



**EWM v MOM; ANM & another (Interested Parties) (Civil Appeal 261 of 2019) [2022] KECA 796 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KECA 796 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 261 OF 2019  
HM OKWENGU, MSA MAKHANDIA & S OLE KANTAI, JJA  
JUNE 24, 2022**

**BETWEEN**

**EWM ..... APPELLANT**

**AND**

**MOM ..... RESPONDENT**

**AND**

**ANM ..... INTERESTED PARTY**

**JTM ..... INTERESTED PARTY**

*(An appeal against the Judgment of the High Court of Kenya at Nairobi (R. Nyakundi, J.) dated 16th October, 2018 in H.C.C.C. No. 1 of 2017(OS))*

**JUDGMENT**

1. This appeal relates to the division of matrimonial properties under Article 45 (3) of *the Constitution* of Kenya and Sections 17 & 18 of the *Matrimonial Property Act*. The appellant and the respondent were married on the 7<sup>th</sup> September 1964 in Kiambu County and later relocated to Rombo in Loitoktok Sub-County of Kajiado County. The marriage was blessed with nine children who are all adults now.
2. Their marriage was however turbulent resulting in divorce on 8<sup>th</sup> February 2017. Thereafter the appellant took out originating summons seeking division of matrimonial property. The appellant's case was that at the time of their marriage, they did not have any property and they stayed with the respondent's mother at Illasit at Loitoktok. That they later moved to Rombo in Loitoktok in 1970 where they were allocated 50 acres of land by the local Maasai community on which they set-up their first home. The land is known as Loitoktok/Rombo xxxx and after settling and putting up their first house she started farming on the land by growing maize and beans from which she claims to have generated income whilst the respondent worked in his brother's shop at Rombo. She thereafter started



a Maasai beads shop in 1974 after raising capital from farming and the proceeds therefrom enabled them to buy their first cow and later were gifted one goat by one, Mzee Ole Ngape-deceased, and which livestock had now increased with years to 1,500 heads of cattle and 1,000 goats and sheep. Further in 1979, both parties started a hide and beer businesses which enabled them to purchase their first motor vehicle, KVV xxxx and later a Land Rover KVG xxxx through a bank loan. When the latter motor vehicle was attached due to default in re-payment of the bank loan, she personally paid Kshs. 90,000 from her personal savings at Posta Savings to redeem it. It was her evidence that during the subsistence of their marriage she had contributed to the acquisition of the properties through the proceeds from their business. Consequently, they were able to buy Lorries and plots which they developed under her sole supervision. The appellant listed the following properties as those which were acquired during the subsistence of their marriage and to which she had direct or indirect contribution.

- i. Loitoktok/Rombo xxxx,
- ii. Loitoktok/Rombo xxxx,
- iii. Plot No. xxxx Ngei II, Nairobi,
- iv. Plot No. xxxx Ngei II, Nairobi,
- v. Plot No. xxxx, Loitoktok,
- vi. L.R. No.xxxx Fedha Estate, Nairobi,
- vii. Title Number L.R. xxxx South C (Nairobi),
- viii. Loitoktok Township No. xxxx,
- ix. Loitoktok Township No.xxxx,
- x. Loitoktok/Rombo xxxx,
- xi. Loitoktok/Olkaria/xxxx,
- xii. Plot No. xxxx New Roysambu (Housing Company Limited),
- xiii. Plot No.xxxx Rombo,
- xiv. Plot No. xxxx Illasit,
- xv. Plot No. xxxx Rombo,
- xvi. Plot No. xxxx Rombo,
- xvii. Motor Vehicle Registration No. KXP xxxx,
- xviii. Motor Vehicle Registration No. KCE xxxx,
- xix. Motor Vehicle Registration No. KUG xxxx,
- xx. Plot No. xxxx Rombo,
- xxi. Plot No.xxxx Entarara,
- xxii. Plot No. xxxx Kimana,
- xxiii. Plot No. xxxx Of Isinet,
- xxiv. Plot No. xxxx Business Rombo,
- xxv. Plot No. xxxx Business Olpopongi,
- xxvi. Plot No. xxxx Business Olpopongi,



xxvii. Plot No. xxxx Business Rombo,  
xxviii. Plot No. xxxx Business Emwemwenyi,  
xxix. Motor Vehicle Registration No. KAD xxxxh,  
xxx. Motor Vehicle Registration No. KAS xxxx,  
xxxi. LR. xxxx Tassia II,  
xxxii. 1500 Cows and 1000 Goats/Sheep

3. Since she had contributed towards the acquisition of the property, it was only proper that the same be shared equally between her and the respondent.

