



**ZWO v GVB (Matrimonial Cause E002 of 2021)
[2024] KEHC 5281 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5281 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MATRIMONIAL CAUSE E002 OF 2021**

**F GIKONYO, J
APRIL 30, 2024**

BETWEEN

ZWO PLAINTIFF

AND

GVB DEFENDANT

JUDGMENT

1. For determination is the Originating Summons (OS) dated 29/04/2021 and filed on 10/05/2021. It is supported by three affidavits. The plaintiff's supporting affidavit, ZWO sworn on 29/04/2021, a further affidavit sworn on 26/04/2023 and 2nd further affidavit sworn on 07/08/2023.
2. The plaintiff sought the following orders;
 1. That there be a declaration that all those properties listed below are matrimonial property;
 - a. Illmashariani/Morijo/ XXXX
 - b. Illmashariani/Morijo/ XXXX
 - c. Cis Mara/Oleleshwa/XXXX
 - d. Cis Mara/Oleleshwa/XXXX
 - e. Cis Mara/Oleleshwa/XXXX
 - f. Cis Mara/Oleleshwa/XXXX
 - g. Cis Mara/Oleleshwa/XXXX
 - h. Cis Mara/Oleleshwa/XXXX
 - i. Cis Mara/Oleleshwa/XXXX



- j. Cis Mara/Oleleshwa/XXXX
 - k. Cis Mara/Oleleshwa/XXXX
 - l. Cis Mara/Oleleshwa/XXXX
 - m. Cismara/Oleleshwa(number withheld by defendant)
 2. A declaration that the properties and income from the same be shared equally between the plaintiff and defendant.
 3. That the costs of the originating summons be paid by the defendant.
3. The plaintiff filed a comprehensive witness statement dated 11/01/2023.
4. The suit herein seeks the division of marital property between the plaintiff and the defendant.
5. The summons was opposed by the defendant vide replying affidavit sworn by the defendant, GVB sworn on 26/05/2023 and 07/07/2021. The defendant added to the listed properties by the plaintiff the following; Cis Mara/Olopito/XXXX, XXXX, and XXXX.
6. The defendant prayed for;
 - a. Dismissal of the application with costs to the defendant.
 - b. Order the plaintiff to deposit all the title documents relating to the suit properties before this court.
 - c. Restrain the plaintiff, her servants or agents from alienating, transferring, giving in exchange, or encumbering or in any other way disposing of any or any all of the suit properties until this suit is determined.
 - d. Find and decree that all the properties listed in paragraph 12 solely owned and are his property held in trust by the defendant for and on his behalf.
 - e. Order the plaintiff to execute all the necessary documents to transfer all the proceeds and remit the same to him defendant. In the event that title and ownership in any of the properties listed in paragraph 12 has already been transferred in the favour of any third party.
7. Both parties gave oral evidence in support of their respective cases. The plaintiff was the sole witness in support of her case and the defendant testified also as a sole witness in support of his case. Both parties also filed their written submissions.
8. The parties herein were married under the Marriage Act of 2014 on 03/06/2012. The marriage was dissolved on 22/02/2021 vide Narok Chief Magistrate's Court Divorce Cause No. XXXXof 2019.

Plaintiff's case

9. The plaintiff tendered the supporting affidavit sworn on 26/04/2021 and the further affidavit sworn on 07/2023 together with the attached documents as her evidence in chief. She produced the bundle of annexures as P Exh 1.
10. On cross-examination, she stated that she was working at Seventh Wonder when she met the defendant. She was a room attendant and storekeeper. Her salary at the time was about Kshs. 5,000/= per month. Her former husband was a balloon pilot. She later learned that most of his money was going to his accounts outside the country. He therefore used to receive only Kshs. 30,000/= to cater for his few



expenses as all expenses were catered for by the lodge. When they met, he offered her a job. She was a photographer then. She used to earn from him. She used to pay her expenses from the proceeds of photographing. He had employed her.

11. She acquired property No. Cis Mara/Oleleshwa/ XXXX before they got married. But they developed it together on the understanding that it was their home and did not belong to only one of them. Her former husband collects rent from two houses. She lived in one and collected rent for one house until recently when he said he would be collecting all the rent.
12. She is aware of all other properties. She has not provided documentary evidence of her claim in these assets that is Cis Mara Oleleshwa/XXXX,XXXX,XXXX,XXXX and XXXX.
13. On Cis Mara XXXX, they acquired them jointly and are registered in her name. She made a monetary contribution from her business towards their acquisition. There is a case on these properties where no documents have been provided. The case was a succession case that concluded.
14. On Cis Mara/Olopito/ XXXX and XXXX, these were her properties. She provided documents of acquisition to the court. These properties were acquired end of 2018 to the beginning of 2019.
15. On the agreement dated 12/09/2017, the process started in 2017 and concluded in 2019. She was still married to the defendant as the marriage was from 2012 to 2019.
16. On property in the UK. She was aware of it. She was not able to provide any documents on its acquisition. She alleged that he was extravagant and squandered his money on extravagant life. She was his wife and did not think of keeping records.
17. He gave her a gift of Kshs. 6,000,000 and it was not a loan.
18. On Cis Mara/Oleleshwa/11819, 14233, and 15113, she bought them with the anniversary gift money he had given her.
19. They lived together and provided each other companionship. He did not support her business. He had initially employed her. He used to visit to check the progress on the farm. She used to visit him at Masai Mara where he was working. She had a daughter before marriage. He did not officially adopt her but lived as a family. Sometimes he paid school fees when she asked for it.
20. She was the source of all properties in Kenya. He invested through her. She was a land broker. They contributed the funds. She was not aware he had a house in Germany before coming to Kenya.
21. She contributed roughly Kshs. 15,000,000/= towards the acquisition of their properties. The evidence before the court includes bank statements on her account between 05/10/2016 to 06/12/2016.
22. On reexamination, she stated that at Seventh Wonder she used to earn a basic salary of Kshs. 5,000 but tips to them were more amounting to Kshs. 20,000/=
23. On property no. 4391 she stated that the same was purchased using her earnings from the hotel, tips, and photos. He was paying her 50% plus salary of Kshs. 12,500. He used to pay her in cash. They used to sell the photos expensively.
24. On Cis Mara/ Oleleshwa/XXXXand XXXX, she stated that he contributed more to these properties. Her contribution was about Kshs. 250,000/=. These properties were registered jointly because they acquired them jointly but his monthly contribution was higher.
25. Those registered in her name were purchased using her money. She fenced them. There is massive development of the properties.



