



REPUBLIC OF KENYA



KENYA LAW
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**JCL v JMN; RNN (Interested Party) (Civil Suit 3 of 2016)
[2024] KEHC 1843 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1843 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL SUIT 3 OF 2016
F GIKONYO, J
FEBRUARY 22, 2024**

BETWEEN

JCL PLAINTIFF

AND

JMN DEFENDANT

AND

RNN INTERESTED PARTY

JUDGMENT

Division of Matrimonial Property

1. This suit was commenced by way of an originating summons dated 02.03.2016 and filed in court on 02.03.2016 against the defendant and the interested party seeking the following orders: -
 - i. That it be declared that the properties listed herein with all buildings and developments thereon acquired and /or developed by the joint funds and efforts of the applicant and the respondent during their marriage and registered in the name of the respondent and his sister Roda Naisiano Nijja, are owned jointly by the applicant and the respondent;
 - a. Cis-Mara/Oleleshwa/4552,
 - b. Cis-Mara/Oleleshwa/3728,
 - c. Cis-Mara/Oleleshwa/4937,
 - d. Plot No 887 Block 11
 - e. Cis-Mara/Olopito/818



- ii. That an order do issue declaring that 50% or such other or higher proportion of the property aforesaid is held by the respondent in trust and for the beneficial interest of the applicant.
 - iii. That the said property be settled for the benefit of the applicant and in such manner and proportions as this honourable court deems fit and just.
 - iv. That the respondent and the third party by themselves, their agents, and /or servants be restrained from alienating encumbering, or in any other manner disposing of the said property.
 - v. That the respondent and the third party be condemned to pay costs of this application on and incidentals as thereto.
2. The defendant filed a replying affidavit sworn by the defendant on 05.04.2016.

Background of the Case.

3. It appears the plaintiff and the defendant started living together as husband and wife in 2002. Even before formalizing the marriage, they entered into an agreement on how they will purchase properties. Later, they solemnized their marriage under the *Marriage Act* Cap 150 (now repealed) at the Narok District Commissioner's office on 17.12.2005. A certificate of marriage was issued thereto.
4. The plaintiff and the defendant were blessed with one issue of their marriage.
5. The following properties are alleged to have been acquired during the subsistence of the marriage;
 - a. Cis-Mara/Oleleshwa/4552,
 - b. Cis-Mara/Oleleshwa/3728,
 - c. Cis-Mara/Oleleshwa/4937,
 - d. Plot No 887 Block 11
 - e. Cis-Mara/Olopito/818
6. The plaintiff and the defendant allegedly later put up their matrimonial home on land reference No Cis-Mara/Oleleshwa/4552 located in Narok Town total area and moved in. But, she was later evicted from her matrimonial home by the interested party- the sister to the defendant- after two of the properties, including the matrimonial home were, without her knowledge, registered in the name of the interested party by the defendant.
7. Although the two are not formally divorced, they no longer live together and none expressed desire to resume the marriage.
8. The plaintiff claims that, she and the defendant contributed to the construction of the matrimonial home. The plaintiff also claims to have directly contributed to the purchase and acquisition of land reference No Cis-Mara/Oleleshwa/4552.
9. The defendant denies this contention and states that funds for the purchase of land reference No Cis-Mara/Oleleshwa/4552 and Cis-Mara/Oleleshwa/3728 were contributed by his father, the interested party, and himself and had the two properties registered in the name of the interested party.
10. The matter proceeded by way of viva voce evidence. The plaintiff called four (4) witnesses. The defendant called three (3) witnesses. The interested party called one witness.