4. In response, the respondent filed a replying affidavit in which he deposed that the following properties did not belong to him.

Plot Number xxxx, Ngei II,  
Nairobi Plot Number xxxx,  
Ngei II, Nairobi Plot Number xxxx,  
Loitokitok Land reference No. xxxx,  
Fedha Estate, Nairobi Land reference No. xxxx,  
South C, Nairobi  
Loitokitok Township No. xxxx Plot No. xxxx,  
new Roysambu (Housing Co. limited)  
Motor vehicle No. KXP xxxx  
Vehicle KAD xxxx

5. That equally he had no allotment letters or lease to the following properties:

- i. Plot No. xxxx Rombo
- ii. Plot No. xxxx Illasit
- iii. Plot No. xxxx Rombo
- iv. Plot No. xxxx Rombo
- v. Plot No. xxxx Entarara
- vi. Plot No. xxxx Kimana
- vii. Plot No. xxxx, Isinet
- viii. Plot No. xxxx, Rombo (business)
- ix. Plot No. xxxx, business Olpopangi
- x. Plot No. xxxx, business olpopangi
- xi. Plot No. xxxx business Rombo
- xii. Plot No. xxxx business Emwemwenyi



6. And thus, it could not be said that they belonged to him. The respondent further deposed that plot Loitokitok township No. xxxx had been sold to 2<sup>nd</sup> interested party while Motor Vehicle No. KCE xxxx was jointly owned by Rehan Trading Company and himself and had an outstanding loan of Kshs. 1,254,000. That nonetheless the properties he owned were the following:
  - a. Land reference Number Loitokitok/Rombo xxxx
  - b. Land reference Number Loitokitok/Rombo xxxx
  - c. Land reference Number Loitokitok/Rombo xxxx
  - d. Land reference Number Loitokitok/Olkaria/xxxx
  - e. Plot No. xxxx Rombo
  - f. Motor vehicle registration no. KUG xxxx
  - g. Motor vehicle registration number KAS xxxx.
7. That land reference number xxxx does not belong to him since it is to be registered in the name of the son of the 1<sup>st</sup> interested party since he had already gifted the sons of the appellant Property worth millions.
8. On livestock, the respondent deposed that he had 200 cows and 100 goats respectively as the others had died due to drought. That the appellant had filed Nairobi Civil Suit Number 24 of 2001 (O.S.) claiming division of matrimonial property which had not been heard and determined and yet again she had filed the suit before the trial court which act amounted to an abuse of the process of court. He further deposed that the 1<sup>st</sup> interested party had similarly filed civil suit number No. 38 of 2006 claiming division of matrimonial property and if both were to succeed he will be rendered destitute. That the appellant had properties she inherited from her mother which she had not disclosed and that she had not in any way contributed to the properties listed in the court papers. As a parting shot the respondent deposed that the appellant had been in and out of the matrimonial home several times totaling a period of a nine years and could not therefore lay a claim over properties acquired during the period of desertion nor can she claim that she accorded him companionship so as to entitle her to a share of such property on account of non-monetary contribution.
9. At the hearing of the suit, the appellant in her testimony merely reiterated and expounded on the contents of her supporting affidavit. Suffice to add that though she had filed a suit alluded to by the respondent in his replying affidavit, she had since withdrawn the same as she was desirous of reconciliation. She insisted that the livestock they owned was not over 1500. That they had stayed separately for 20 years as at the time she was testifying and that although the motor vehicle KVG was purchased in 2015, she equally laid claim on the same. That she knew that the 1<sup>st</sup> interested party was her co-wife but she did not know the properties she owned with the respondent.
10. The respondent testified that he had done an inventory of what belonged to him and what did not and the court should go by it. That the appellant had a tendency of deserting their matrimonial home for a long period of time and that he acquired some of the properties, during her desertion spells. Thus the appellant could not claim a share of such properties. That during such desertion she never provided companionship to the respondent so as to entitle her to a share of the properties on account of non-monetary contribution. That he had already distributed the properties to his children although he retained the titles. That some of the properties were allocated to him by the community as a custom and therefore the appellant cannot claim a share of the same as none of the parties contributed towards their acquisition. That the 2<sup>nd</sup> interested party, was his brother to whom he had sold land parcel Loitokitok xxxx and was not therefore part of the matrimonial property. Finally, the respondent stated that the



figures of livestock given by the appellant were imaginary as most of them had died in her absence and others were utilized towards payment of dowry of their sons.