26. He was at Maasai Mara but would go to narok as he was preparing for retirement. He found her developing them and could provide him comfort at home.
27. They separated in 2017.
28. Her home is one Cis Mara/ Olopito/XXXX and XXXX. Mr. Lemein sold her the properties.
29. She advised the defendant to buy the property in the UK to buy off his brothers after his mum's death and keep the house as theirs. He bought it. He gave her a gift of Kshs. 6 million to buy land. The gift was not a loan. She gave him a balance of her gift and sent it to his son.
30. The joint account was to do joint development as a family but the gift did not go to the joint account as it was personal.

The defendant's case

31. The defendant testified that he is a former husband to the plaintiff. He adopted his replying affidavit sworn on 26/05/2021 and the annexures thereto as his evidence in chief.
32. On cross-examination he stated that parcel no. Cis Mara/Oleleshwa/4391 was bought in 2012 November. He financed its purchase. Kshs. 800,000 was transferred to her account to cater for the building of the property. It was not for the purchase of Cis Mara/Oleleshwa /4391. He could not remember the name of the farm owner. They lived on the said property as husband and wife. Three mansions are built on it. She worked as a waitress. It was her hobby to get tips from photography. It was not really employment. She tried hairdressing and shop for household goods. She engaged in wheat farming but made a loss of Kshs. 240,000/= . She deposited Kshs. 390,000/= while his' was Kshs. 470,000 to their joint account. He gave her Kshs. 1,300,000/= as capital to her business. He also gave her Kshs. 500,000 to finance her biz. He loaned her Kshs. 6,000,000 on a promise of joint venture. It was not a gift as stated by her. The money was to be invested in land. Some properties were purchased directly by him to the vendor, others through the Kshs. 6 million he provided. They paid through a joint account or directly by him. He was the only one who contributed to the joint account. He also paid Lemein directly. Purchase negotiations were in his absence but he entrusted her to sign the agreement. They selected properties and purchased them. He has never seen a dependants pass.
33. They offered companionship mutually. Both of them supervised the site and building until October. She was the only one at the farm. He engaged domestic workers.
34. The agricultural land Morijo (three parcels) are registered in her name. She signed the sale agreements but he supplied the money. He paid the vendor the purchase money directly from his personal account to the vendor. All she dealt with were registered in her name but those he dealt with were registered in their joint names. The Morijo properties were through succession but were done to her name.
35. She requested that he finance land in a 10-acre parcel of land and sell it at a profit. She was to refund the Kshs. 6 million. He deposited it to her as a wife. The joint account was dormant at that time. He later closed it two years ago. They made a verbal agreement to loan 6 million when she took him to the site. Naftali a minor was present no other witnesses.
36. Of Lenana property (3 of them) they acquired them together. The properties were bought after separation. They were acquired in September 2017 and 2018. They were together in 2019. She abandoned the matrimonial home twice; on 31/07/2017 for 11 months and returned in June 2018 she moved back to the matrimonial property and lived for 8 months when she left again in February 2018. This was the final separation. Lenana property was purchased before the separation. It was acquired in September 2017. She used Kshs. 6 million to buy the properties.