The Plaintiff's Case

11. PW1- Kimwere Henry. He adopted his witness statement dated 04.08.2016. He testified that he bought a huge chunk of land namely Cis-Mara/Oleleshwa/2967 which he started subdividing in 2005 into smaller units of 50ft by 100ft. In 2006 the plaintiff and the defendant approached him intending to buy a plot. He showed them the plots and the plaintiff selected one plot whereas the defendant selected another plot adjacent to the one selected by the plaintiff each measuring 50ft by 100ft. Both the plaintiff and the defendant agreed that they would combine the two plots and have them registered in their joint names. The combination of two plots resulted in parcel No Cis-Mara/Oleleshwa/4552. A week later the defendant approached PW1 alone to have the agreement drawn and upon inquiry by PW1 as to the whereabouts of the plaintiff he stated that the plaintiff was not feeling well and that since they are husband and wife it would be okay if the agreement is drawn in his names. The agreement was done as requested by the defendant (P Exh1) Since the mother title was in the name of the original owner, he would liaise with the original owner to cause the execution of the transfer to the new buyers. He did not know how the said parcel of land was transferred to the interested party since he never met or knew the interested party.
12. On cross-examination, PW1 confirmed that the plot was bought by the plaintiff and the defendant. The agreement was to be done in the joint names of the plaintiff and the defendant but it was only done in the defendant's name given his reasons for the whereabouts of the plaintiff. The agreement was done after the purchase price had been deposited to PW1's account and the defendant produced a deposit slip of Kshs 147,000/=.
13. PW2-Makori Joel. He adopted his witness statement dated 22.09.2016. He stated that he worked for both the plaintiff and the defendant in constructing a residential home on Cis-Mara/Oleleshwa/4552. The defendant called him and introduced him to the plaintiff to construct the residential house. He did the construction for almost a year and was being paid his daily wages by the plaintiff who was always around when the construction was ongoing. He stated that at no time did he work under any contractor. The plaintiff was the one who would source the materials and bring them to the construction site and he would proceed with the construction.
14. On cross-examination, the PW2 stated that he started working on the construction moments it had already started and that it was the defendant who called him and introduced him to the plaintiff.
15. PW3-Philemon Kipruto Kisang. He testified that sometime in 2003 he was at a place called Enaibelbel where he was employed to sell Irish potatoes. He knew the plaintiff as she was working at the county referral hospital of Narok and on some occasions she treated him. In the same year 2003, the plaintiff approached him and asked if he could take up a job at a farm where she was farming wheat around Katakala and Ngoben area which he accepted.
16. Sometime in 2005, the plaintiff informed PW3 that she wanted to get married to the defendant but he did not know him at first. He knew the defendant in 2005 when the plaintiff instructed him to escort her to deposit money in the defendant's account at the National Bank of Kenya, Narok branch which money she had received the same day after selling wheat from the farm and she had been paid in cash as it was the practice with wheat farmers. The plaintiff had informed him that she had identified two plots which together with her husband wanted to buy and put up a matrimonial home.
17. PW3 continued working on the farm until when the plaintiff instructed him to move to the land they had purchased behind Total which was now a site and that he was one to take care of materials bought for construction. He was on the said parcel of land when the construction was started by a person known as Mr. Nyabuto who laid the foundation and stopped the construction until the year 2007



when another mason by the name of Mr. Makori Joel took over and continued with construction. PW3 stated that the plaintiff used to bring materials for the construction as well as pay the casual labourers. The defendant would visit once in a while to see the construction. The house erected on a parcel of land Cis-Mara/Oleleshwa/4552 was never built by any contractor but rather by masons who were well-known to PW3.

18. PW3 testified that it took three years to complete the construction of the house on LR No Cis-Mara/Oleleshwa/4552 and when the house was completed, he continued working there as a watchman and a gardener for the plaintiff and the defendant after they had moved in until 2009 when he left employment. He stated that he had never seen the interested party nor their parents during the construction of the house but only saw them when the house was officially launched- at a ceremony held by the plaintiff and the defendants.
19. PW4 - Jaqueline Chepleting Louis. She is the plaintiff herein. She testified that she is legally married to the defendant and that she is a clinical officer currently working at Transmara. She started cohabiting with the defendant sometime in 2002. They lived together as husband and wife in a government house in Narok before solemnizing her marriage in 2005 during which period she was working with the defunct Narok county council as a clinical officer. She earned a net salary of Kshs 17,000/=. During their cohabitation, the defendant was not working and only got his first job as a nursery school teacher in 2004 with a net salary of Kshs 3,000/=.
20. PW4 testified that sometime in July 2005 before her wedding, she identified a plot measuring 50ft by 100ft owned by PW1. The defendant equally identified an adjacent plot to the plaintiff measuring the same. The plots were going for Kshs 75,000/= each making a total of Kshs 150,000/= both plots. The same was discounted to Kshs 147,000/=.
21. The plaintiff stated that due to the previous mistrust between her and the defendant stemming from previous money transactions where the plaintiff took out a loan and gave the defendant the money to purchase a parcel of land only to be misappropriated by the defendant, they entered into an agreement on how the money would be paid and/ or utilized. A mutual agreement (P Exh5) dated 06.07.2005 was drawn wherein the plaintiff was to deposit Kshs 120,000/= to the defendant's account 0124341701700, held at the national bank, Narok branch to purchase the two plots. The amount was deposited by the plaintiff as exhibited in P Exh2, 3(a) and (b). Pursuant to the mutual agreement she was to make a further deposit of Kshs 200,000/= to the same account of the defendant to develop the said parcels of land for their home. The amount was equally deposited to the said account as exhibited in P Exh 3 and 5.
22. According to PW4, the construction of their matrimonial home on land reference No Cis-Mara/Oleleshwa/4552 was done in phases starting with the construction of a water tank, a store, and fencing of the property sometime in mid-2006. The main construction of the matrimonial home began in 2007 and through the construction, the plaintiff and the defendant would purchase construction materials as the need arose and those purchases would be noted in the black book by the respective party indicating the date, materials bought, and all other expenses for that particular date as exhibited in P Exh6. However, not all the purchases were noted in the black book. The construction of the house was completed in 2008 and thereafter they moved into their new home in January 2009.
23. The plaintiff testified that sometime in 2008, the defendant had identified another plot which is now LR No Cis-Mara/Oleleshwa/3728. At that time the defendant did not have money to pay the purchase price of Kshs 123,000/=. The plaintiff took out a top-up loan of Kshs 350,252 as exhibited in P Exh10 to purchase the said land. She however was not the one who gave the entire sum of the purchase price. The agreement was drawn in the name of the defendant. The advocate who drew the agreement told