11. The 2<sup>nd</sup> interested party John, testified that he was the younger brother of the respondent and that he had purchased Parcel No. Loitokitok xxxx from him and although the appellant had placed a caution on the said property, it was later withdrawn. That the appellant was at all times a house wife and never a business lady at all. Therefore, she never contributed to the acquisition of the properties she now claims a share of.
12. After considering the pleadings, oral evidence, submissions and authorities cited before him, the trial court (Nyakundi, J.) delivered its judgment and distributed the matrimonial properties as below:-
13. Properties allocated to the respondent
  - a. Title No. Loitokitok/Rombo xxxx
  - b. Title No. Loitokitok/Olkaria/xxxx
  - c. Motor vehicle registration No. KUG xxxx
  - d. Plot No. xxxx Rombo
  - e. Nairobi/Block xxxx Fedha estate
  - f. Plot No. xxxx, loitokitok
  - g. Plot No xxxx New Roysambu housing company limited
  - h. Loitokitok township No. xxxx
  - i. Plot No. xxxx Rombo
  - j. Plot No. xxxx Illasit
  - k. Plot No. xxxx Kimana
  - l. Plot No. xxxx Rombo Properties allocated to the appellant
    - (a) Title No. Loitokitok/Rombo xxxx
    - (b) Title No. Loitokitok/Rombo xxxx
    - (c) Plot No. xxxx Rombo
    - (d) Plot No. xxxx Entarara
    - (e) Motor vehicle Registration No. KAS xxxx
14. The 200 cows and 100 goats and sheep were to be shared equally between the respondent and the appellant.
15. The appellant was not satisfied with the decision and therefore approached this court on appeal with ten grounds which are, that the trial court erred in law and fact in failing to give due weight to the evidence to the effect that all the properties in question were acquired during the subsistence of the marriage; giving undue weight to the appellant's testimony while correspondingly not giving due weight to the testimony of the respondent; holding that the livestock be shared between parties equally and not the other properties; awarding the respondent the bulk of the matrimonial properties; distributing the matrimonial properties without determining each party's contribution based on the evidence on record; allocating all the residential properties to the respondent leaving the appellant without any shelter; allocating the property known as Title Number Loitokitok/Rombo xxxx to the respondent that has been the only residential home of the appellant since 1970; holding that the



