacy as a constitutional imperative to govern such relationship. My reading and interpretation as act as a whole does not limit acquisition of property whether movable or immovable by either of the spouses independent of each other which is capable of being managed and if need be disposed off as part of incremental of capital investment without the necessity of this so called spousal consent. In my view given the rights enshrined in our constitution under Article 40 which expressly states as follows: " Subject to Article 65 every person has the right either individually or in association with others to acquire and own property:- (a) of any description and (b) in any part of Kenya." With this right just the formation of a marriage union duly recognize as valid under *marriage Act* should not limit those rights so expressly accorded to the citizen of Kenya. The property regime should be extinguished by marriage which is an important step for the advancement of equal rights and time has come for couples to consider that the properties acquired during the subsistence of the marriage be contradistinguished as between those jointly owned to be considered matrimonial property and can be evenly distributed at the end of the marriage with those owned individually by either spouse and with a reservation clause that they should not be interfered with when any of them calls it quits from the partnership.

65. The duty to provide companionship, homemaking and child bearing should be classified as those obligations and duties which is each spouse shall participate in the common household of the family and the maintenance of the marriage to the best of his or her abilities. The maintenance of the spouses is a much wider human rights and moral obligations which go with the relationship validly formed to achieve a particular objective. One of the cardinal purpose and aim of a marriage is to bring forth a generation by searing children for the continuity of the right to life of mankind. The question of family within the doctrine of creation transcends our humanity and as part of the creation not specifically a legal science but by a declaration based on the gemology of Adam and Eve as the first image of man and woman. This means maintenance is the fulfillment of the common needs of spouses and their children if any as well as the personal needs of each spouse.

66. So at the end our legal system has come of age this far from the 1882 *matrimonial property act* to our current 2013 *Matrimonial Property Act* which represents a trajectory by the constitutional debate with specific clauses under Articles 27 and 45 of *the constitution* and it is necessary that the same be purposively interpreted with Article 40 of the same constitution. That is not the only glass to observe but further in the nature of the right or fundamental freedoms on ownership of private property and its importance to the right to life and the economic social and cultural rights as a juridical phenomenal if ownership of assets of both movable and immovable were to be distinguished by the spouses to the marriage as between those individually and independently acquired with those jointly acquired and registered as either joint tenant or common tenants the chaos of rights which is the evil soul of the matrimonial property regime might be a thing of the past. But this is another story which must be risen

by both the National Assembly in having a re-look of the current legislative scheme on this branch of law and the jurisprudential development by the Judiciary.

67. In the case at bar, as adjudicated by this court and the main arguments for and against the Plaintiff/Applicant it is true that the spouse who is the 5th Defendant/Respondent disposed off some shares of the suit land leaving a balance of 30 Acres which is available as a share definitely which may be co-owned property for the benefit of the marital state. The alienation of it may be underpinned within the regulatory framework of the *matrimonial property Act* or still remain as separate private property in the name of the 5th Defendant/Respondent.

68. One of the cardinal predominant issue is whether this High Court has duly constituted under Article 50(1) and 165 (3) (4) of *the constitution* can exercise jurisdiction to cancel land titles issued to innocent purchasers for value without notice and for this case the Plaintiff/Applicant central issue that no spousal consent was secured by the 5th Defendant/Respondent. I have already made a finding that the Plaintiff has not discharged that claim on spousal consent to the threshold envisaged by the law. The other aspect of this case is that the Plaintiff/Applicant has not shown by way of cogent and credible evidence that this was a matrimonial property. Hence the provisions of Section 26 & 80 of the *Land Registration Act* 2012 which was expressly enacted that a title issued by the Land Registrar can be challenged on grounds of fraud, illegality, or lack of procedure on the part of the Plaintiff/Applicant case remains unproven on the laid down test on the standard and burden of proof on a balance of probabilities. I have already discounted the aspect of spousal consent which is a threshold issue on the part of the Plaintiff's case. This to me looked like an after thought which must have triggered this litigation on the part of the Plaintiff/Applicant.