37. He inherited the UK home in 2017. She did not advise him to buy off his brothers. He agreed with his brothers at that time they were still married.
38. On re-examination, he stated that their marriage was terminated in February 2021. The 6 million he gave her was to buy some property and resell at a substantial profit of Kshs. 4 million. The money was not returned to him the plan collapsed but she had bought properties that she would transfer to him. The properties were Cis Mara/Oleleshwa /XXXX,XXXX and XXXX, Cis Mara/Olopito /XXXX and XXXX.
39. When she returned to the matrimonial home the 2nd time she requested a loan for 6 months which was about 1.3 million. She did not return the money. There were other loans to renovate her narok shop. He financed cumulatively Kshs. 1.8 million for the shop. She never repaid him but instead, purchased and developed properties, especially Olopito ones.
40. During marriage as married couples they acted in good faith and trust. They made verbal agreements. He worked as a licensed balloon pilot. He was earning Kshs. 200,000 monthly with 2 months of paid leave.
41. On Cis Mara/ Oleleshwa/XXXX, the same was purchased with his money. He owns property in Germany. He owned a home there. He sold it and proceeds were wired to Kenya. About 23 million. He invested the money in high-return investments. He also earns a pension. The money was used to build no. XXXX. The monthly pension was about 2000 dollars monthly.
42. Dependency pass, he has never depended upon the plaintiff for survival. There were options to apply as a spouse or individual. Immigration status requires 7 years. He had 8 years in his work permit. As a spouse, he needed a marriage for 3 years. He had not attained this requirement. His quest took long and immigration advised him to withdraw his earlier application and apply as a spouse. They asked his spouse to file a dependency pass and she did. He is not financially dependent on her.
43. They opened a joint account. She deposited Kshs. 300,000- 400,000 or thereabout. He deposited Kshs. 400,000-500,000/=. That was the only deposit she made into the account. All other deposits to the accounts came from him from the bank statement. It amounts to about 8 million.
44. On Cis Mara/Oleleshwa/4391, the same was registered in her name because she told him that the inclusion of his name in the title before his permanent status would be problematic. He agreed the exact amount towards the purchase and build was about 8 million.
45. Of Morijo properties, they were registered in her name for the same reason. He contributed 100% towards their purchase. He paid the purchase price directly to the vendor.
46. Those in their joint names were from his personal friend JG. He sold them to him he asked him to register them in their joint names. They paid from the joint account she contributed Kshs. 300,000.
47. Of Cis Mara/ Oleleshwa/XXXX -XXXX was financed 100% by him.
48. Oleleshwa and Olopito properties were registered in her name. She purchased using the 6 million. He is therefore entitled to claim them.
49. The UK property was his inheritance from his mother. The three sons were to divide equally. She also left them money. They agreed that he would buy them off. He bought from his own sources. The plaintiff was not involved. Income from the rented home was used by her during their marriage. When she left he took over and she only received from one rented house a sum of Kshs. 15,000. They agreed



she gets income as her source of income at the time. They mutually agreed after separations that she collects rent from one unit.

50. It was 32 acres of rental land where agricultural investment was to be done. He gave Kshs. 1,000,000 to the project. There was a loss of Kshs. 240,000 but they redirected Kshs. 76,000 to purchase Oleleshwa.

The plaintiff's submissions

51. The plaintiff submitted that the matrimonial properties of Zubeda and Beckwith are; Cis Mara/Oleleshwa/4391, and the title no. 90, Moor Lane, XXXX (freehold), Cis Mara/Illmashariani/Morijo/XXXX,XXXX and XXXX, Cis Mara/Oleleshwa /XXXX,XXXX and XXXX The plaintiff relied on sections 6(1) and 9 of the [*Matrimonial Property Act*](#).
52. The plaintiff submitted that she made direct monetary contributions to land parcels Cis Mara/Oleleshwa/ XXXX,XXXX and XXXX Cis Mara/Olopito/XXXX,XXXX and XXXX She relied on the case of Nairobi civil appeal 560 of 2019 [*JKO v CKO \(Civil appeal 560 of 2019\)*](#) [2023] KECA 115 (KLR) (3 February 2023).
53. The plaintiff submitted that her contribution towards the acquisition purchase and development of Cis Mara/Illmashariani/ Morijo/ 5197, 5484, and 5848 was substantial enough to give her a 50% beneficial share thereon. She argued she made a monetary contribution. She relied on the cases of Nakuru Matrimonial Cause No. XXXX of 2019 MMK v JJM &Another [2023] eKLR, and Meru civil suit no. 36 of 2018 PKM v JNK &Another [2020] eKLR.
54. The plaintiff submitted that she made non-monetary contributions to the acquisition of the properties by performing domestic work, overseeing the purchase of property, supervising construction work, involvement in litigation, and aiding Beckwith obtain residency status. She relied on the case of Nairobi Matrimonial Property Cause No. XXXX of 2019 AWM v JGK [2021] eKLR, Malindi Matrimonial Cause No. XXXX of 2014 F.S. V E.Z. [2016] eKLR, Kakamega Civil Case No. 18 of 2018 LIO v AOO [2020] eKLR, Kilgoris Matrimonial Cause No. XXXX of 2021 (OS) HNM v FTS [2021] eKLR and section 7 of the [*Matrimonial Property Act*](#).
55. The plaintiff submitted that only property acquired and/or developed during cohabitation and before separation qualifies to be called matrimonial property. She relied on the Black's Law Dictionary Ninth Edition, Milimani Civil Suit No. 59 of 2011(OS) JWC v PBW [2015] eKLR, Mombasa Family Division Originating Summons No. XXXX of 2017 AIN v IMM [2019] eKLR, Nairobi Civil Suit No. 25 of 2012 (OS) RWW V EW [2019] eKLR, and Nairobi HCCC No. 39 of 2004 (OS) BNM v GMK [2018] eKLR.
56. The plaintiff submitted that Beckwith has not rebutted the presumption that the gift of Kshs. 6 million to Zubeda was absolute. She relied on section 3(1) of the [*Law of Contract Act*](#), section 15 of the [*Matrimonial Property Act*](#), and Kakamega Civil Case No. XXXX of 2018 LIO v AOO [2010] eKLR.
57. The plaintiff submitted that the jurisdiction of this court has not been invoked properly to make an inquiry on the question of loan which is a commercial dispute with a different set of laws and rules. The prayer for cancellation and alteration of title deeds for parcels Cis Mara/Oleleshwa/ 14233, 1511, 11819, Cis Mara/Olopito/ 7193, 7194, and 7196 flouts the provisions of Order 21 Rule 6 of the Civil Procedure Rules. Further, the defendant has not provided certified copies of titles for the said parcels. She relied on owners of the Motor Vessel Lilian 'S' v Caltex Oil (Kenya) Ltd [1989] KLR 1.
58. The plaintiff submitted that the loan of Kshs. 6 million should not be used to offset Zubeda's property. She relied on the case of Nairobi Civil Suit No. 51 of 2012(OS) NNN v SNM [2017] eKLR.