- the plaintiff that herself and the vendor's wife should remain as witnesses since it will not change the fact that the land belong to the plaintiff and the defendant an advice they gladly accepted. On this particular parcel of land, they jointly constructed ten rental houses. The defendant continued to receive rent from the said houses.
24. The plaintiff testified that during their colourful wedding, her father-in-law gifted them with land reference No Cis-Mara/Olopito/818 whose title was given to them jointly as a present. The plaintiff still holds the title to the same.
 25. PW4 testified that, concerning plot No 887Block 11, the same was allocated to them by the defunct county council of Narok. She identified the land and started the process of its acquisition before the defendant took over and completed the process as well as the land reference No Cis-Mara/Oleleshwa/4937, which is in the name of the defendant. She continued with her farming activities in various locations in Narok and would then use the proceeds to top up on what the defendant had for their respective purchase. The parcels of land were all registered in the names of the defendant since he was the one dealing directly with the vendors.
 26. The plaintiff testified that sometime in 2010 when she returned from burying her grandmother, the defendant uttered words to wit- "unaringa na hii nyumba sana" which words made the plaintiff visit the lands office to check the progress of the titles and to her shock she discovered that LR No Cis-Mara/Oleleshwa/4552 had been registered in the names of the interested party. The transfer to the interested party was done when the plaintiff was grieving on 07.12.2010 as exhibited in P Exh8. LR No Cis-Mara/Oleleshwa/3728 had also been first registered in the names of the defendant before it was eventually transferred and registered in the names of the interested party on 06.12.2010 as exhibited in P Exh 9. She reported all the changes to property ownership to CID officers vide OB No 52/16/3/3011. she also reported the matter to his parents who called for a meeting to resolve the dispute on 09.02.2014. Both families were duly represented including the plaintiff and the defendant. It was agreed that the two properties Cis-Mara/Oleleshwa/4552 and 3728 should be reverted to the joint ownership of the plaintiff and the defendant as exhibited in P Exh11. The interested party was advised to stop interfering with both the plaintiff's and the defendant's affairs.
 27. It was the plaintiff's testimony that sometime in 2015, she was evicted from her own home on Cis-Mara/Oleleshwa/4552, and upon making further inquiry she learned that there was collusion between the defendant and the interested party wherein the interested party based- on the change of ownership of the said parcel of land had moved to court and obtained orders evicting the plaintiff and the defendant who were purportedly tenants in their own home that they had fraudulently transferred to the interested party's names. Since the eviction, the defendant has been residing on that property to date.

The Defendant's Case.

28. DW1- Joseph Naija Meeli. He testified that he is married to the plaintiff but they no longer live together. He adopted his replying affidavit and annexures thereto. He stated that he bought a parcel of land Cis-Mara/Oleleshwa/4552 as exhibited in the sale agreement and the payment for the same was done through his national bank account. He also stated that parcel No Cis-Mara/Oleleshwa/3728 was purchased by him and both parcels are currently registered in the names of the interested party.
29. On cross-examination, the defendant stated that as to the source of his income at the time of the purchase of the said plot, the defendant did not prove any or at all. He admitted that the deposits of Kshs 200,000/= in two instalments of Kshs 20,000/= and Kshs 80,000/= as well as Kshs 120,000/= as stated and agreed in the mutual agreement produced as P Exh...