69. I think in the Courts view the introduction spousal consent to limit Article 40 of *the constitution* was bad law and I am informed that the same is no longer applicable to limit individual spouses to invest their income in acquisition and ownership or both movable and immovable assets in disputably during the existence of the marriage union for it is the most desirable thing to do for resources to be pulled together to jointly acquire property for the full enjoyment for not only the married couples but by their own children. The acquisition of properties of either spouses should not be limited by marriage for their individual capacities vision and mission in life is never extinguished by virtue of getting into a marriage partnership. Indeed I hold a strong view that constitutionally each spouse capacity to acquire and own property locally and internationally commonly referred to as diaspora in CapeTown, Dubai, the United Kingdom, in Tanzania etc is a fundamental right enshrined both in the Bill of Rights as construed with Article 40 of *the constitution* 2010. It therefore follows, that with that right each of them will have the legal capacity to make a decision to validly dispose off the same property by way of sale without the anxiety that if there are subsisting marriage differences of philosophy on the purpose driven life this freedom will not be curtailed by the other spouse. This court takes judicia notice that disputes abound on resolution of marriages impacted by profound differences of opinion in which courts have dissolved the unions often focusing on the concept of irretrievable breakdown, where the difference between couples are so deep seated that the marriage is reduced to shell with no hope of reconciliation. There are many couples across the Republic of Kenya who cohabit and stay together despite such differences resulting in mental anguish and lack of real-life happiness. I pause the question if either of the spouses is in need of disposing any of the Assets acquired individually with his own financial investment for a particular necessity use or recapitalization and under the canon of holding the property in trust for the other spouse can he or she be able to secure the spousal consent? The answer in my view is in the negative and that expected sale would be in limbo

70. It is said that marriages are made in heaven and celebrated on the planet earth but this maxim as much as it is true to the greatest extent that special bond founded in love sometimes dries up and the marriage

status of one man and woman united in law for life breaks down irretrievably due to irreconcilable differences. It has been said that the relationship viruses which attack a happy marriage to break a legal union between two people who solemnly swore they shall cherish the relationship until death sets them asunder include: lack of trust, mutual respect, communication, love and mis-understanding and the strong effects of it is permanent separation or divorce. From the above analysis I concur with the maxim that a spousal consent initially cherished by the legal system of this country on safeguarding rights in the regime matrimonial property is a double edged sword and if it has been removed from our statutes the better for the protection and fundamental rights of each spouse to a marriage union to exploit the fundamental rights and freedoms on appreciation and ownership of the right to property under Article 40 of *the constitution*.

71. Generally, there is a presumption in law as guided by the principles in the following authorities of Mugo Muriu Investments Limited v EWB and 2 others (2017) eKLR, Gissing v Gissing (1970) 2 ALL E.R 780, (1971) AC 886, Falcona v Falcona (1970) 3 ALL E.R .449, (1970) 1 WLR 1333 and Hazel v HAZEL 1 ALL ER 923, that the title to the suit land though registered in the name of the 5th Defendant/ Respondent his wife retained lien of trust by virtue of the marriage. There are other factors as discussed elsewhere in this judgement which render that general principle not applicable to the facts of this case. I bear in mind the best this court was being asked to do was to issue declarations with specifics on this suit land which was sold of by the 5th Defendant /Respondent to the purchasers being the 1st and the 4th Defendants/Respondents. What is intriguing with that remedy? This court has not been told if indeed the Plaintiff/Applicant has approached this court with clean hands what happens to the inventory of other Assets both movable and immovable which may fall within the definition of matrimonial property either only jointly or registered individually. This split litigation of the Assets renders the claim suspicious for the court to grant the remedy of cancelation of the sale notwithstanding there is a questionable discourse whether this court would be clothed to the necessary jurisdiction to determine the fraud or mis-representation of facts or non-disclosure of material around the generic concept on spousal consent. In my appreciation of the evidence this was a commercial sale of land between the 5th Defendant/Respondent and the 1st to the 4th Defendant/Respondent which this matrimonial court has not found cogent and credible evidence to render it null and void. The only connecting factor is that besides the 5th Defendant/Respondent they happen to be a spouse who is the Plaintiff/Applicant crying foul that the purchase and sale as initiated and concluded by the 5th Defendant/Respondent was not above board for reason of being tainted for non-spousal consent. This court deals with the net-estate under the *Matrimonial Property Act* 2013 and any Assets which have already been secured by a bank in a mortgagee and mortgagor contract cannot be litigated by this court, that to me also applies to the movable and immovable assets which have since been sold off and they are in the hands of the 3rd parties who do not fall within the adjudication of disputes of this Act. It is for the Plaintiff/Applicant therefore to go to the drawing board to establish which is the forum of conveniens to hear and determine her grievances.

