



**PMM v WK Ole KN (Civil Case 16 of 2017)
[2024] KEHC 2231 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2231 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL CASE 16 OF 2017
F GIKONYO, J
FEBRUARY 29, 2024**

BETWEEN

PMM PLAINTIFF

AND

WK OLE KN DEFENDANT

JUDGMENT

1. Before this court for determination is the originating summons dated 13/04/2016 and filed in Nairobi on 11/05/2016. The summons is supported by the affidavit of the plaintiff, PMM sworn on 13/04/2016 and further affidavit sworn on 23/06/2019 and filed on 26/06/2019.
2. The plaintiff sought the following orders;
 1. That there be a declaration that all those properties known as;
 - a. Plot No. XXXX Narok Lenana Estate Narok Town
 - b. Ntulele Plot Ntulele Centre Off Mai Mahiu-Narok Road.
 - c. Cis Mara/Olombokishi/XXXX.
 - d. Cis Mara/Ilmashariani Morijo/XXXX.
 - e. Plot MD XXXX, Narok Stadium
 - f. Plot MD XXXX, Narok Stadium

Registered in the name of or otherwise allocated solely to WK Ole KN which were acquired and developed by the joint funds of both the applicant and the respondent during the subsistence of their marriage is matrimonial property.



2. That the properties listed in paragraph (1) above be divided equally and the respective portions be registered in the names of the applicant and the respondent separately and such registration be effected at the relevant registries.
 3. That alternatively to paragraph (2) above; the properties listed at paragraph (1) above should be sold and the applicant and the respondent share equally all the proceeds of those sales.
 4. That the respondent by himself, his agents and or servants, and/or anyone acting under him be permanently restrained from damaging, wasting, alienating, encumbering, or in any way manner disposing of the properties listed in paragraph (1) above.
 5. That the respondent handover to the applicant Bedford truck registered as KBP XXXXX(chassis number XXXX) which whereas registered in the name of the applicant and acquired solely by her is nonetheless in the possession of the respondent.
 6. That the respondent do pay to the applicant the sum of Kenya shillings one million and fifty thousand (Kes. 1,050,000/=) being the value of household goods, furniture, and fittings bought by the applicant solely but which have been retained by the respondent in various houses both in Nairobi and in Narok area and its environs; which items are specifically;
 - a. Household furniture – beds (9), sofa sets (3), dining table and chairs (2 sets), coffee table (3), wall unit (1) bookshelves (2), bedside tables (3).
 - b. Electronic goods- fridges (3), microwave cookers (2), television sets (2), home theatre unit plus speakers (1) DVD players (2);
 - c. Kitchen items -gas cookers (2), gas cylinders (3) assorted cutlery, assorted kitchen and dining items.
 7. That the respondent do pay to the applicant the sum of Kenya shillings two million five hundred and fifty thousand (Kes. 2,550,000/=) being the conservative value of 50% of the retained profits of the farming businesses and other businesses that were jointly undertaken by the applicant and the respondent; with the financial and labour contribution of the applicant; but which retained profits have not been shared by the respondent to the applicant.
 8. That costs of the summons be awarded to the applicant as against the respondent.
3. The suit herein seeks the division of marital property between the plaintiff and the defendant.
 4. The summons was opposed by the defendant vide replying affidavit sworn by the defendant, WK Ole KN sworn on 06/03/2017 and filed on the same date. The defendant also filed two witness statements; the witness statement of Dickson Ole Tontol dated 20/12/2019 and filed on 22/01/2010 and the witness statement of Paul Ngei Mulai dated 20/12/2019 and filed on 22/01/2020.
 5. Both parties led oral evidence in support of their cases. The plaintiff was the sole witness in support of her case while the defendant testified and called two other witnesses in support of his case.

Plaintiff's Case

6. The plaintiff testified as PW1. She relied on her supporting affidavit dated 14/04/2016 and documents annexed thereto as her evidence in chief (P Exh.2 PM1-M6). She also relied on her further affidavit dated 23/06/2019 (P Exh. 2.) She produced a black book in which she was keeping records of all family business in harvesting and selling building stones and sand and lists of all workers and daily repairs as P Exh 3. She worked from Monday to Friday and the defendant would come over during the weekend



- and she would show him the entries in the back book. P Exh 3pm5 according to her are receipts for furniture she bought in the course of the marriage
7. On cross-examination, she testified that she was married on 20/12/1997. She was and is still a high school teacher. The defendant was a farmer. They met in college and the defendant was not employed then.
 8. On the Ntulele/Mahiu property she stated that it was acquired and not bought. The defendant acquired it. She took a loan and built it. The land was not given to the defendant by his clan.
 9. On property no. XXXX, she stated that the defendant did not purchase it. He acquired it before marriage but it was not clan land.
 10. On Narok stadium property, she stated that the defendant gifted her verbally.
 11. On Lenana property XXXX, she stated that she gave him Kshs. 50,000 in 1992 to buy a plot for her. He told her he had a plot and they should build on it. The defendant did not have a job therefore they used her money to construct the matrimonial home. The matrimonial home was constructed between 2003-2007. She stated that Ngei constructed the house. She would give the defendant her ATM card to withdraw money for the construction.
 12. The plaintiff showed the court the pay slip for August 2005 when the matrimonial home was being constructed. The pay slip did not show any loan deductions.
 13. The plaintiff stated that she used to indicate the money from her business and the money from the defendant she used to deliver sand and they would pay her. She would deposit it into her personal account or his account which she was not sure.
 14. The plaintiff stated that she gave the defendant Kshs. 50,000/= to transport his furniture from Kaloleni in Giriama to Narok.
 15. The plaintiff and the defendant bought Bedford lorry KBP XXXX which is in her name. She was not claiming the minibus matatu KAB 442Y.
 16. She is claiming the assorted furniture or the value thereof. She moved out of the Nairobi home while the defendant was away. She bought one bed. She had furniture she brought from Kaloleni which she gave to his sister though that is not what she was claiming.
 17. The plaintiff stated that the only property that the parties purchased was Cis Mara/Ilmashariani Morijo/2617.
 18. In the same area where Cis Mara/Ilmahariani Morijo/XXXX is situated, she is the owner of the plot Cis Mara/Ilmashariani Morijo/XXXX. The plaintiff alleged that there were three plots acquired by the defendant and that he gave his stated one (but unidentified) gifted the plaintiff Cis Mara/Ilmahariani Morijo/XXXX and he retained Cis Mara/Ilmahariani Morijo/XXXX and now wants him to share it with her. Ntulele /Mai Mahiu was not bought. It was acquired by the defendant and he built on it to get entitlement. She conceded that the land belongs to the defendant and that he does not have a title deed to it but allotment letters. The defendant did not buy Cis Mara/Olombokishi/XXXX rather he acquired it before the marriage. The Lenana property plot no. 153 where the matrimonial home was built was allocated to the defendant before marriage.