- property known as Loitoktok Township/xxxx claimed by the 2<sup>nd</sup> interested party was not part of matrimonial property; and lastly, that the judgment and findings of the trial court were against the weight of the evidence on record.
16. Parties filed written submissions in support of their respective positions. The appellant submitted that the trial court erred in failing to give due weight to the evidence on record that showed that all the properties were acquired during the subsistence of the marriage between the parties which evidence was not controverted by the respondent at all.
  17. The appellant further submitted that the trial court erred by failing to apportion the property on the basis of 50:50 share despite the evidence on record that the appellant was a farmer and a business woman and that, even in his own evidence in the divorce cause, the respondent had admitted to the appellant owning a hotel which had been described as huge and making Kshs. 100,000/=per month. That by allowing the 50:50 sharing of the livestock, the trial court acknowledged the equal contribution by the appellant towards the acquisition of the matrimonial properties and therefore the other properties ought to have been shared in the same ratio.
  18. It was submitted that the trial court gave more weight to the evidence of the respondent than that of the appellant; a case in point being on the issue of livestock to wit that, whilst the appellant estimated the same to be 1500, the respondent estimated them to be 300 and the trial court even while granting a 50:50% distribution of the same, used the figures given by the respondent which was prejudicial to the appellant. That most of the properties were allocated to the respondent by the County Council of Kajiado and were not bought by the respondent as he claimed. The appellant further submitted that the trial court erred in apportioning all the residential properties to the respondent thus leaving her homeless and in particular the residential home comprised in Loitoktok/Rombo xxxx.
  19. It was the submission of the appellant that the trial court erred when it made a finding that the property Loitoktok Township/38 which had been claimed by the 2<sup>nd</sup> interested party was not part and parcel of matrimonial property but failed to give weight to the evidence by the appellant that the said property had been transferred to the 2<sup>nd</sup> interested party with the sole aim of defeating her claim. The appellant thus submitted that as per Article 45(3) of *the Constitution*, parties to a marriage were entitled to an equal share of properties acquired at the time of marriage, during and at the dissolution of the marriage. She relied on cases of *PNN VS. ZWN & Nderitu Vs. Nderitu* Civil Appeal No. 203 of 1997 and *Muthembwa Vs. Muthembwa* Civil Appeal No. 74 of 2021 to buttress her case and asked the Court to allow the appeal and set aside the judgment of the High Court.
  20. On his part, the respondent submitted that the appellant filed a similar suit being Civil Suit No. 24 of 2001. The respondent was thus being tried twice over the same issue and the trial court ought to have dismissed the suit on that ground alone.
  21. The respondent further submitted that though the appellant listed a total of 23 properties and assets as being held by the respondent on her behalf, he was only aware of eight. The appellant did not provide any evidence to support her claim that the properties were indeed registered in the name of the respondent and even when some documents were produced, the same were not authentic as it could not be ascertained as to how the appellant had obtained them. Further and in any event, the documents did not prove that the properties belonged to the respondent. That according to the appellant's own documents, properties Plot No. xxxx Rombo, Plot No. xxxx Kimama T.C., Plot No. xxxx Business Illasit and Plot No. xxxx Business Oloolopon belonged to different persons and not the respondent and the claim that they had been so transferred so as to defeat her suit was not supported by evidence.



22. As regards Loitoktok/Rombo xxxx and Loitoktok/Olkaria/xxxx, it was the respondent's submission that the properties had been given to him by his Nkidongi clan as a son under the local Maasai community custom and the same belonged to him solely and not the family, hence it did not fall for sharing as it is supposed to be passed from one generation to another. On livestock, the respondent submitted that it's only him who knew the exact number of the livestock as the appellant had been away for over 20 years, some of livestock had died as a result of drought whereas others had been utilized towards payment of dowry for their sons. The respondent agreed that the Matrimonial Property Act 2013 classify contribution as either monetary or non-monetary. That their marriage was always on thorns, and that the appellant had deserted the matrimonial home three times lasting 6 years, 2 years and a year respectfully all totaling to 9 years. That in the process the appellant engaged herself in extra-marital affairs. That the appellant would have registered assets in her name if she was an entrepreneur as she claims and further, she had several properties inherited from her mother which she had sold without sharing the proceeds thereof with the respondent. That despite the respondent setting up a business for the appellant on plot No. xxxx Rombo, the appellant had contributed nothing to the upkeep of the family. That all properties of the respondent had been acquired through loans and hire purchase agreements. The respondent submitted that there was no dispute as to the 1<sup>st</sup> interested party, being his 2<sup>nd</sup> wife. The respondent relied on Section 17 of the Matrimonial Property Act 2013 to buttress the fact that the 2<sup>nd</sup> wife was entitled to a portion of the properties as she had contributed to the acquisition and development of some of them.
23. As to whether the properties should be shared equally it was the respondent's submission that under Section 7 of the Matrimonial Property Act, 2013, entitlement to matrimonial properties was dependent on spousal contribution. That by the fact that the respondent was polygamous, all the properties he had acquired were subject to Section 8 of the Act as the 1<sup>st</sup> interested party had played a key role towards their acquisition when the appellant deserted the matrimonial home.
24. That Loitoktok/Rombo xxxx had already been sub-divided and given to their sons who had established their homesteads.
25. With regard to whether the 2<sup>nd</sup> interested party had any claim to Loitokitok/Township/38, the respondent submitted that the property had been bought by him who had developed the same from 2001 and thus it cannot be said that the same belongs to the respondent.
26. The respondent concluded his submissions by citing the case of PNN Vs. ZWN [2017] eKLR to buttress the point that the Matrimonial Property Act 2013 does not envisage a case of 50:50 share of matrimonial property in all cases upon the dissolution of marriage. The appellant having failed to prove that she had contributed towards the acquisition of the properties by way of monetary or non-monetary contribution, the appeal should be dismissed.
27. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties also filed their submissions. It was their case that both parties having agreed to the 1<sup>st</sup> interested party not testifying, the appellant cannot go back on her word and be seen to question the 1<sup>st</sup> interested party interest in the matter given that there was no dispute as to whether she was the wife to the respondent or not. As such, the 1<sup>st</sup> interested party was entitled to a share of the matrimonial properties. The 2<sup>nd</sup> interested party, submitted further that he had bought the property known as Loitoktok/Township/xxxx for a consideration from the respondent and exhibited in court documents to that effect. Thus the claim by the respondent over the same was accordingly extinguished. As a result, the appellant had no claim over the said property and cannot therefore form part of the matrimonial property. They all prayed that the appeal be dismissed.