72. In our legal system and elsewhere in the continent there is so much emphasis by the various courts that the threshold issue of contribution which may be direct and monetary or indirect non-monetary must be met by any Applicant or spouse seeking a share of the property which to the best of her knowledge or his knowledge ought to be classified as matrimonial property capable of being shared out when time is ripe for either of them to liquidate the union including placing it under receivership for their may be debt to be paid incurred during the subsistence of the marriage. The Court in Uganda in the case of Katurami v Katurami 2019 UGHCLD 55 in which the Judge acknowledged the principles in the Kenya case of PNN v ZWN 2014 eKLR by laying down the following key guidelines when it comes to

exercising discretion, in the Division of Matrimonial Assets as underpinned in the statute and Article 45 (3) of *the Constitution*.

> " The learned Justice observed that all that *the constitution* declares is that marriage is a partnership of equal. 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 rider roughshod over the rights of the other. One is not to be a mere appendage cowered into silent by the sheer might of the other flowing inly from that others 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 anu) shall be born, to where the family shall reside or invest-all the way to who shall have custody of children and who shall keep what is the unfortunate event of marital breakdown, the parties are well in the eye of the law.
>
> Does this marital equality recognized in constitution mean that matrimonial property should be divided equally just like that learned judge. I do not think so. The learned judge took the view that 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 of 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 proprietary entitlement. The reality remains that when the ship or marriage hits the rock flounders and sinks, the sad awful business of division and distribution for matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 matra. 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 contested object of love ambitious or desire into two equal parts. The learned Judge further relied on the case of Francis Njoroge v Viginia Wanjiku Njoroge where it was observed that: " a division of the property must be decided after weighing the particular circumstances of each case. As was stated by the court of Appeal of Singapore in Lock Yeng Fun v Chua Hock Chye (2007) Sga 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

73. Given the series of decisions made by various courts on the disputes which arise under the *Matrimonial Property Act* prima facie legal opinion is divided as whether the law in this branch of litigation can be settle to be settled which to me was the case of Rono v Rono as well as Kivuitu v Kivuitu pronouncements by the Court of Appeal. Having been part of that college what we are required to recite here is whether the evolving fabric of our society requires a convergence based on our constitutional architecture to undergo un incremental change to confront this question squarely for spouses in a marriage union to bite the bullet and classify with precision what constitutes matrimonial property drawing inspiration from the letter and spirit of the *matrimonial property Act* as the underpinning of the common law as domesticated in the Act does occasion some confusion and prejudice as between spouses. The Kenyan legal system has emphasized the importance of marriage and nuclear family as an important institution of our society which gives rise to duties, covenants, and legal obligations within the cluster of Human Rights. In a family unit the existence of children gives even more greater responsibilities and obligations upon the spouses to ensure that the stipulated rights

under Article 53 of *the constitution* the various provisions provided for in the Children's Act within the prism of the doctrine of welfare and the best interest of the child is protected and guaranteed.

74. I bear in mind that during the trial of this case, the Plaintiff/Applicant and the 5th Defendant/ Respondent focused more on what is in for each one of them but there was never a mention about the nuclear family. Understandably, there was a predominant refrain on the part of the drafters of the marriage property Act 2013 to give an echo of silence to the children of the marriage when time has come for their parents to occasion division of matrimonial assets. That ambiguity is left to the Judiciary to answer the question who bears the greatest responsibility of maintenance and sustenance of the welfare and the best interest of the children when there mother and father are sharing the remnants of the estate upon divorce or during the declarations as the instant case seems to suggest that the court exercised such discretion to that effect.

75. The perspective I hold on this matter is a kin to the persuasive principles in the case of Hyundai Motor Distributors (Pty) Limited v Smit No (2000) ZACC 12 2001 which states: " it is the duty of a judicial officer to interpret legislation in conformity with *the Constitution* so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with *the Constitution* Such an interpretation should not, however, be unduly strained."