59. The plaintiff submitted that the Cis Mara/Oleleshwa/ 11819, 14233, 15713, Cis Mara/Olopito/7193, 7194, and 7196 were registered solely in Zubeda’s name with no indication of an existing trust. Therefore, the properties belong to Zubeda absolutely. She relied on the case Mombasa Family Division Divorce Cause No. 31 of 2015 EMP v ENM [2020] eKLR, Nairobi Civil Suit No. 51 of 2012(OS) NNN Vs SNM [2017] eKLR and section 14 of the *Matrimonial Property Act*.
60. The plaintiff submitted that the statement (GVB 17) carried damning information and admitted the statement is prejudicial to the plaintiff as she will have been denied the right to challenge the facts stated therein leading to a violation of her right to a fair trial.
61. The plaintiff submitted that a report by Adomag Valuers and Associates (GVB24) does not bear a seal of the company and is not signed on all page’s contents thereon cannot be verified until the maker says so.

The defendant’s submissions.

62. The defendant submitted that Cis Mara/Oleleshwa/XXX Cis Mara/Illmashariani/ Morijo/ XXXX Cis Mara/Olopito/XXXX and XXX constitute matrimonial property. NYK XXXX, 90 Moor Lane, York, United Kingdom is a trust property and does not constitute matrimonial property. That between 3/6/2012 and 22/02/2021 there was a legal and valid marriage between 3/6/2012 and 22/02/2021, there was a legal and valid marriage between the applicant and respondent. The defendant relied on sections 3(1) and 16 of the *Marriage Act*, section 6 of the *Matrimonial Property Act*, and HNM v FTS [2021] eKLR.
63. The defendant submitted that the property title no. XXXX,90 Moor Lane York, United Kingdom does not form part of the matrimonial property and it falls within the exceptions under section 6(2) of the *Matrimonial Property Act*. Further, the plaintiff has not provided any evidence of any monetary or non-monetary contribution to its acquisition improvement or development and therefore not entitled to a share thereof. The defendant relied on section 6(2) of the *Matrimonial Property Act*, and Matrimonial Cause No. 6 of 2021) [2022] KEHC 16643(KLR).
64. The defendant submitted that 6 million together with Kshs. 3,775,000 and 9,775,000 received by the plaintiff from the defendant are not gifts as claimed but matrimonial property. Consequently, any proceeds, investments, or land acquired through the said funds should be declared to form part of matrimonial property. The defendant relied on section 15 of the *Matrimonial Property Act*, and the Black’s Law Dictionary.
65. The defendant submitted that merely because the property is registered in the name of the plaintiff does not mean that the property belonged to her. Furthermore, properties registered in but names did not automatically grant the plaintiff a share of the property. The plaintiff has to prove the extent of her monetary and non-monetary contribution towards the purchase, improvement, or development of the properties registered in her name. The defendant relied on Article 40(1) and (6) of *the constitution*, sections 26 and 28 of the *Land Registration Act*, sections 2,9,12, and 14 of the *Matrimonial Property Act*, F.S. v E.Z. [2016] eKLR, and Federation of Women Lawyers of Kenya (FIDA) v Attorney General & Another [2018] eKLR.
66. The defendant submitted that the division of the matrimonial property between the spouses is determined based on the contribution made by each towards its acquisition, improvement, or development. The defendant contends that a significant portion of funds utilized to acquire, develop, and improve all the suit properties was financed from the sale of his house in Germany for (Kshs. 22,317,032.35) his regular salary, and retirement pension (KES 220,000), consultancy income (USD