28. This is a first appeal from the decision of the High Court in the first instance and Rule 29 of the Court of Appeal Rules requires that we re-appraise the evidence and draw our own inferences of fact and law. That mandate has indeed received several judicial pronouncements and the most cited case is of course *Selle & Another Vs. Associated\* Motor Boat Company Limited & Another* {1968} E A 123 where this Court stated.

...An Appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

29. We have anxiously considered the record, the grounds of appeal and the submissions by rival parties and we surmise that the following issues fall for our determination whether the properties listed by the appellant in the originating summons formed part of matrimonial properties; the appellant was entitled to a share and the ratio thereof and lastly whether the judgment of the trial court should be disturbed on account of having gone against the weight of evidence.

30. As to the first issue, the appellant listed the properties detailed elsewhere in this judgment as matrimonial property which she desired the court to share between herself and the respondent. The appellant stated that the said properties were acquired during the subsistence of their marriage. On the other hand, the respondent stated that not all the properties listed by the appellant as aforesaid were matrimonial properties. He pointed out the properties he deemed to be matrimonial properties as set out elsewhere in this judgment.

31. The question is what amounts to matrimonial property. This question is now well settled as under Section 6(1) of the *Matrimonial Property Act*, matrimonial property is defined to include matrimonial home or homes, household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned or acquired during the subsistence of the marriage.

32. We start with whether Title No. Loitoktok/Rombo xxxx and Title No. Loitoktok/Olkaria/xxxx are part of the matrimonial property. It was the respondent’s case that the same were given to him as an inheritance from his Maasai clan, Nkidongi. It is a norm of his community that sons are given land by the community. Thus it cannot be deemed as matrimonial property. According to the custom, he too will have to pass over the parcel of land to his sons which according to him he had already done. But according to the appellant, those parcels of land were acquired during the coverture and were therefore matrimonial properties.

33. In *Julius Rwabinumi Vs. Babimbisomwe* SCCA No. 10 of 2009, the Supreme Court of Uganda stated that;-

Matrimonial Property is understood differently by different people. There is always property which the Couple chooses to call home. There may be property which may be acquired separately by each spouse before or after marriage. Then there is property which a husband may hold in trust for the clan. Each of these should in my view be considered differently. The property to which each spouse should be entitled is that property which the parties choose to call home and which they jointly contribute to.”