The defendant's Case

19. The defendant testified as DW1. He adopted his replying affidavit sworn on 06/03/2017 and the annexures thereto as his evidence in chief. He pointed out that the sum of Kshs. 50,000/- the plaintiff



- claimed to have given him in 1998 to purchase for her plot money which she used as transport from her previous school in Kaloleni Narok. The defendant reiterated the evidence of the plaintiff that the store on the Ntulele plot was constructed by the defendant in 1996-before their marriage.
20. The defendant disputed that he bought three plots beyond Cis Mara/Ilmashariani Morijo/XXXX and XXXX. He clarified that it was his sister who got an offer to buy five plots but she could only afford three and asked the defendant to buy plots XXXX and XXXX out of which he gave the plaintiff plot no. XXXX which is still registered in her name.
 21. The defendant averred that he is Maasai of the Ildamat clan by ethnicity and a member of the oloombokishi group ranch. Between 1985 and 1990 he was working as an army officer with the armed forces of Kenya. He joined Kenyatta University where he met the plaintiff while he was still in service of the armed forces.
 22. The defendant averred that his matrimonial home in Narok Lenana estate is constructed on plot no. 156. The defendant testified that the said plot 156 was allotted to him by the county council of Narok sometime in 1991.
 23. The defendant averred that he singlehandedly constructed the matrimonial home on his allotted plot no. XXXX Lenana.
 24. The defendant averred that he is not aware of the existence of plot no. md bk 10, Narok stadium and plot md bk 11 Narok stadium. He however averred that if the plots meant by the plaintiff were plots nos. XXXX HD BK XXXX Narok Stadium and XXXX md bk XXXX Narok Stadium then they both traced from initial allotment to the defendant in February 1991 by the county council of Narok plot no. XXXX block 11 which was later cancelled and the defendant was reallocated and compensated with plots XXXX HD BK XXXX - Narok Stadium and XXXX MD BK XXXX Narok Stadium in 2006. The defendant produced evidence of the initial letter of allotment and the re-allocation and compensation letters.
 25. As for Cis Mara/Olombokishi/XXXX the defendant averred that it was neither bought nor acquired but is simply his ancestral entitlement as a male member of his ildamat clan and a member of the Oloombokishi group ranch. The defendant produced the register of the Oloombokishi group ranch. He is member no. XXXX allotted parcel No. XXXX and the date of membership as 26/10/1971.
 26. As for the plot off Mahi Mahiu Road the defendant averred as conceded by the plaintiff, that this was not bought but acquired by the defendant in 1996 on behalf of his ildamat clan and developed as a buffer of ildamat clan land from annexation by the county council of Narok and other Maasai clans.
 27. As for Cis Mara/Ilmashariani Morijo/XXX, the defendant averred that this was one of the plots that the parties acquired using his salary while he was working at the office of the prime minister between 2008 and 2013 and from proceeds of farming activities. The 'sister plot' is Cis Mara /Ilmashariani Morijo/XXXX which is registered in the name of the plaintiff. The defendant annexed a search certificate exhibiting the registration of the plaintiff as the owner.
 28. As for Bedford truck KPB 970V the defendant averred that he is the one who bought the truck but registered it in the name of the plaintiff when their marriage was blissful. Unlike the plaintiff, the defendant gave detailed evidence of how and from whom he purchased the said truck.
 29. On household items, the defendant averred that contrary to the claims of the plaintiff, it is the plaintiff who left their matrimonial home in Nairobi and carted away all the households including items that the defendant had acquired before their marriage. That the few purported furniture receipts annexed to the affidavit of the plaintiff are all in the name of the defendant.