30. In respect of the construction, the defendant could not prove the payments of the alleged contractual amount of Kshs 3,000,000/= to the alleged contractor. No approved construction plan for the alleged house which is a requirement of law or other documentation for that matter. He however conceded to having been evicted from the house where he was an alleged tenant. He could not produce any notices or documents to demonstrate the alleged rent arrears that resulted in his eviction.
31. The defendant could not provide proof of how the transfer was done in parcel No Cis-Mara/Oleleshwa/3728 to the interested party. He had no proof of payments for the transfer, and the land control board approving the transfer. He admitted that the tenants were paying rent to his account but currently, the interested party was the one receiving the rent because it was her property.
32. The defendant admitted that the plaintiff has custody of the original title deed in respect of land parcel No Cis-Mara/Olopito/818 and the same is registered in the names of the Defendant's father.
33. DW2-Hesbon Mbunge Ochol. He adopted his witness statement. He testified that he was a contractor hired to construct a house on parcel No Cis-Mara/Oleleshwa/4552. As per the terms therein, he went ahead and produced as evidence a construction agreement.
34. On cross-examination, he disowned the agreement dated 15.11.2006 since he could not tell whether he was the one who executed the same on behalf of the company. He did not have any document to prove his directorship of the company or any certificate of registration of the alleged Hembuko building contractors. DW2 also failed to provide evidence of payments of the alleged contractual amounts as well as approved plans and drawings of the said house as required under the Physical Planning Act. He only described the kind of house he alleged was constructed by his company.
35. DW3 - Gordon Odoyo OwiNo He adopted his witness statement. He further testified that he is managing director of Gobecco Enterprises a company allegedly contracted under an agreement dated 08. 10.2010 to construct rental houses on parcel No Cis-Mara/Oleleshwa/3728 for a contractual amount of Kshs 8,731,073.40/=.
36. On cross-examination, DW3 could not provide proof of payment of the contractual amount either by acknowledgment, bank statements, or Mpesa transactions if any he also did not provide the approved plan and drawings for the structure to be constructed as required by the physical planning act. No certificate of registration of the alleged company not a copy of the CR12 from the registrar of companies as well as a certificate of occupation ever issued to the proprietor was produced. He did not also provide proof of payment of VAT as required by law.

The Interested Party Case

37. The interested party adopted her replying affidavit as her evidence. She testified that she is a sister to the defendant and a sister-in-law to the plaintiff. She confirmed being the registered owner of parcels known as Cis-Mara/Oleleshwa/4552 and Cis-Mara/Oleleshwa/3728. She however stated that the two properties belong to her family and that she was only registered as the proprietor.
38. On cross-examination, she stated that she moved to court vide CMCC No 90 of 2014 and obtained an eviction order against the defendant who had been her tenant. She however could not provide proof of any payments received from the defendant prior to his eviction. She could also not provide proof of receipt of rents from the tenants upon eviction of the defendant in Cis-Mara/Oleleshwa/4552 as well as rents from tenants in respect Cis-Mara/Oleleshwa/3728. The interested party also could not tell whether she ever executed transfer documents in respect of the said parcels of land transferring ownership to her name and how much each member of the said family contributed.



The Plaintiff's Submissions

39. The plaintiff submitted that the parcels of land subject to this suit were purchased and developed during the pendency of the marriage hence the listed properties listed herein form part of the matrimonial property. The plaintiff relied on the case of Matrimonial Cause No 49 of 2019 [*AWM v JGK*](#).
40. The plaintiff submitted that the plaintiff made monetary contributions towards the purchase and the development of the suit parcels of land and provided supervision during the construction, management of the home and the rentals, and child care during the period the defendant was away from the home. The plaintiff relied on section 2 of the [*Matrimonial Property Act*](#), 2013.
41. The plaintiff submitted that she is entitled to more than 50% share of parcel No Cis-Mara/Oleleshwa/4552, Cis-Mara/Oleleshwa/3728, Cis-Mara/Oleleshwa/4937 and Plot No 887 Block 11. The plaintiff further submitted that bearing in mind that they were gifted jointly parcel No Cis-Mara/Olopito/818 she is entitled to a 50% share. The plaintiff relied on the case of SCK Petition No 11 of 2020- [*Joseph Ombogi Ogentoto v Martha Ogentoto & others*](#).