34. Customary law has a great impact on the lives of majority of Africans especially in the area of personal law and in particular as regards property after divorce. Section 11 (a) & (b) of the *Matrimonial Property Act* 2013 provides for consideration of customary law principles thus:-
- “II. During the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of *the Constitution*, be taken into account including—
- (a) the customary law relating to divorce or dissolution of marriage;
  - (b) the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of *the Constitution*; and
  - (c) the principles relating to access and utilization of ancestral land and the cultural home by a wife or wives or former wife or wives.”
35. The reason given by the respondent for the properties not being included as matrimonial property was that it was communal hence it would move from him to his sons and so forth, and which he had already bequeathed that property to sons. Does this resonate well with part (b) of Section 11 of the *Matrimonial Property Act*? We think the provision is in line with the holding in the Ugandan case of *Rwabinumi* (supra) and it is good law and applicable to this case. Furthermore, matrimonial property is all about spousal contribution be it monetary or non monetary. We do not see how a gift to one spouse on the basis of custom and which he holds in trust for other generations to come be deemed matrimonial property.
36. This is the law as par section 6(2) of the *Matrimonial Property Act*. What would be considered as the contribution of the other spouse? We would accordingly agree with the respondent’s position that, this was community property and therefore not available for distribution as matrimonial property. In our view it is not correct as the appellant has submitted that by so holding, the trial court was biased against her and put a lot of weight on the evidence of the respondent as opposed to hers. Nor can it be said that the trial court proceeded to share the properties without determining each spousal contribution.
37. As regards Plot xxxx; Nairobi/Block xxxx Fedha Estate, Plot No. xxxx Loitokitok; plot No. xxxx Rombo; Plot No. xxxx Illasit; Plot NO. xxxx Entarara; Plot No. xxxx Kimana; Plot No. xxxx Rombo and New Roysambu Housing Company Ltd; the respondent denied ownership but never provided evidence to that effect. The appellant produced documentary evidence showing that the properties were still registered in the name of the respondent. The trial court found that indeed the said properties were in the respondent’s name and the mere denial was not backed-up with any documentary evidence. In the end, the trial court concluded that they were matrimonial properties and rightly so in our view and therefore available for apportionment.
38. There was another issue as to whether the 2<sup>nd</sup> interested party, a brother to the respondent had purchased Loitokitok/Township/xxxx. From the judgment of the trial court, it considered the issue at length, including the facts surrounding the sale and came to the conclusion that indeed there was a sale, necessary consents obtained, documents of transfer executed and though the property was still in the respondent’s name, it was nonetheless no longer matrimonial property. Further the trial court opined that transaction was done in good faith and that there was no evidence that the respondent had disposed it of so as to defeat the appellant’s claim as submitted by the appellant. We have no reason to fault the finding of the trial court.
39. As to whether the appellant should have been given the matrimonial home, we have already dealt with this issue under the issue number one above to the extent that the two properties do not form part of



the matrimonial property as per section 6(2) of the Matrimonial Property Act, we are convinced that by the provisions of Section 11 (b) of the Matrimonial Property Act, the said property ought to be protected for future generations and the community at large.

40. We now turn to consider whether the trial court misdirected itself in the apportionment of the Matrimonial Property. Section 7 of the Matrimonial Property Act Provides that ownership of Matrimonial Property depends on each Spouses' contribution. It specifically provides; -

Subject to Section 6(3) ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or the marriage is otherwise dissolved.”

41. Based on Section 7, above, the key word is contribution. Contribution as per the said Act is defined under Section 2 to mean monetary and non-monetary. The Section provides inter alia;-

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.”

42. Further and in line with (d) above, family business is defined as:- “Family business means any business which

- a) Is run for the benefit of the family by both spouses or either spouse; and
- b) Generates income or other resources wholly of part of which are for the benefit of the family.”

43. There is also a provision for improvement on the property which has been provided for under Section 9 of the Matrimonial Act and it provides; -

“Where one Spouse acquires property before or during the Marriage and the property acquired during the marriage does not become Matrimonial property, the Spouse who makes a contribution acquires a beneficial interest in the property the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”

44. Did the appellant contribute towards the acquisition and development of the matrimonial properties as claimed? Article 45 of the Constitution provides that marriage is a partnership of equals and there is no superior partner over the other.

45. We agree with the interpretation of the same by Justice Kiage, JA in the case of PNN Vs. ZWN 2017 where the judge rendered himself as follows: -

To my mind, all that the Constitution declares is that marriage is a partnership of equals no spouse is superior to the other. In those few words all forms of gender superiority whether taking the form of open or subtle chauvinism, misogyny, violence, exploitation or the like have no place. They restate essentially the equal dignity and right of men and women within the marriage compact. It is not a case of master and servant. One is not to ride rough shod over the rights of the other. One is not to be a mere appendage covered into silence by the



sheer might of the other flowing only from that other's gender. The provision gives equal voice and is meant to idealize the voluntarism of marriage and to hold....