30. On claim of Kshs. 2,550,000/- alleged 505 profits share from the farming as other businesses, the defendant averred that their farming activities failed due to drought long before the divorce proceedings and that the alleged profits are non-existent and simply imaginary. The plaintiff did not present evidence of any profits made, banked, or transmitted to the defendant let alone the claim of Kshs. 2,550,000/=. Indeed, the few cash deposit slips to the KCB bank account in Narok annexed to her affidavit do not show that the account belonged to the defendant and the withdrawal slips from the plaintiff's Barclays annexed to her affidavit are not accompanied by receipts of what was purchased or simply put they cannot by themselves be evidence of use of the money.
31. The defendant further averred that when farming activities were good the parties purchased two vehicles which they shared mutually vide a written agreement dated 21/01/2015(after decree nisi had been given).
32. Regarding the money appearing in a copy of the bank statement of the defendant for September 2013 annexed to the affidavit of the plaintiff, the defendant averred that the money was his professional earnings as a consultant in the office of the prime minister. It is also instructive that the plaintiff did not point out any cash deposit that she ever made to the bank account of the defendant at a national bank.
33. On the allegation that the defendant was in dire straits between 1997 and 2003 and that he relied on the plaintiff's salary. The defendant averred that on the contrary he was gainfully employed as a farmer and an executive director of an NGO called Maasai Education Discovery (MED) and that he is the one who footed their wedding reception bill in December 1996 at the holiday inn in Westlands and he is the one who frequently assisted the plaintiff and her family with hospital bills of her late father. The plaintiff did not disclose her pay slip and render a breakdown of the expenditure of her salary.
34. DW2-Dickson Ole Tontol adopted his witness statement dated 20/12/2019. The crux of the evidence of DW2 is that he is a fellow member of the Ildamat clan and the Olombokishi group ranch of which the defendant is a member. The group ranch held its annual general meeting on 26/09/1995 and resolved to dissolve and distribute its land Cis Mara/ Oloombokishi/XXX to its members. He tendered into evidence the letter from the Ministry of Lands (DOT 1) dated 06/12/1995 granting consent to dissolve and subdivide the land. DW2 also tendered in evidence the register of parcel allotments to members (DOT2) indicating the defendant's allotment as number 213.
35. DW2 stated that in 1998 he was elected the caretaker secretary of the Oloombokishi group ranch and served until 2001 when the group ranch completed the dissolution and vesting of individual parcels to members. DW2 was also emphatic in his statements that male members of a group ranch became entitled to a share of their land upon birth as an ancestral birthright and further widows and unmarried daughters of the members who had fatherless children were also eligible for membership of a group ranch by right of their deceased husbands and their fathers who were members.
36. DW2 asserted that the defendant became entitled to his share of the land of the group ranch upon birth which was formalized upon his registration in 1995 and actualized upon demarcation of the land in 1998 and vested by the issuance of title deed in the year 2000
37. On cross-examination DW2 reiterated the gist of his statement.
38. The defendant also called DW3 Paul Ngei Mulai as his last witness. DW3 adopted his statement dated 20/12/2019 and filed on 22/01/2020. The gist of the evidence of DW3 is that he was the contractor hired by the defendant to construct his home on Lenana estate plot 156 between 2003 and 2006. (It was common ground that DW3 was the contractor who built the home). In his statement, DW3 stated that he was orally contracted by the defendant for a sum of Kshs. 280,000/= which escalated with works to Kshs. 570,000/=. DW3 also stated that he was aware that during this period the defendant



was working in Nairobi with the Constitutional Review Commission (the Bomas conference) and he would bring materials to him in Narok over the weekend or would travel to Nairobi to pick up the materials from the defendant.

39. DW3 was categorical in his statement that throughout the construction period, it was only the defendant who availed materials to him to his foreman and fundis. DW3 also asserted that throughout the said construction period it is only the defendant who paid him the entire contractual sum of Kshs. 570,000/=
40. DW3 also asserted that throughout the said construction period, it was only the defendant who visited the site mainly on weekends to assess the progress of construction.
41. DW3 was also categorical that although he used to see the plaintiff at the offices of the defendant's organization the Maasai Education Discovery (MED) in Narok town, the plaintiff never visited the construction site of the house, never paid him, and never delivered any construction materials to him.
42. DW3, stated that as a contractor, he would have expected the plaintiff as the wife of the defendant to also come to the site if she had put out her money into the construction but she never visited the site.

The Defendant's Submissions.

43. The defendant submitted that the applicable law in this case is article 45(3) of *the constitution*, sections 2,6,7, 9, and 14 of the *Matrimonial Property Act* nos. 49 of 2013.
44. The defendant submitted that the burden of proof in this case lies on the plaintiff. The defendant relied on section 107 of the *Evidence Act*.

Analysis And Determination.

The marriage, issue and divorce

45. The parties herein were married under the African Christian Marriage and Divorce Act on 20/12/1997 at Kariakor Methodist church in Nairobi. The marriage was consequently dissolved due to the cruelty and adultery of the respondent.
46. The marriage between the parties was blessed with one issue, a girl named SK born on 02/08/2003.
47. They are now divorced. Decree nisi of Chief Magistrate's Court at Milimani Commercial Courts was given on 29/08/2014 and made absolute on 29/02/2015.

Issues

48. From the pleadings and submissions of the parties, the major issues for determination in this cause are: -
 - i. Whether the suit properties are matrimonial property;
 - ii. Whether the Petitioner /Applicant made any contribution in the acquisition or improvement of the matrimonial properties;
 - iii. Division of the matrimonial property?
 - iv. Potency or otherwise of the orders prayed for.