The Defendant's and Interested Party's Submissions

42. The defendant and the interested party submitted that the plaintiff has failed to prove which property amounts to matrimonial property and what was her contribution. The defendant and the interested party relied on Section 6(1) of the [*Matrimonial Property Act*](#), Article 40(1) of the [*Constitution*](#) of Kenya, [*EKTM v ECC*](#) [2021] eKLR, in the Supreme Court of Kenya family petition 11 of 2020 [*JOO v MBO; Federation of Women Lawyers \(FIDA Kenya\) & another \(Amicus Curiae\)*](#) (Petition 11 of 2020) [2023] KESC 4(KLR) (FAMILY),
43. The defendant and the interested party submitted that it appears unusual for the boyfriend and girlfriend to enter into a mutual agreement to acquire a joint property as was in the case of parcel No Cis-Mara/Oleleshwa/4552. The property was not registered in the name of the plaintiff and the defendant because it was not considered a joint property. The plaintiff failed to substantiate any financial contribution towards the acquisition of the property. The defendant and the interested party relied on the case of the supreme court of Kenya family petition 11 of 2020 [*JOO v MBO; Federation of Women Lawyers \(FIDA Kenya\) & another \(amicus Curiae\)*](#) (petition 11 of 2020) [2023] KESC 4(KLR) (FAMILY),
44. The defendant and the interested party submitted that any form of contribution in the management or maintenance of a property known as Cis-Mara/Olopito/818 as alleged by the plaintiff does not confer a right to claim ownership or apportion any interest of ownership against the indefeasible owner provided in the title of the property. The registered owner of the said parcel of land is Samson Ole Naija who is the defendant's father. Therefore, the parcel is not part of matrimonial property and the plaintiff should return the title deed to its rightful owner. The defendant and the interested party relied on section 26(1) of the [*Land Registration Act*](#), section 6(1) of the [*Matrimonial Property Act*](#), Article 40 of the [*Constitution*](#), [*Henry Muthee Katburima v Commissioner of Lands & another*](#) [2015] eKLR, [*Republic v Land Registrar Taita Taveta District & another*](#) [2015] eKLR.
45. The defendant and the interested party submitted that the defendant proved that he solely made all the financial contributions and arrangements on the acquisition of the property known as Cis-Mara/Oleleshwa/3728. The said property is registered in the name of the interested party and hence not part of the matrimonial property. Marriage and cohabitation do not in a strict sense entitle or accord parties to a marriage a right to an equal share as that alone does not take away the basic principles that every



- party to a marriage deserves a share proportional to his/her contribution. The defendant and interested party relied on *JMM v MM* [2019] eKLR, *FS v EZ* [2016] eKLR, *PNN v ZWN* [2017] eKLR
46. The defendant and the interested party submitted that the plaintiff has not produced any evidence to support her acquisition the land parcel No Cis-Mara/Oleleshwa/4937 but only relied on the testimony of the parties not backed up by any corroborative or factual evidence. Therefore, the property is separate and solely owned by the defendant. The defendant and the interested party relied on the cases of in the Supreme Court of Kenya family petition 11 of 2020 *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (amicus curiae)* (petition 11 of 2020) [2023] KESC 4(KLR) (FAMILY),. Matrimonial Cause No 3 of 2018 *TMW v FMC* [2018] eKLR.
 47. The defendant and the interested party submitted that allocations of properties by authorities such as county governments do not confer title to individuals but rather a right to use therefore a joint proprietary right that is created or implied to a party in a marriage is no right of acquisition or ownership exists to a party. Therefore, it cannot be considered matrimonial property even if it can be demonstrated that one spouse made a significant contribution in acquiring the said property.
 48. The defendant and the interested party submitted that the division of matrimonial property cannot take place whilst the marriage is still subsisting. There must be a decree evidencing that the marriage has been dissolved. Therefore, this court should reject the plaintiff's invitation to determine the existence of any share, right, or claim to the impugned property. The defendant and the interested party relied on section 6(3) of the *Matrimonial Property Act*, article 45(1) of the *Constitution* of Kenya, *MNH v FHM* [2018] eKLR, *TWM v FMC* [2018] eKLR, *MNW v WNM & 3 others* [2013] eKLR.

Analysis and Determination

49. The pleadings, evidence, parties' arguments and the law pose the following issues for determination: -
 - i. Whether the suit properties constitute matrimonial property?
 - ii. Whether the plaintiff contributed towards the acquisition and development of the matrimonial properties
 - iii. Whether the plaintiff is entitled to an equal share or such higher proportion of the matrimonial properties and whether these properties were held by the defendant in trust for the plaintiff.