46. Does this marital equality recognized in *the constitution* mean that matrimonial property should be divided equally, I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process is of determining entitlement may lead to a distribution of 50:50 mantra. It is not an issue of mathematics merely as in splitting of an orange in two for.... Thus, it is that *the constitution*, thankfully, does not say equal rights "including" half of the property". And it is no accident that when parliament enacted the *Matrimonial Property Act* 2013, it knew better than to simply declare that property shall be shared on a 50:50 basis rather, if set out in elaborate manner the principle that division of Matrimonial Property between Spouses shall be based on their respective contribution to acquisition."
47. It is clear to us that the *Matrimonial Property Act* of 2013 recognizes and formalizes both the monetary and non-monetary contribution of parties in a marriage. The position is succinctly captured in *NWM Vs. KNM*[2014] eCLR where it was stated that the court must give effect to both monetary and non- monetary contribution that both the appellant and the respondent made during the pendency of marriage to acquire the matrimonial property. From the instant appeal, the appellant stated that from the onset upon marriage, they were gifted a 50-acre parcel of land and it is from that she had farmed and started the business of selling Maasai beads. Later she engaged in the business of selling animal skin/hides and opened a beer shop. It is however not clear from the evidence on record that she applied part of that income towards the acquisition of any of the matrimonial properties, other than mere assertions of the appellant. The trial court found and rightly so in our view, that the appellant's monetary contribution as claimed was not proved on a balance of probability. From the record and our own analysis, we find that indeed the appellant did not and has not proved on the required standard that she made monetary contribution to the acquisition of the properties at all.
48. As regards non-monetary, contribution, the trial court found that the appellant dutifully took care of the family, worked for many years for the family, through her participation in domestic work and management of matrimonial home and taking care of the children as a worthy contribution. Of course the conduct of the appellant during the subsistence of the marriage matters a lot when considering her non- monetary contribution. The evidence by the respondent that she had deserted their matrimonial home intermittently, for a period totaling nearly 9 years was not controverted at all. Indeed, even at the time of filing the suit giving rise to this appeal, the appellant had deserted the respondent for a period in excess of 20 years. Section 7 of Part C of the Act provides for a factor to be considered known as Companionship. Without companionship, a marriage is but a mirage since it is the cornerstone. When one spouse leaves a home intermittently for a period totaling 9 years, can it be said that there was companionship that made the respondent to have peace of mind so as to think of acquiring properties? Perhaps the only time that the respondent enjoyed companionship if at all was when she could come back after desertion. This cannot count for much. Thus her non-monetary contribution was low. The trial court was alive to this fact when it apportioned the property as it did, and cannot therefore be faulted. There was no property registered in the joint names of appellant and the respondent. Indeed, all the properties that were listed were in the name of the respondent. Vide Section 14 of the *Matrimonial Property Act*, there is a rebuttable presumption that where a matrimonial property is acquired during marriage and registered in the name of one spouse, the property is held in trust for the other spouse and if in the names of the spouses jointly there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.



49. In the case of *PWK Vs. JKG [2015] eKLR* the court said:

Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportion of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim equality in equity while needing the caution of Lord Pearson in *Gissing Vs. Gissing [1970] 2 ALL ER. 780 Pg 788*.

50. Her contribution as we have already stated was minimal. This is a factor that was properly considered by the trial court. As stated in *Francis Njoroge Vs. Virginia Wanjiku Njoroge*, Nairobi Civil Appeal No. 179 of 2009 that; -

...a division of the property must be decided after weighing the peculiar circumstances of each case.”

51. It is on this premise that the trial court distributed some properties to the appellant as it did. The trial court was alive to the issues raised in this judgment and even went further to state that the appellant was never with the respondent for over twenty years.

52. Before we conclude, we revert to the issues, whether the appellant had filed two similar suits against the respondent and the division of the livestock. Yes, the appellant initially filed civil suit number 24 of 2001 touching on the same subject matter. However, from the record that suit was subsequently withdrawn on the 28<sup>th</sup> July 2017. That being case, the submission by the respondent that he is being vexed by two similar suits being filed against him is not correct.

53. On the issue of livestock, the trial court was right in basing its decision on the concrete evidence of the respondent as it was clear that the appellant had not seen the livestock for twenty years and the explanation of reduction in the numbers due to drought and others being used to pay for pride-price of their children (sons) was plausible and commending reliance on as against the mere averment by the appellant. Further the mere fact that the trial court ordered that they be shared equally does not mean that the same formula should have applied to the other properties.

54. For all these reasons we find the appeal bereft of merit and dismiss it. This being a family dispute we make no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE, 2022.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**



*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