Matrimonial property

49. Matrimonial property in section 6 of the [Matrimonial Property Act](#), includes; _
- “(a) the matrimonial home or homes
 - (b) Household goods and effects in the matrimonial home or houses or
 - (c) Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”
50. The plaintiff contended that the following properties although registered in the name of the defendant were matrimonial properties acquired and developed during the subsistence of the marriage with the joint contribution of the parties. The plaintiff listed the following properties;
- i. Plot No. XXXX Narok, Lenana Estate, Narok Town.
 - ii. Ntulele Plot, Ntulele Centre Off Mai Mahiu-Narok Road.
 - iii. Cis Mara/Olombokishi/XXXX.
 - iv. Cis Mara/Ilmashariani Morijo/XXXX.
 - v. Plot MD BK XXXX, Narok Stadium
 - vi. Plot MD BK XXX, Narok Stadium
51. The Respondent has denied that any of the above properties save for Cis Mara /Ilmashariani Morijo XXXX comprises matrimonial properties, insisting that either he single-handedly contributed towards their acquisition or that he was allocated by his Ildamat clan by virtue of his birthright.
52. The plaintiff prays to be awarded an equal share of the properties acquired during the subsistence of the marriage and to be reimbursed for the monetary and non-monetary development made on the properties that were acquired before the marriage.
53. The defendant submitted that the declaration of matrimonial property sought in prayer 1 of the summons and the alternative prayers 2 and 3 and the injunctive orders sought in prayer 4 cannot be issued with regard to the following properties.
- a. Plot no. 153 narok lenana estate narok town.
 - b. Ntulele plot, ntulele centre off mai mahiu -narok road.
 - c. Cis mara/olombokishi/XXXX.
 - d. Plot md bk XXXX, narok stadium
 - e. Plot md bk XXXX, narok stadium.
54. The defendant relied on the case of JOO v MBO (supra) and Article 45(3) of [the constitution](#).
55. The defendant contends that the following properties are what should be declared matrimonial property in terms of the presumption under section 14 of the MPA.
- a. Cis Mara/Ilmahsariani Morijo/XXXX
 - b. Cis Mara/Ilmashariani Morijo/XXXX



- c. Bedford truck KBP XXXX (chassis number XXXXX)
 - d. Motor vehicle KAV XXXX
 - e. Motor vehicle KBQ XXXX G (Toyota Caldina Salon)
56. Parties have taken quite discordant positions especially on those properties which have not been admitted to constitute matrimonial properties.
57. Under Section 14 of the Matrimonial Properties Act, the law has created two rebuttable presumptions of law in respect of property acquired during marriage as follows:
14. Presumptions as to property acquired during marriage
- 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
58. These presumptions of law serve to protect matrimonial property by creating a trust. Trust form has also been used by law, to deal with any abuse of trust by one of the spouses who is registered as the owner or in total control of the matrimonial property from claiming both control (ownership) and enjoyment (benefit) of the trust property to the exclusion of the other. .
59. See a work of this court in *Jacqueline Chepleting v Joseph Naila & Another Narok HCCC No 3 of 2016(OS) [2024] eKLR* that:
- ‘The protection may take many forms appropriate to the facts of the case. And, where a spouse has demonstrated a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the matrimonial property, a share of the property proportionate to the contribution can be impressed with a constructive trust in his or her favour.’
60. In the same decision it was stated that: -
- ‘...hitherto, it is not uncommon that, matrimonial property in Kenya is either registered or held in the name, or under the full control of the husband. This may be by mutual agreement, or by invocation of some traditional belief. But, it is the kind of holding with real potential for abuse.
- Trust or constructive trust has been used in law to remedy abuses in relation to matrimonial property by one of the spouses in vantage position. See section 7, 8, 9 and 14 of the *Matrimonial Property Act*.
- Abuse of the trust form occurs where the trustee (in this case, the defendant) attempts to have both enjoyment and control of, as if he fully owned the property.
61. The rule of the thumb is: Whoever alleges must prove.
62. Each property shall be dealt with in its individual characterization and relevant evidence thereto.

Plot No. 153 Narok Lenana Estate Narok Town.

63. The plaintiff in an annexure PMM6 schedule of ‘marital property’ on the asset column describes plot no. XXXX Narok as; ‘allocation letter to WKO and on the narrative column states that; ‘at the onset of the marriage in 1997 the plot of land was undeveloped’.



64. The plaintiff conceded that the Lenana property 153 had been allocated to the defendant before their marriage. She later stated that the defendant told her that the county council gave him the plot where the matrimonial home stands.
65. The defendant led evidence of the history of how he was allocated the land through the intervention of the late Hon. Geoffrey Nkaisery well before marriage.
66. The defendant submitted that Plot No. XXXX Narok, Lenana estate Narok town is not a matrimonial property for being an allotment solely to the defendant, and the allocation was made before marriage. The defendant relied on the case of JWC v LKM [2019] eKLR..
67. However, the evidence adduced in court show that this property was developed through the efforts of the plaintiff and the defendant during the subsistence of marriage. It is therefore, a matrimonial property.

Ntulele Plot Ntulele Centre Off Mai Mahiu Narok Road.

68. The plaintiff in an annexure PMM6 schedule of ‘marital property’ on the asset column describes the Ntulele plot as; a ‘group ranch subdivided into individual plots’ and on the narrative column states that; at the onset of the marriage the grain house was present but the building was incomplete’.
69. The plaintiff stated that the Ntulele Mai Mahiu property was acquired but not bought. The defendant acquired it. The defendant told her that the property lay at a border and needed to build it to give him entitlement. The land belongs to the defendant. The land does not have title deeds but allotment letters. The defendant was not given by the clan. The plaintiff conceded that the store was built in 1996 and she was married in in 1997.
70. The defendant led evidence of the history of his acquisition of the Ntulele plot as a buffer to stop the encroachment of the land of his Ildamat clan by other Maasai clans and the county council of Narok.
71. The defendant submitted that the Ntulele plot, Ntulele Centre off Mai Mahiu -Narok road is not matrimonial property having been the defendant’s land before marriage.
72. This court finds that this property was acquired by the defendant before marriage and the plaintiff has not shown she made any improvements to it. It is therefore, not or part of the matrimonial property.

CIS Mara/olombokishi/XXXX.