- 1,500) and other savings and other investments while working in Maasai Mara narok county. Therefore, he had the means to acquire the said properties. The defendant contends that the plaintiff's admission that the funds were used to acquire and develop various properties corroborates the defendant's assertion that the funds were to be used for a land investment. The various properties are listed as Cis Mara/Oleleshwa 14233, 15113, 11819, Cis Mara /Olopito 7193, 7194, and 7196. The defendant relied on Article 45(3) of [the Constitution](#), section 7 of the [Matrimonial Property Act](#), JOOV MBO; Federation of Women Lawyers (FIDA Kenya) & Another (Amicus Curia)(Petition 11 of 2020)[2023] KESC 4(KLR)(Family), P.N.N v Z.W.N. [2017] eKLR, HNM v FTS [021] EKLR, aw v MVCMAWM [2018] eKLR, RCL v MKK (Matrimonial Cause 6 of 2020) [2022] KEHC 10719 (KLR) (9 June 2022), ENK v MNNN (Civil Appeal 559 of 2019) [2021] KECA 219(KLR, and [JRN v ENN alias EM \(civil appeal E007 of 2021\)](#) [2022] KEHC(KLR)
67. The defendant submitted that a fair and reasonable assessment of the parties' respective contributions and beneficial shares in Cis Mara/Oleleshwa /XXX be pegged in the ratio 95: 5 in favour of the defendant.
 68. The defendant submitted that a fair and reasonable assessment of the parties' respective contributions and beneficial shares in Cis Mara/Oleleshwa /XXXX, XXXX and XXXX be pegged in the ratio of 100:0 in favour of the defendant.
 69. The defendant submitted that a fair and reasonable assessment of the parties' respective contributions and beneficial shares in Cis Mara/Oleleshwa /XXXX, XXXX and XXXX and Cis Mara/Olopito/ XXXX, XXXX and XXXX. 7196 be pegged in the ratio of 60:40 in favour of the defendant which is developed and the rest be pegged at a ratio of 95:5 in favour of the defendant.
 70. The defendant submitted that a fair and reasonable assessment of the parties' respective contributions and beneficial shares in ownership of tile NYK200848, 90 Moor Lane, York, United Kingdom be pegged in the ratio of 100:0 in favour of the defendant.
 71. The defendant submitted that this court has jurisdiction to hear and determine the dispute before it. The defendant relied on Article 165(3)(a)(b)(c) and 45(3) of [the constitution](#), section 6(c) and 17 of the [Matrimonial Property Act](#), and [Royal Ngao Holdings Limited v NK Brothers Limited & another \(civil case 156 of 2019\)](#) [2021] KEHC 275(KLR).
 72. The defendant submitted that the documentation produced by the defendant in court provides the court with sufficient information on the status of and particulars of each of the suit properties. He urged the court to find that they meet the requirements of Rule 6 given the unique circumstances of the defendant. Further urged this court that should it require these documents, the plaintiff be ordered to produce them.
 73. The defendant submitted that the divorce court properly admitted the witness statement (GVB 17) into evidence and it was part of the court record considered in the determination of the divorce cause. Its production and admission by this court are proper and in line with provisions of section 77 of the [Evidence Act](#). The defendant relied on sections 34 and 77 of the [Evidence Act](#).
 74. The defendant submitted that the report (GVB24) falls within the threshold of section 33(b) of the [Evidence Act](#) and the document is duly signed and thus admissible. He urged this court to exercise its discretion to admit them in evidence as the other documents produced by both parties. The defendant relied on sections 33 and 33(b), 35(1) and (2), 170(1) and (2), 67 and 68 of the [Evidence Act](#), section 2 of the [Land Registration Act](#), and section 2 of the [Survey Act](#).



Analysis And Determination.

Relevant and important facts and period

75. The plaintiff and the defendant were married under the Marriage Act on 3rd June, 2012. The marriage was dissolved on 21st February 2021.

Issues

76. From the pleadings and submissions of the parties, the major issues for determination in this cause are: -
- i. Whether the suit property is matrimonial property;
 - ii. Whether the Plaintiff made any contribution in the acquisition or improvement or development of the matrimonial properties;
 - iii. Division of the matrimonial property?
 - iv. Potency or otherwise of the orders prayed for.
77. But, there are some issues which are of preliminary significance that arose, to wit;
- i. Jurisdiction to hear and determine the acquisition made out of the 6 million shillings herein
 - ii. Whether the property acquired using Kshs. 6 million, 9,775,000/= and 3,775,000/= was matrimonial property
 - iii. Whether the defendant flouted provisions of Order 21 Rule 6 of the Civil Procedure Rules.
 - iv. Whether contested documents GVB 17 and GVB 24 should be admitted as evidence.

Jurisdiction

78. The plaintiff argued that this court does not have jurisdiction to try issues on gift between spouses. The plaintiff contends that all that property bought using the gift money belongs to Z absolutely. That this court's jurisdiction has not been invoked properly to inquire the question of loan which is a commercial dispute with a different set of rules and laws.
79. The defendant contends that this court has jurisdiction to hear and determine this matter. The defendant contends that the plaintiff cannot be allowed to approbate and reprobate on the issue of Kshs. 6 million. The defendant argued that the plaintiff seeks to benefit from the jurisdiction of this court by praying that this court finds that the Kshs. 6 million advanced to her by the defendant was a gift that she used to acquire various properties. On the other hand, she seeks this court to oust its jurisdiction on determining ownership of the said gift when the defendant asserts that the money was a loan and thus he has a beneficial interest in the properties acquired therefrom. According to the defendant, the plaintiff contradicts herself.
80. The Court of Appeal in *AKK v PKW* [2020] eKLR stated:
- It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of Section 7, the High Court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved.
81. Gifts between spouses are governed by Section 15 of the Matrimonial Property Act which provides as follows: -



Gifts between spouses

Where a spouse gives any property to the other spouse as a gift during the subsistence of the marriage, there shall be a rebuttable presumption that the property thereafter belongs absolute to the recipient.