I. Whether the suit properties constitute matrimonial property?

50. Matrimonial property is defined in Section 6 of the *Matrimonial Property Act* as: -
 - (a) the matrimonial home or homes;
 - (b) household goods and effects in the matrimonial home or homes; or
 - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
51. Are properties listed in the pleadings by the plaintiff matrimonial property in the sense of Section 6 of the *Matrimonial Property Act*?
52. The plaintiff testified how they jointly acquired parcel No Cis-Mara/Oleleshwa/4552. Her testimony was corroborated by that of PW1, PW2 and PW3. She stated that she contributed Kshs 120,000/= towards the purchase of the said property. The said amount was paid pursuant to a mutual agreement. The defendant admitted that the deposits for the purchase of the property was in accordance with the mutual agreement between the two.



53. She further stated that she took a top-up loan of Kshs 300,000/= which was used to purchase parcel No Cis-Mara/Oleleshwa/3728. She proved the property was acquired during the subsistence of their marriage.
54. She testified that Cis-Mara/Olopito/818 was gifted to them by her father-in-law upon solemnization of their marriage, but, the property was never transferred to their joint names.
55. According to her testimony, Parcel No Cis-Mara/Oleleshwa/4937 and Plot No 887 Block 11 were allocated to the two during the pendency of their marriage. She demonstrated that she was in charge of the process of acquisition of the two plots before the defendant took over the process, but, had them registered in his sole name.
56. From the foregoing it follows therefore that the parcels of land Cis-Mara/Oleleshwa/4552, Cis-Mara/Oleleshwa/3728, Cis-Mara/Oleleshwa/ 4937, and Plot No 887 Block 11 were acquired and developed during the pendency of their marriage.
57. The plaintiff and the defendant started living together as husband and wife in 2002 and solemnized their marriage in 2005.
58. Evidence show that the plaintiff and the defendant were also gifted jointly land parcel No Plot No Cis-Mara/Olopito/818 during the pendency of their marriage.
59. Accordingly, the properties listed herein form part of the matrimonial property.

II. Whether the plaintiff contributed towards the acquisition and development of the matrimonial properties

60. . Each case is determined on its own peculiar circumstances and facts. See the Court of Appeal in [TKM v SMW](#) [2020] eKLR where it is stated as follows:

“We bear in mind the edict in *Muthembwa v Muthembwa* (2002) 1 EA 186, and many other decisions reminding the courts that in assessing the contribution of spouses in acquisition of matrimonial property, each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness.”

61. Contribution towards the acquisition of matrimonial property is defined under Section 2 of the [Matrimonial Property Act](#), 2013 in the following terms:

In this Act, unless the context otherwise requires—

“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.



62. Section 9 of the same Act recognizes contribution through the improvement of a property acquired before or during the marriage in the following terms:

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”

63. In determining the extent of contribution, fairness is key, which brings the court to state in passing something about fairness especially in cases of non-monetary contribution by a spouse.

Useful hints

64. 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?

65. 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.

66. 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.

Back to the main

67. The plaintiff stated that throughout her cohabitation and marriage she was in gainful employment. This fact was proved. She was also doing farming activities and used the proceeds therefrom in purchasing the suit parcels of land.

68. The plaintiff contributed to the purchase of land parcels No Cis-Mara/Oleleshwa/4552 and Cis-Mara/Oleleshwa/3728. She made a monetary contribution towards the farming activities in Cis-Mara/Olopito/818. She produced a black book (P Exh6) which demonstrated how she made money contribution. The black book records the amount of money contributed by both parties towards the development of the properties on different dates. From the black book, the plaintiff contributed about Kshs 2,269,786/= whereas the defendant contributed about Kshs 403,680/=.

69. The interested party claimed the two properties were family assets having been purchased through funds contributed by the family, and that she was merely registered as the proprietor.