73. The plaintiff in an annexure PMM6 schedule of ‘marital property’ on the narrative column describes Cis Mara/Olombokishi/213 as; ‘this farm was part of the land owned by the Olombokishi group ranch under the Group Ranch Representatives Act. The process of subdivision of land started after they got married. The defendant as a member of the group ranch was entitled to a portion of the land.
74. The plaintiff stated that No. XXXX is their property. The defendant did not purchase it. He acquired it before their marriage.
75. The defendant led evidence of the history of Cis Mara/Olombokishi/XXXX as his birthright ancestral land from the Olombokishi group ranch of his Ildamat clan. DW2 corroborated the evidence of the defendant as to the root of his title to this land held on account of customary law. The evidence of DW2 was to the effect that Cis Mara/Olombokishi/213 was part of the larger community land of the Oloombokishi group ranch held by the group ranch in trust of its members in accordance with the repealed Land (Group Representatives) Act.



76. The defendant submitted that Cis Mara/Olombokishi/213 Ntulele Plot Ntulele Centre is not matrimonial property and has been the defendant's land before marriage and it be excluded from the matrimonial property by dint of section 6(2) of the *Matrimonial Property Act*.
77. The plaintiff did not prove contribution towards its improvement or development.
78. This court finds that the property was acquired before marriage. Therefore, does not form part of the matrimonial property.

Plot MD BK XXXX, Narok Stadium and Plot MD BK XXXX, Narok Stadium

79. The plaintiff in an annexure PMM6 schedule of 'marital property' on the asset column describes the two plots on the narrative column thus; 'was not purchased. plot allocation by Narok town residents who ask to be given plots for residential purposes.'
80. The plaintiff acknowledged that two alleged properties belonged to the defendant but she alleged that the defendant had gifted them to her.
81. The allegation that the plots were gifted to the plaintiff was not pleaded in the summons or the further or supporting affidavits. The plaintiff did not produce any evidence of the alleged gifting.
82. The defendant did not acknowledge having made a gift of the two plots to the plaintiff. The defendant deposed that he is not aware of such plots but is aware of plot Nos. XXXX HD BK XXXX Narok stadium and 66 MD BK XXXX Narok stadium which he explained were re-allocation and compensation for previous allocation in 1992 of plot No. XXXX block 11 whose allocation scheme was cancelled.
83. The defendant submitted that plots MD BK XXXX and MD BK XXXX Narok Stadium are not matrimonial property and their ownership is governed by the holding in the JWC V LKM (supra) case.
84. This court finds that this property was acquired before marriage and the plaintiff has not proved she was gifted the above properties. Therefore, both properties do not form part of matrimonial property. Cis Mara/Ilmashariani Morijo/XXXX and Cis Mara/ Ilmashariani Morijo/XXXX.
85. The plaintiff stated that in the same area where Cis Mara/Ilmahariani Morijo/2617 is situated, she is the owner of the plot Cis Mara/Ilmashariani Morijo/2616. The plaintiff alleged that there were three plots acquired by the defendant and that he gave his sister one (but unidentified), and gifted the plaintiff Cis Mara/Ilmahariani Morijo/2616 and he retained Cis Mara/Ilmahsiani Morijo/2617
86. The defendant concedes that land reference No. Cis Mara/Ilmashariani Morijo/XXXX was acquired during coverture and registered in his name. The same therefore falls in the inventory of the matrimonial property for distribution to both parties on the ratio of contribution that the court will determine.
87. The defendant submitted that Cis Mara/ Ilmashariani Morijo/2616 was bought at the same time and registered in the name of the plaintiff but the plaintiff has not disclosed the same in her pleadings.
88. The defendant submitted that both plots Cis Mara/ Ilmashariani Morijo/ XXXX and XXXX are matrimonial property.
89. From the record, land reference number Cis Mara/Ilmashariani Morijo/XXXX is registered in the name of the plaintiff while Cis Mara/Ilmashariani Morijo/2617 is registered in the name of the defendant.



90. This court finds that Cis-Mara/Ilmashariani Morijo/XXXX and XXXX are matrimonial property since they were acquired during the subsistence of the marriage.

Bedford truck KBP XXXX (chassis number XXXX)

91. The plaintiff prayed for an Order that the defendant hands over to her a Bedford truck KBP XXXX (Chassis number XXXX) which she claimed was solely acquired by her and registered in her name but in possession of the defendant.

92. The plaintiff stated that the plaintiff and the defendant bought Bedford lorry KBP 970B which is in her name.

93. The defendant conceded that Bedford truck KBP XXXX (chassis number XXXX) was acquired during coverture and registered in the name of the plaintiff. It thus falls in the inventory of matrimonial property for distribution to both parties on the ratio of the contribution that the court will at its discretion determine.

94. This court finds that Bed for truck was acquired during subsistence of marriage and therefore, forms part of the matrimonial property.

Kshs. 1,050,000/= being the value of household goods, furniture, and fittings bought by the plaintiff solely but retained by the defendant.

95. The plaintiff prayed for an order that the defendant pay her Kshs. 1,050,000/= being the value of household goods, furniture, and fittings bought by the plaintiff solely but retained by the defendant on various houses in Nairobi and the Narok area and its environs.

96. The plaintiff has prayed for half of the money value of the same being Kshs. 525,000/=.

97. The defendant submitted that the figure of Kshs, 1,050,000/= has no particulars of how it was arrived at, and no evidence has been adduced to support the claim of household goods, furniture, and fittings solely bought by the plaintiff. The few alleged receipts of the purchase of furniture exhibited by the plaintiff are in the name of the defendant.