82. On a strict approach, matters of gifts between spouse are matters falling within the province of this court under the *Matrimonial Property Act*.
83. The matters raised herein also related to property acquired during marriage and is claimed as matrimonial property; whether the money used to purchase the properties was given by a spouse to the other spouse as a gift, or loan or trust between spouses is part of the issues to be determined by this court.
84. This court therefore has jurisdiction to declare the rights of the parties in relation to matrimonial properties contested herein.
Of Property acquired using Kshs. 6 million, 9,775,000/= and 3,775,000/=
85. Both parties admit there was a transfer of Kshs. 6 million by the defendant to the plaintiff but differ on the purpose. Z says it was a gift given to mark the 4th wedding anniversary. Beckwith maintains it was a loan for a joint venture to purchase property.
86. The plaintiff contends that it was more of a gift because it was wired on 21/06/2016 and parties got married on 3/6/2012. June is their anniversary month. She stated that, the money was paid to the plaintiff's sole account. And, there is no loan agreement. According to her, spouses rarely loan each other such substantial amounts of money and expect repayment without putting it down in writing.
87. The plaintiff contends that all that property bought using this money belongs to Zubeda absolutely. That this court's jurisdiction has not been invoked properly to inquire the question of loan which is a commercial dispute with a different set of rules and laws.
88. The plaintiff contends that the 'loan' of 6 million should not be offset against Zubeda's property.
89. Cis Mara/ Oleleshwa/ 11819 registered on 25/08/2017, Cis Mara/Oleleshwa/XXXX registered on 19/01/2017, Cis Mara Oleleshwa/XXXX registered on 28/04/2017. Cis Mara/Olopito/XXXX purchased for Kshs. 800,000 on 3/9/2018 and registered on 12/03/2019. Cis Mara/Olopito/7194 purchased at Kshs. 900,000 on 3/9/2018 and registered 12/3/XXXX. Cis Mara/Olopito/XXXX purchased for Kshs. 1,700,000 on 12/9/2017 and registered 12/03/2019.
90. She urged that, it is not contested that the period of separation was between 31/07/2017 and June 2019, from February 2019 to date. Zubeda stated that she purchased the above properties from Kshs. 6 million gifts, income from property management/real estate income from printing campaign materials for the 2017 general elections.
91. She made further arguments. Financial support from her father, Peter Omao, and proceeds from the sale of Cis Mara/Oleleshwa/XXXX (concerning 3 Lenana property) income from her shop and money lending business. These properties were later developed using the aforementioned income sources and loan facilities. If parties intended to have property purchased from 6 million the funds would have been channeled through their joint account and not Z's account. Properties meant to be owned jointly were registered as such.
92. The defendant contends that during the subsistence of the marriage, he invested in various business ventures or loaned money to the applicant to undertake various investments in total he advanced a



total of Kshs. 9,775,000 in cash and through the bank account on diverse dates during the subsistence of marriage. He provided bank statements (GVB14 and 15).

93. The defendant refutes the plaintiff's claims that monies loaned or invested through her by the defendant in the course of the marriage were gifts and not matrimonial property. He tabulated the amounts advanced to the plaintiff and particular dates.
94. The defendant refutes the plaintiff's claim that the Kshs. 6 million she received from the defendant was given to her as a 4th-anniversary gift.
95. The defendant contends that the plaintiff did not provide any written document to show that indeed the money was given to her as a gift or any independent witness to corroborate her claim.
96. The defendant asserts that the money was a loan to the plaintiff to invest in a property in Narok and repay the principal amount after making her profit. The defendant tabulated the purpose of transfers made when giving instructions to his bank. According to his tabulation, a transfer of 6 million was made to the plaintiff with the intent of land investment. This is evidenced in 'GVB14' in the defendant's handwriting.
97. The defendant contends that the plaintiff's admission that the funds were used to acquire and develop various properties corroborates the defendant's assertion that the funds were to be used for a land investment.
98. On the basis of evidence, this court finds that, it is not disputed that the money was provided by the defendant through a transfer to the plaintiff. The plaintiff did not prove the 6million shillings was a gift to her. Evidence show that the money was transferred to her for purposes of land investment. Acquisitions using the said money was also during their marriage, making them matrimonial property.
99. Other evidence led shows that that Property acquired using Kshs. 9,775,000/=, and 3,775,000/= forms part of the matrimonial property.
100. In sum, this court finds that Property acquired using Kshs. 6 million, 9,775,000/=, and 3,775,000/= forms part of the matrimonial property.

Provisions of Order 21 Rule 6 of the Civil Procedure Rules.

101. The defendant in his evidence and testimony stated that the plaintiff took possession of all the documents relating to the suit properties. The defendant sought orders of this court to compel the plaintiff to deposit all the title documents relating to the suit properties before this court. The defendant tried and supplied the court with a) title register of the UK property (GVB 18), b) official search records (GVB 16), c) official search records in the valuation report (GVB 24), and d) title deeds relating to Cis Mara/Oleleshwa/XXXX and XXXX. in the valuation report (GVB 24).
102. The court notes that the plaintiff is aware of the particular properties in issue in these proceedings. She is also aware, and filed responses and arguments in respect of properties of whose title deeds she is in possession. The plaintiff despite having possession of title deeds to the properties has not produced them in court. The plaintiff has also not challenged the description or particulars of any of the suit properties as per documents produced by the defendant.
103. The plaintiff now seeks the aid of the law; and invokes Order 21 rule 6 of the Civil Procedure Rules which provides: -

Judgment affecting registered title to land [Order 21, rule 6]



Where there is a prayer for a judgment the grant of which would result in some alteration to the title of land registered under any written law concerning the registration of title to land, a certified copy of the title shall be produced to the court before any such judgment is delivered.

104. It is contrived to seek the aid of the law which you have violated, and without seeking to purge the default by compliance.
105. In the spirit of article 159(2)(d) of *the Constitution*, the unique circumstances of the case, and on the basis of the documents filed, Order 21 Rule 6 of the Civil Procedure Rules has not been violated.

Contested documents GVB 17 and GVB 24 should be admitted as evidence.