76. The distinction on marital estate distribution as between married spouses to a marriage blessed with children and those largely not so lucky to have children during their lifetime of their marriage in the larger context of the rights and obligations uniquely attached to the marriage. I say so because there are wide range of legal privileges and obligations that are triggered by non-monetary contribution in a marriage union where there is a nuclear family of children and the one though valid within the *marriage Act* but have no children to call their own or adopted as per the law established. Sometimes it is difficult to interpret and construe precisely and further contra-distinguish the weight to be accorded on non-monetary contribution on the elements of companionship, child bearing and care, home-making, in a family contract of marriage where there are children within the consanguinity and affinity in the first degree of that union and on the other hand there are neither biological or adopted children. I think this is the legal controversy on the reciprocal duty of support for monetary contribution as weighted with non-monetary contribution in the acquisition and ownership of the marital estate. It is not unfair to make a distinction between married couples with children and on the other hand those couples in the context of the *Matrimonial Property Act* provisions with those who have not been so blessed with children. However, it should be remembered that no imposition of stigma should be applied to trigger any elements of discrimination based on this status. This is not to say that the dignity of a spouse not blessed with the a child or children is worthless than that of another spouse who is married but with children.

77. It is inappropriate in my view to condense the forces underline the adoption of one type of family unit over another into a simple dichotomy between those who have with those with no children during the subsistence of their marriage. The family unit both customarily and in law means different things to different people but for purposes of the division of matrimonial assets is equally a valid and worthy of concern as the court is expected to delve into the issues involving the Human Rights of children under the age of 18 years as contemplated in the children's Act.

78. In the various legal mythology as enacted under the *Matrimonial Property Act* by the legislature there is in-fact a choice by either of the spouses to elect what indeed constitutes Matrimonial Property

and the category which should be individually owned given our foundational constitutional value of freedom. This value of respecting independence and autonomy in creation of wealth notwithstanding the institution of marriage means giving legal effect and credence not only to a decision to marry but for each one of them to make informed choices about alternative lifestyles on ownership of the marital estate.

79. It is necessary in order to obtain compliance with the ethos of *the constitution* to radically alter the little interpretation of the statute that either of the assets registered in the name of one of the spouses is automatically being held in trust for the beneficial interests of the other spouse even though no traces of non-monetary and monetary contribution can tangibly be found to be admissible in evidence under Section 107(1), 108 & 109 of the *Evidence Act*. In Article 27 (1) & (4) of *the constitution* everyone is equal before the law and has the right to equal protection and benefit of the law. This means equality includes the full and equal enjoyment of all rights and freedoms not excluding the right to property under Article 40 of *the constitution*. Yes I agree with the legal philosophy that in certain instances some rights and obligations should attach exclusively to the marriage relationship or union but this scope is not a license or impediment to the individual couples to acquire and own property individually and have the same disposed for other capital development projects without the sting of spousal consent.

80. As I have said elsewhere in this Judgement marriage and family are the most important social institutions in any society under the planet earth but the many disputes on divorce, separation, division of matrimonial assets, even within the lifecycle of the relationship whose ink which signed the marriage certificate by the Bishop of a congregation or Registrar of Marriages dries up. I am inspired by the words in the case of Volks v Robinson (2005) ZACC 2,2009 JDR 1018.

> " Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well. The institution of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear in important role in the raring of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part of the fact that marriage is celebrated generally in a public ceremony, often before family and close friends. The importance of the family unit for society is recognized in the international human rights instruments referred to above when they state that the family is the ' natural' and fundamental unit of our society.

81. As I associate myself with this dicta one wonders at what stage does the controversy on the distribution of the matrimonial property tear this institution apart and the loving sense of duty evaporates into the atmosphere and every mind and soul see nothing else but to liquidate the marital estate by sharing it without even the decency that offspring brought forth deserve some sense of justice as to what portion is being curved out or set aside for the protection of their Human rights under the cover of the right to life as expressly stated in Article 26 of *the constitution*.

82. From a constitution point of view, the inquiry on limitation of acquisition and ownership of property rights which accrue from the marriage union and on termination by divorce or for that matter by death of any of the spouses that division of assets as to the joint or individual ownership in my view ought to be guided by the provisions of Article 24 of *the constitution*. Thus " (1) A right or fundamental freedom in the Bill of rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including: (a) the nature of the right or fundamental freedom (b) the of the purpose of the limitation, (c) the nature and extent of the limitation, (d) the need to ensure that the enjoyment of right and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others, and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