98. The defendant submitted that when the coverture disintegrated, the plaintiff ended up with all the household goods furniture, and kitchenware of their Nairobi home.

99. The plaintiff in cross-examination stated that when she moved out of the home in Nairobi the defendant was away and she did not move with everything. The defendant brought everything she had left in Nairobi's home to her apartment. He did not need them as he had another home in Narok.

100. On cross-examination the plaintiff conceded that the defendant had furniture in Malindi. The defendant on cross-examination affirmed that while in Malindi he had built beds and furniture and he moved them to Kaloleni where the plaintiff was teaching soon after marriage. The defendant added that from Kaloleni they moved to Narok and the plaintiff paid for transportation of their households. The plaintiff conceded that she gave that furniture to the defendant's sister. Therefore, the defendant had no furniture in Narok.

101. The plaintiff has retreated in her submissions the claim of the whole Kshs. 1,050,000/= and is now asking for half that is Kshs. 525,000/=

102. The defendant submitted that there are no households retained by the defendant for distribution in this cause. It is the plaintiffs to disclose the inventory of the households that she retained from their erstwhile Nairobi home so that they also fall for apportionment and distribution in this summons.



103. This court finds that the household goods, furniture and fittings form part of the matrimonial property but their whereabouts is obscure, and no reliable quantification has been provided before this court. The court makes no order in respect of household goods, furniture and fittings.
- Profits from farming and other businesses jointly undertaken by the parties.
104. Kshs. 2,550,000/= was claimed as being 50% of the profits from farming and other businesses jointly undertaken by the parties.
105. The defendant submitted that the figure of Kshs. 2,550,000/= is not supported by any evidence. There are no particulars or formulas of how it was arrived at. The allegation that the couple jointly engaged in 'other businesses' apart from farming is also without evidence.
106. The defendant submitted that the evidence on record shows that the plaintiff was running her businesses and would receive assistance from the defendant. The plaintiff also conceded that she used to deposit money received by her from their joint activities into her account.
107. The plaintiff in cross-examination stated that she used to account for the money the defendant gave her. She indicated money from her business and the defendant. She used to deliver sand to Asoro Plus construction company. They would pay her. She used to deposit it in her personal account or his account. She stated that she was not sure.
108. The plaintiff did not provide evidence of accounts of the money she deposited into her personal account or deposit slips or even her own bank statement. She also did not produce any bank slips of deposit made to the defendant's bank account or even a narrative of recollecting any money given to the defendant by the plaintiff as profits from any business.
109. The defendant on cross-examination stated that the parties ran their respective businesses separately and kept their personal finance independently.
110. The defendant submitted that the claim of the plaintiff against the defendant for kshs. 2,550,000/- being 50% of the profits from farming and other businesses jointly undertaken by the parties must fail.
111. Upon evaluation of material provided, this court finds that claim under this head has not been proved. Motor vehicle KAV XXXX (Toyota minibus/matatu) and KBQ XXXX (Toyota Caldina salon)
112. The defendant asserts that the above motor vehicles are matrimonial property.
113. The Toyota minibus KAV XXXX appears on the plaintiff's schedule of 'marital property') PMM4 and the acquisition and status of the Toyota Caldina KBQ XXXX. The defendant deposed that when the farming activities were good they purchased a motor vehicle for the plaintiff- Toyota Caldina KBQ XXXX- which is currently in the possession of the defendant pursuant to an exchange agreement in the presence of an advocate and the plaintiff took Toyota Hiace Van KAV XXXX which she later sold and bought her current vehicle.
114. From the record the plaintiff abandoned her claim over the Toyota minibus KAV XXXX. The defendant deposed that the parties mutually exchanged the vehicles and it is the plaintiff who retained the minibus KAV XXXX.
115. This court finds that the vehicles herein although form part of the matrimonial property were exchanged by the parties by mutual consent.
- Has the plaintiff proven contribution to the acquisition and/or improvement of any or more of the matrimonial property?



116. Matrimonial property rights are real property rights protected under Article 40 of *the Constitution*. The broad constitutional principle that underpins rights at, during, and upon dissolution of a marriage includes matrimonial property rights is in article 45(3) of *the Constitution* of Kenya 2010 which states that;

“Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage, and at the dissolution of marriage.”

117. Judicial pronouncements argue that this constitutional provision is not a peremptory command for a 50/50 ownership of matrimonial property between the spouses. See the case of PNN v ZWN [2017] eKLR, Kiage JA; expressed himself on this issue as follows:

“I think that it would be surreal to suppose that *the Constitution* somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving, and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment, and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say *the Constitution* gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free cash cheque bearing the words “50 percent.”

118. Ownership of matrimonial property vests in the spouses according to the contribution of the spouse towards the acquisition or development of the property. See section 7 of the *Matrimonial Property Act* which provides that;

“Subject to section 6(3), ownership of 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.”

119. Of beneficial ownership arising out of the development or improvement of property by a spouse; see Section 9 of the Act which provides as follows: -

“Where one spouse acquires property before or during the marriage and the 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 a contribution acquires a beneficial interest in property equal to the contribution made.”

120. Accordingly, spouses may own matrimonial property in equal shares or other proportions. Mutatis mutandis, the division of the matrimonial property between the spouses is in accordance with the contribution made by each towards its acquisition or improvement or development.