106. The plaintiff contested that the production and admission of GVB 17 and GVB 24. GVB 17 is a statement of JMM dated 23/09/2020. JG was a plaintiff witness (PW2) in Geoffrey VB v ZWO, Narok Chief Magistrate Divorce Cause No. 12 Of 2019.
107. The defendant contends that the presence of the witness could not be obtained on time and as such he was not available to testify in the present case. Further, the present case is between two parties to the divorce cause which is dealing substantially the same issue related to their marriage and matrimonial properties. The plaintiff participated in the divorce cause by filing a cross-petition but declined to testify, call witnesses, or cross-examine any of the petitioner's witnesses despite having reasonable opportunities to do so. Therefore, there is no prejudice suffered by the inclusion of the statement as it is a court record of a divorce case that has been heard and finally determined.
108. GVB24 is a report drawn by Adomag valuers and associates. The plaintiff contested specifically the limiting conditions 1,8 and 11 of GVB 24 headed 'limiting conditions' and has not been signed on all pages.
109. The defendant contends that the report was commissioned and paid for as a professional service from Adomag valuers and associates. Due to time and scheduling constraints, the valuer could not be reached to attend the court session. Page 3 of the report confirms the instructions given and notes that the valuer inspected the properties and valued them based on their open market values between 2014 and 2023. Page 5 of the report outlines the methodology used to conduct the valuation. A letter confirming instructions is dated 12/05/2023 and a payment voucher dated 22/05/2023 for Kshs. 240,000 are included on pages 229 and 230 of the defendant's bundle of documents. The report itself is authored and signed by a licensed valuer, Dominic O Auma practicing in the firm of Adomag Valuers and Associates as part of the discharge of his professional duty to his client, the defendant.
110. The report is signed by Dominic O Auma on behalf of Adomag valuers and associates on page 7 thereof. At the footer of each page of the report is the name 'Adomag valuers and associates' which is the signature of the valuer and his firm and falls within the definition of a signature as defined in section 2 of the *Survey Act* and section 2 of the *land registration act* which are among the various legislations which were amended by the Business Laws (Amendment) Act, 2020. From the definition, it is immaterial whether Dominic O Auma used an advanced signature, made a mark, or wrote initials on his name for the document to be deemed signed. What is important is that writing the name of his firm 'Adomag valuers and Associates' on all pages of the report which he has created by himself is enough to identify him as the signatory and link him to the contents of all pages of the report. There is no evidence that any pages of the documents have been omitted or substituted with others as the report was published in a single process and shared as a scanned PDF document.
111. The defendant contends that the witness statement (GVB17) and valuation report are both relevant to the case and the contents at reliable as they speak to the facts in issue.



112. The defendant stated that the documents have been developed by persons who have no pecuniary interest in the outcome of this case. Despite not being available to testify, in open court, each one of them in making the documents relied on information that they had first-hand experience in and personal knowledge of.
113. John Gatua interacted with the parties to this suit at various times during the marriage while Dominic O Auma the valuer rendered his professional expertise by inspecting each of the properties and rendering his opinion on their respective values. The defendant therefore called upon this court to make a presumption that they are genuine in the development of the documents as no compelling evidence has been adduced to contradict their statements.
114. The defendant further contends that counsel for the parties agreed during pre-trial mentions to have all the documents including certified copies produced by the parties filed comprehensive statements and attached all relevant documentation with leave of the court.
115. The defendant contends that the plaintiff has not challenged the admissibility of all other documents (agreements, certificates, bank statements, or records) produced by the defendant despite not being produced by their makers or insisted on their makers to be cross-examined on the substance of the documents expunging the documents would be prejudicial and occasion injustice. The court is capable of weighing and determining the probative value and relevance of any evidence presented for its consideration.
116. This court finds that the statement (GVB 17) is part of a court record in the divorce cause which was heard and determined therefore the plaintiff stands to suffer no prejudice by the inclusion of the statement as evidence in this matter.
117. This court finds that the report (GVB 24) falls within the threshold of section 33(b) of the [Evidence Act](#). The document is also duly signed.
118. Accordingly, the statement (GVB17) and report (GVB 24) are admitted as part of the evidence of the defendant herein
119. This court will delve into each of the individual properties.

Of Matrimonial property: the law

120. Matrimonial property 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.” (S. 6, [Matrimonial Property Act](#))
- 117) The plaintiff has listed the following properties as comprising matrimonial properties: -
 - a) Illmashariani/Morijo/ XXXX
 - b) Illmashariani/Morijo/ XXXX
 - c) Cis Mara/Oleleshwa/XXXX
 - d) Cis Mara/Oleleshwa/XXXX



- e) Cis Mara/Oleleshwa/XXXX
 - f) Cis Mara/Oleleshwa/XXXX
 - g) Cis Mara/Oleleshwa/XXXX
 - h) Cis Mara/Oleleshwa/XXXX
 - i) Cis Mara/Oleleshwa/XXXX
 - j) Cis Mara/Oleleshwa/XXXX
 - k) Cis Mara/Oleleshwa/XXXX
 - l) Cis Mara/Oleleshwa/XXXX
 - m) Cismara/Oleleshwa (number withheld by the defendant)
121. The defendant has admitted the above properties are matrimonial property, save he added Cis Mara/Olopito/XXXX,XXXX and XXXX to comprise matrimonial properties.
122. Section 14 of the Matrimonial Properties Act 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
123. Subject to the foregoing presumptions of law, the rule of thumb is; Whoever alleges must prove the proportion of ownership of the matrimonial property.
124. 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 including matrimonial property rights is found 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.”
125. Nonetheless, judicial pronouncements posit that this constitutional provision is not a peremptory command of 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.”