70. The interested party did not, however, show how the property is family property, or how it was purchased by the family. She did not even prove that she made any contributions towards the acquisition or development of the matrimonial properties transferred to her by the defendant. She could not explain how she was registered as the proprietor of the two pieces of land.
71. Contrast the story by the interested party with what the defendant stated. He stated that he bought a parcel of land Cis-Mara/Oleleshwa/4552 as exhibited in the sale agreement and the payment for the same was done through his national bank account. He also stated that parcel No Cis-Mara/Oleleshwa/3728 was purchased by him and both parcels are currently registered in the names of the interested party.
72. He, however, attempted to stake the narrative by the interested party to explain why she was registered as proprietor. Unexplained, nonetheless, is how the properties moved from his name to that of the interested party. Proof of purchase by the family through family contribution is lacking completely.
73. The plaintiff has, however, proved that she made a higher proportion of monetary contributions in the purchase and development of land parcels known as No Cis-Mara/Oleleshwa/4552 and Cis-Mara/Oleleshwa/3728.
74. The plaintiff also demonstrated that she made a monetary contribution towards farming activities in parcel No Cis-Mara/Olopito/818. The proceeds thereof were applied towards development of the other matrimonial properties herein.
- II. Whether the plaintiff is entitled to an equal share or such higher proportion of the matrimonial properties, and the question of trust.
75. Arguments were made by the defendant that division of matrimonial property cannot be done during the subsistence of marriage.
76. Section 7 of the *Matrimonial Property Act* provides that:
- “Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”
77. The section has two parts. Ownership of the matrimonial property which, subject to any agreements before marriage, vests in the spouses according to their contribution towards the acquisition of the property. And, division of matrimonial property between the spouses which is done upon divorce or where the marriage is otherwise dissolved.
78. The section contemplates a marriage may be otherwise dissolved other than by divorce. Death is such one incident that dissolves a marriage. There is also a debate on dissolution where the parties conscientiously consent or agree to end the marriage or cannot simply stay in the marriage or are already staying apart for a considerable period of time with no intention of resuming the marriage.
79. Be that as it may, matrimonial property rights may be ascertained, preserved and protected during subsistence of the marriage (s. 17 of *Matrimonial Property Act*).
80. Although enacted under the Land and Environment chapter, Parliament is mandated under article 68(c)(iii) of the *Constitution*: -
- to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage



81. 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.
82. This court has considered the provisions of the Constitution on Article 45(3) as well that:
“Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage”
83. The provision has been interpreted not to confer equal entitlement to property acquired during the marriage, except to the extent of contribution by the spouse towards the acquisition of the property. See the Court of Appeal (Kiage, JA) in PNN v ZWN [2017] eKLR that:
“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 that to simply declare that property shall be shared on a 50-50 basis. Rather it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.”
84. However, the article guides the courts in determining the rights of parties to a marriage in respect to the division of matrimonial property on the basis of their respective contribution towards the acquisition of the property.
85. Upon careful scrutiny of the evidence of each party, the plaintiff has proved to the court that she made monetary contribution towards the acquisition of the matrimonial properties. She produced bank statements, Mpesa messages, and correspondence with different people including the defendant. She further stated that through her employment she acquired loans and monies that she applied towards the acquisition of matrimonial property as well as the development of the properties in question.
86. Evidence show that, the defendant made sure that, despite their mutual agreements, and the substantial contribution by the plaintiff in the acquisition of the properties, the matrimonial properties were registered in his name. He abused this status and even transferred or caused transfer of two of the matrimonial properties to the interested party- her sister.
87. At this juncture, it is appropriate to note 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.
88. 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.
89. 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. The evidence shows that the intention of the defendant’s actions in collusion with the interested party-his sister- was to keep the enjoyment as well as the control of the matrimonial property as if it was his absolutely. His contrived scheme was to achieve exactly this. Amazingly, the defendant and the interested party succeeded to register two properties in the name of the interested party and evicted the plaintiff from her matrimonial home and the rental houses, and placed them at the exclusive enjoyment and control of the defendant through his sister. The evidence adduced support an indictment that, the court proceedings for eviction were



- part of the contrived scheme in an attempt to clothe their actions with some form of legality. The defendant still lives in the matrimonial home and although it was claimed that he is a tenant, there was no evidence that he pays rent.
90. The interested party claims to be the owner of the property but holding it in trust for the family. She was not able to explain how the property was acquired by the family or how she was registered as the proprietor of the pieces of land in question.
 91. The evidence adduced before the court shows that the properties in question were purchased by the joint efforts of the plaintiff and the defendant. And, they were living in one of the properties which they had established as their matrimonial home. It was also established through evidence that the interested party was registered in collusion with the defendant much later after the acquisition and development of the properties by the plaintiff and the defendant.
 92. It was also borne out of the evidence adduced that the interested party evicted the plaintiff in overt collusion with the defendant from her matrimonial home in Cis-Mara/Oleleshwa/4552 and has denied her the benefit of the rental income in respect of Cis-Mara/Oleleshwa/3728. The claim by the interested party that the plaintiff and the defendant were tenants in the property was neither substantiated nor proved. It was mere ploy to hoodwink the court into believing their contrived scheme to dissipate or deny the plaintiff of the matrimonial properties.
 93. The defendant and the interested party were terribly complicit to take away the matrimonial property from the plaintiff, vanquish her and extinguish her property rights in these properties.
 94. The transfer of matrimonial property herein to the interested party was of trust property. It was a wrong committed by the defendant and the interested party to the plaintiff. And, such property in the hands of the interested party calls for a declaration of a remedial constructive trust in favour of the plaintiff to the extent of the proportion of her contribution. This remedy is based on the principle of unjust enrichment and is achieved through the process of tracing and restitution.
 95. Tracing and restitution of property, inter alia, facilitate a claim to a proprietary right.
 96. The plaintiff demonstrated how the two properties were acquired by them with common intention of developing them as matrimonial properties.
 97. The plaintiff has also demonstrated her contribution as required under section 2 of the [Matrimonial Property Act](#) towards the purchase and development of the captioned properties herein.
 98. The plaintiff has established she made monetary contribution of more than 50 % towards acquisition and development of the matrimonial properties known as Land Parcel Number Cis-Mara/Oleleshwa/4552, Cis-Mara/Oleleshwa/3728, Cis-Mara/Oleleshwa/4937 and Plot No 887 Block 11
 99. . In fairness, however, the court finds that she is entitled to 50% of each of the properties.
 100. The court also finds that, the plaintiff is entitled to 50% of land parcel No Cis-Mara/Olopito/818 a gift the two received.
 101. The evidence shows that the plaintiff and the defendant started living together as husband and wife in 2002 and solemnized their marriage in 2005. The defendant and the interested party made a submission that it is strange for a boyfriend and a girlfriend to enter into such arrangement for purchase of properties. This submission was oblivious of the fact of pre-nuptial agreements which are recognized and enforceable in our law. In fact, ownership and division of matrimonial property is subject to the pre-marriage agreements on properties (s. 6 of the [Matrimonial Property Act](#)).