121. Contribution by a spouse for purposes of sharing matrimonial property may be monetary or non-monetary or both. See definition of ‘contribution’ in section 2 of the *Matrimonial Property Act*: -

“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;

122. In this case, the contribution by the plaintiff earns her ownership of the matrimonial home to the extent this court will determine on the basis of the evidence provided.
123. What is the extent of ownership of the matrimonial property in accordance with the contribution by the Plaintiff? In other words, how should the matrimonial property be shared between the two spouses?
124. The court must give effect to both monetary and non-monetary contributions made by the applicant and the Respondent during the currency of the marriage in the acquisition or improvement of the matrimonial property. See the case of *NWM v KNM* [2014] eKLR.
125. And, this brings to bear the need to assign proper and appropriate proportion of weight to the contribution elements especially non-monetary contribution in order not to lose their real worth in a marriage and acquisition of property. Towards that end, this court stated in *Jacqueline Chepleting Louis v Joseph Naila & Another* [2024] eKLR thus: -

Useful hints

As far as assessment of non-monetary contribution in the acquisition of matrimonial property is concerned, courts should pursue fairness and best-judgment values in the best way they can, through the use of shared assumptions, methodological tools, responsible use of legal doctrine and principle, and— perhaps most importantly— by assigning specific values, weights and significance to the relevant specific non-monetary contribution elements in light of the peculiar circumstances of each case. In some cases, a spouse is forced to quit an equally lucrative employment or business in order to take care of children or family holdings or properties, which allows the other spouse time to make money and acquire family properties. Shouldn't such contribution count as high as monetary contribution made by the other?

It is not expected that this approach will produce complete consensus or uniformity of thought, but, it is, at least, capable of producing actionable and reliable trend or guideline judgments on assessment of non-monetary contribution in the division of the matrimonial property which will minimize the disparities associated with ad hoc apportionment or adjustments made on the basis of absolute caprices of a judge. It will also inform and emphasize on apportionment of appropriate proportion of weight, value and significance to each non-monetary element of contribution in the overall contribution of a spouse towards the acquisition of the property, obtain good judgment and fairness to the parties in the marriage.

Therefore, assessment of non-monetary contribution should not be exclusively at the court's equitable discretion and good conscience without a dependable methodology which produces fair judgment.

126. The defendant submitted that the contribution of the plaintiff must be specific to the improvement of those properties and must be real and tangible in terms of section 9 of the *Matrimonial Property Act*. The defendant relied on the case of *JOO v MBO* [2023] KESC 4 (KLR).
127. The defendant submitted that plots MD BK XXXX and MD BK XXXX, Narok stadium are both allocations to the defendant and remain undeveloped. Therefore, no contribution on these plots by the plaintiff arises howsoever.



128. The actual reason the defendant kept her ATM card, he explained, was because her Narok branch of Barclays Bank was closed at the time and she only could access the money by either going to Nairobi or sending the defendant with the card to withdraw the money for her. She had no evidence that the defendant ever used her money for any purpose. According to the defendant, the plaintiff had no evidence to prove allegations that she took loans to improve the family business not even a single pay slip to construct on any of the properties or of any money given to the defendant by her.
129. The plaintiff made both monetary and non-monetary contributions toward the acquisition and development of the matrimonial property. The plaintiff stated the following as her contributions;
- i. That she performed domestic work and managed the matrimonial home, especially when the respondent was out on other engagements.
 - ii) She was the primary caregiver and parenting figure for the sole issue of the marriage
 - iii. As the defendant was for several years financially reliant on the plaintiff and the defendant would walk around with the plaintiff's ATM card and make withdrawals to sustain him.
 - iv) She managed the family business and property and farm work and provided labour skills in other enterprises owned by the defendant.
 - v) She was the sole breadwinner from 1997 to 2003 when the defendant's financial fortunes were strained when the defendant was either without income or with low/inconsistent income, and this she did wholeheartedly. She used to go the extra mile by funding the businesses and even taking loans to give- the businesses limbs. This is confirmed by the pay slips and loan statement.
130. During the hearing of the suit, the defendant did not dispute the detailed business log maintained by the plaintiff nor the fact that it was maintained by the plaintiff to account for the profits that the defendant did not share with the plaintiff.
131. The plaintiff submitted that from the oral testimony and documentary evidence, it was clear that the plaintiff had proved her case and that the defendant had failed to rebut the same. Accordingly, the plaintiff prayed that the originating summons be allowed as prayed. The plaintiff relied on the case of *AWM v JGK* [2021] eKLR.
132. The plaintiff on her grounds on the face of the summons did not assert direct financial contribution to the acquisition of the said properties but rather 'that the applicant invested in, worked on and supervised the various farms and farming activities, and businesses and business activities and as a result of which the respondent received large monetary profits; which he did not share with the applicant.'
133. The plaintiff did not assert direct financial contribution to the acquisition of the said properties.
134. The defendant urged this court to bear in mind that the plaintiff was not a housewife. The plaintiff was a high school teacher in full pay. the plaintiff did not exhibit her pay slips for all the 17 years of marriage and in this suit, she did not account for her salary for all that period. Beyond her salary, the plaintiff was engaged in her own independent business whose proceeds she was banking in her personal bank account. The plaintiff did not produce her bank statements.
135. The defendant was in gainful employment and engaged in farming activities which the plaintiff assisted from time to time. As such both parties created money for themselves separately and jointly for the family.
136. The parties had only one child whom the plaintiff and the defendant took care of jointly. That issue is now an adult. The defendant was mostly away from home in Narok and therefore the plaintiff did



not spend much time taking care of his daily requirements. The plaintiff did not accuse the defendant of ever failing to meet the welfare needs of the family. The plaintiff expressly conceded that they shared the welfare needs of the family jointly with the defendant.

Ntulele Plot, Ntulele Centre Of Mai Mahiu -Narok Road.