83. In this matrimonial discourse from a definitional point of view sometimes there is confusion between what constitutes matrimonial property both movable and immovables and the exacting definition of a matrimonial home. From my perspective there is a differentia minimum and differentia maximum between the characteristics of matrimonial property with the very common concept usually referred to as matrimonial home. Surely, a matrimonial home should be given special status when matrimonial property constituting the net estate is subject to the division by either of the spouses. There is an heritage and family roots associated with the matrimonial home. It is therefore on this grounds I hold the view that equal division of the home should be departed from only in exceptional circumstances which may include but not limited in answering the question as when that matrimonial home was brought into existence and by which spouse. It is then at that juncture that the discretion of the court can be exercised looking at the various parameters like the value of the home at the date of the marriage, the improvements done during the marriage and any encumbrances on it. This issue sometimes on the matrimonial home is very contentious and its time the same is defined as the residence for the spouses and regarded as their last place of cohabitation and should include only that portion of the surrounding land that may reasonably be regarded as necessary for the use and enjoyment of the residence.

84. In the scrutiny of the evidence, placed before this court by both the Plaintiff/Applicant and the Respondents more specifically the 5th Defendant/Respondent there is no prima-facie evidence that the suit land fall within the specs of a matrimonial home. There was also no evidence tendered by the Plaintiff/Applicant that there was extravagant or wasteful dealing with the matrimonial property in question by the 5th Defendant/Respondent without her consent requiring the courts intervention for a declaration to order for a division of the property.

85. In a nutshell it should be noted that a conveyance in favor of a bona- fide i.e (without notice of the fact that spousal consent has not been procured or that it is a family home) purchaser for full value is not void. The court is of the view that where a non - owning spouse omits or refuses to consent may if it considers it unreasonable for her or him to withhold consent dispense with such consent. The best of this case from the evidence is that the value of the entire property in question is not quantifiable in terms of value to the so called Kshs six million which may have been a borrowing internally between the Plaintiff/Applicant and the 5th Defendant/Respondent. Clearly it should be stated that any shortfall of the six million allegedly borrowed towards the transactional conveyance of the suit land should be on agreement by both parties a sum of it less the two million pay out the Plaintiff/Applicant be refunded to her as a benefit which accrued for her monetary contribution.

86. For those reasons, having considered the ramifications, of the claim as filed by the Plaintiff/Applicant as against the Defendant/Respondents the following orders shall abound:

a. That a declaration be and is hereby made that the suit as filed and its ancillary reliefs fails to meet the threshold on liability curated as being on a balance of probabilities against the defendant/ Respondents and its therefore good for dismissal for want of merit

b. That the non spousal consent which was the mainstay of the claim was also unproven given the rebuttal evidence which emerged from the Defendants/Respondents that the Plaintiff/ Applicant all along was never kept in the dark in the seller purchase agreement touching on the suit property REF: LR NO 8638/26 South East Of Eldoret Municipality/uasin Gishu District.

c. That a declaration be and is hereby made that acquisition and ownership of property is a constitutional imperative under the rights and fundamental freedoms on rights on property as prescribed under Article 40 of *the constitution* and each spouse who has the financial resources has a right to acquire property in his or her individual capacity which indeed is a fundamental right which cannot be limited by an act of a Marital Union.

d. That a declaration be and is hereby made that the right of a wife or husband to acquire and own both movable and immovable assets individually or jointly cannot be limited by the right to marry and form a family within our societal values and constitutional dictate under Article 45 of *the constitution*.

e. That a declaration be and is hereby made that although the marital property is defined by the statute as property acquired during the marriage nothing disbars the spouses in a joint effort to invest in both jointly or commonly owned Assets which then shall be the subject of the *matrimonial property Act* upon the irretrievably breakdown of the marriage.

f. That in view of the litigation chaos and the *matrimonial property Act* a declaration be and is hereby made that it is time the couples with an intention to marry and those already in a marriage partnership to take advantage of the law by inking Pre-Nuptial and Post-Marriage Nuptial agreements specifically tailored on this elephant in the room defined as matrimonial property.

g. That a declaration is made given our jurisprudential development that a court should have a discretion to depart from equal division of matrimonial property where there has been a willful and nearly total refusal for a spouse to contribute to the marriage unless in circumstances where is a reasonable excuse of compelling reasons for the absence of contribution.

h. That a declaration is made that nuptial and pre-nuptial agreements are enforceable in Kenya and capable of variation under the existing statute law by our courts within that statutory criteria.

i. The costs of this matrimonial cause be shared equally by each of the parties to this litigation.

GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT THIS 2ND DAY OF MARCH 2026.

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R. NYAKUNDI

JUDGE