102. The plaintiff and the defendant were also gifted jointly land parcel No No Cis-Mara/Olopito/818 during the pendency of their marriage. Accordingly, the plaintiff is entitled to 50% of the said property. It is so ordered.
103. The properties listed herein form part of the matrimonial property.

Conclusion and orders

104. Taking into consideration the totality of the evidence adduced in this case and the applicable law, this court makes the following, declarations, determinations and orders:
- i. It is hereby declared that the Properties number Cis-Mara/Oleleshwa/4552, Cis-Mara/Oleleshwa/3728, Cis-Mara/Oleleshwa/4937 and Plot No 887 Block 11 are matrimonial property.
 - ii. The plaintiff made substantial contribution towards acquisition and development of parcels of land known as number Cis-Mara/Oleleshwa/4552, Cis-Mara/Oleleshwa/3728, Cis-Mara/Oleleshwa/4937 and Plot No 887 Block 11.
 - iii. However, in all fairness and practical purposes, her contribution entitles her up to half of each of the three properties. Accordingly, the court hereby declares that the plaintiff is entitled to half of each of the the properties above named.
 - iv. Parcel No Cis-Mara/Olopiti/818 was a gift to the plaintiff and defendant in their wedding day. It was an acquisition during their marriage. The court hereby declares that the plaintiff is entitled to half of the land
 - v. The defendant held the matrimonial properties in (i) above in trust for the plaintiff to the extent of her contribution determined above.
 - vi. Transfer of the two properties, to wit, Cis-Mara/Oleleshwa/4552 and Cis-Mara/Oleleshwa/3728 to the interested party by the defendant was in breach of the trust form. The transfers were also in collusion with the interested party. Those acts were wrongs committed to the plaintiff for which remedial constructive trust arises against the interested party. A trust is therefore impressed upon the two properties. And, the interested party is hereby ordered to make restitution of the properties through transfer to the plaintiff and the defendant of Cis-Mara/Oleleshwa/4552 and Cis-Mara/Oleleshwa/3728 within 90 days from the date of this judgment which failing, (iv) & (v) below shall apply.
 - vii. For purposes of execution of this order, the relevant land Registrar shall register the properties herein in the names of the plaintiff and the defendant as proprietors in common in equal shares.
 - viii. And, for purposes of this order, where the original title deed cannot be found or is not produced, the registrar shall dispense with the requirement for production of original title.
 - ix. Subsequently, and subject to attendant processes, each party to get their respective share in the properties herein.
 - x. Given the nature of the order herein and the necessary transmission of the properties in question, as well as the need to ensure full execution of the order, a structural interdict is necessary and incidental to ensuring execution of the orders of the court. Accordingly, parties



are to report progress of enforcement of the order, and are at liberty to apply as may be necessary.

xi. Considering this is a family dispute, each party shall bear own costs of the suit.

105. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 22ND DAY OF FEBRUARY, 2024.

HON. JUSTICE F. GIKONYO

JUDGE

In the presence of: -

C/A – Mr. Otolu

Nyambochwa for Defendant and interested party – Present

Lukorito for the Plaintiff