137. From the earlier analysis, this plot belonged to the defendant before marriage. The plaintiff also conceded that the store that sits on this plot was built by the defendant in 1996 before their marriage in 1997. Although the plaintiff stated that she borrowed a loan to refurbish the building she did not tender any evidence of the alleged loan.
138. The defendant submitted that, there is no evidence or proof of contribution towards the improvement of the Ntulele Plot, Ntulele Center Off Mai Mahiu- Narok road- by the plaintiff. The plot thus remains the property of the defendant solely.
139. This court finds that the plaintiff has not proved contribution in respect of this property.

Cis Mara/ Olombokishi/XXXX.

140. This property was given to the defendant by his Olombokishi group ranch as his ancestral birthright initially held in trust for him by the group ranch. The plaintiff has not provided any evidence that she contributed improvement of this property. The defendant deposed that he cleared a portion of 35 acres of land for cultivation.
141. The defendant submitted that there is no evidence or proof of contribution by the plaintiff towards the improvement of Cis-Mara/Olombokishi/XXXX which thus remains the property of the defendant solely.
142. This court finds that the plaintiff has not proved contribution in respect of this property.

Plot No. 153 Narok Lenana Estate Narok Town.

143. This is the plot where the parties' matrimonial home was constructed in Narok town.
144. From earlier analysis, the plot was allotted to the defendant before marriage. But, the matrimonial home was constructed on the plot between 2003 and 20W3 was hired to construct the home. He stated that building materials were provided by the defendant. The record shows that for the whole construction period of five years, the plaintiff never visited the construction site and never paid DW3 or supplied him with any building materials.
145. From the record the only time the plaintiff interacted with DW3 where the matrimonial home was when the driveway was being constructed.
146. The plaintiff during cross-examination stated that the family moved in April 2007 and the driveway was constructed in 2009. DW3 averred that he only saw the plaintiff at the house after he had completed construction and the family had already moved in.
147. The plaintiff conceded that she never paid DW3 for the construction. The plaintiff testified that she was not happy with the construction from the start allegedly for not consecrating it to God. On cross-examination, the defendant was categorical that the plaintiff simply refused to visit the site and despite the plaintiff being a teacher in Narok, it was the defendant who had to travel from Nairobi to supervise construction.



148. However, the plaintiff stated that the defendant would use her ATM card to withdraw money for the construction. She, nonetheless, conceded that the true reason why the defendant kept her ATM card was because her bank had closed its branch in Narok and the only way she could access her money was to send the defendant to Nairobi with the card or herself to travel to Nairobi.
149. Although the plaintiff alleged to have taken a loan to help with the construction, she never led evidence of any loan. She did not produce her pay slip. The pay slip for August 2005 did not display any loan deductions.
150. The other purported evidence of contribution by the plaintiff to the construction was the town business log PMM4. However, the said business log relates to the period between 2010 and 2012 long after completion and moving into the house.
151. The defendant submitted that there is no evidence of contribution by the plaintiff towards the improvement of Plot No. 153 Narok Lenana Estate Narok Town.
152. The evidence in fact points to a wife who was disinterested in the construction consistent with a person who had not put her mind into the project.
153. The defendant submitted that plot no. 153 Narok Lenana Estate Narok Town together with the house erected by the defendant thereon belong to the defendant solely.
154. Nevertheless, important evidence which should not be lost is that, the defendant was away from the matrimonial home at Narok most of the time. Similarly, although the plaintiff was not a house wife, she moved to Narok in order to take care of the child of their marriage. The defendant did not complain that the plaintiff did not do a good job as a mother despite being in employment. The defendant had all the time to engage in gainful activities and earn money. This kind of contribution is not the lesser. It requires proper proportion of weight to be accorded to it when considering the extent of contribution of the spouse.
155. This court finds that the plaintiff on a balance of probability has proved contribution to this property. Whether the plaintiff is entitled to the prayers sought and in what ratio should the matrimonial property be shared?
156. The defendant proposes a 50: 50 sharing of the above matrimonial properties. The defendant in cross-examination stated that they did business together and all they acquired as co-owners they shared.
157. In the upshot this court finds and holds that: -
158. The plaintiff is entitled to 50% share of Plot No. 153 Narok Lenana Narok Town and matrimonial home thereon.
159. Ntulele Plot Ntulele Centre Off Mai Mahiu Narok road, Cis Mara/Olombokshi/XXXX and Cismara/ Ilmashariani Morijo/XXXX shall remain the property of the defendant,
160. Cis Mara/Ilmashariani Morijo/XXXX, KBQ XXXX Toyota Caldina Salon, Bedford truck KBP XXXX (Chassis number XXXX), and Motor Vehicle KAV XXXX Toyota Minibus /Matatu shall remain the property of the plaintiff.
161. The identity of Plot MD BK XXXX, Narok Stadium and Plot MD BK 11, Narok Stadium was not clear. There was no proof that the plots were gifted to the plaintiff. Therefore, both properties do not form part of matrimonial property.
162. Claims for a share of household goods, furniture and fittings have not been proved.



163. The claim for profits from farming and other businesses undertaken by the parties have not been proved.

Who should bear the costs?

164. The defendant submitted that costs should follow the outcome of the suit as was reiterated by the Supreme Court in JOO v MBO(supra). The defendant contends already been undertaken by the parties themselves and therefore the plaintiff should bear the costs of the suit.

165. Given the nature of these proceedings, each party to bear its own costs.

166. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 29TH DAY OF FEBRUARY, 2024.

F. GIKONYO M.

JUDGE

In the presence of:-

- 1. Court Assistant – Otolo**
- 2. M/s Omwalo for Mwamuye for Plaintiff - Present**
- 3. Murithi for the Defendant - Present**