126. Ownership of matrimonial property vests by the contribution of the spouse towards the acquisition or development or improvement of the property. See *Matrimonial Property Act* which provides in Section 7 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.”

127. 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.”

128. Accordingly, the contribution of the spouse towards the acquisition or development of the matrimonial property determines the extent of ownership. So, will spouses own matrimonial property in proportions equal to their contribution; which may be 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.

129. Contribution by a spouse for purposes of ownership and division of matrimonial property may be monetary or non-monetary or both. According to 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;

130. In this case, the plaintiff claims her contribution to the acquisition or improvement of the matrimonial properties in question was monetary as well as non-monetary.

131. 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.

132. Applying the test:

CIS Mara/Oleleshwa/4391

133. It is not disputed that the parties established their matrimonial home, and settled as husband and wife on *Cis Mara/Oleleshwa/4391*.



134. The plaintiff contends that the parties had household items in the matrimonial home erected on Cis Mara/Oleleshwa/XXXX and upon separation Beckwith retained them.
135. The point of disagreement is the acquisition and development of the property.
136. The plaintiff claimed that she acquired the property before marriage at Kshs. 7 million from her own savings. She claimed further that, the property was thereafter developed by the parties' joint efforts from funds pooled in their joint account. The initial savings came from Z income generated from a) salary and tips working at Seventh Wonder in Maasai Mara and b) commissions from photography work done for Beckwith before marriage.
137. The sale agreement was executed by Zubeda as the sole purchaser from Sammy Maina Kigotho on 14/11/2012. That Beckwith's initial amount paid into the joint account was made on 27/06/2013 way after Z had concluded the purchase.
138. The defendant contends that he made a significant monetary contribution of Kshs. 7,196,149(94.87%) towards the construction of Cis Mara/Oleleshwa/XXXX on diverse dates between 2013 and 2014 as per bank statements (GVB 11). The same coincides with the time the property was acquired and developed.
139. Notably, the plaintiff claims that she bought this property before marriage in November, 2012. However, the evidence shows that the two were married on 3rd June, 2012.
140. The plaintiff also stated that the property was developed through their joint efforts; using funds from their joint account.
141. Nevertheless, the plaintiff has not disputed that the defendant made a monetary contribution to the acquisition, development, and improvement of this property. She however claims she made a monetary contribution of Kshs. 7 million. The property was acquired for Kshs 700, 000/= as per the defendant's testimony which proceeds from the Kshs. 1 million invested in the failed wheat project (GVB 7). The estimates of the value of the properties based on the valuation report (GVB 24) match the amounts spent by the defendant to acquire, develop, and improve the property.
142. No evidence was adduced before the court by the plaintiff that she paid for the said property save for the sale agreement. The plaintiff was working earning Kshs. 12,500/= monthly and could not possibly access that kind of money or means to make payments but for the defendant's intervention who was earning significant income.
143. That the plaintiff has not produced evidence of the non-monetary contribution. She was compensated as he gave her Kshs. 39,000/= monthly to run the matrimonial home (GVB21). The defendant paid house help Kshs. 8,109.90 set for cleaners (GVB22). HOUSE servants Kshs. 9,370.30 set for cooks. He therefore provided equivalent if not greater non-monetary contribution. He bought up the plaintiff's daughter (GVB 20). The evidence shows that, the plaintiff frustrated his efforts to obtain a residency permit in March 2019(GVB 10). The purported role in obtaining status was not attributed to the acquisition of the matrimonial property.
144. The defendant was present at all material times of the acquisition, development, and improvement of the property while working at Maasai Mara. Since the construction he had lived in the matrimonial home from retirement and continued to oversee the necessary repairs and maintenance etc.
145. As regards household goods, the defendant disputes the claim and asserts that she carted away all household goods from the matrimonial home when she vacated and transferred them to Cis Mara/



- Olopito/XXXX. The defendant was forced to acquire new household goods which are now his sole property.
146. This court finds that this property was acquired and developed during the subsistence of marriage.
 147. The defendant proposes a 95:5 sharing of the above matrimonial property.
 148. The evidence show that the defendant made substantial contribution towards the purchase and development of the property. However, there is some evidence that the plaintiff made some contribution to the development of the property as she earning a salary and tips working at Seventh Wonder in Maasai Mara, and commissions from photography work done for Beckwith before marriage.
 149. They established their matrimonial home on the property and lived there until the plaintiff moved out.
 150. Because of these reasons, this court finds that the plaintiff is entitled to a 50% share of parcel No. Cis Mara/ Oleleshwa/XXXX. It is so ordered.

Title No. 90 Moor Lane, XXXX, (freehold).

151. The plaintiff does not dispute that Beckwith inherited this parcel of land. She stated that the same was inherited during the subsistence of marriage and the two considered the same as their overseas home.
152. This parcel of land was transmitted to the defendant in May 2017 after the demise of his mother and during their cohabitation.
153. The plaintiff contends that on her advice, Beckwith bought off his brother's respective shares from funds pooled for the family. The home was utilized as a family home on two occasions the parties traveled to the UK.
154. The defendant contends that this property is ancestral property inherited under UK customary law by him and his two brothers following the will of his mother upon her demise in 2017. It is not contested that the property was inherited during the subsistence of marriage.
155. The defendant contends that this property does not form part of the matrimonial property and falls within the exceptions under section 6(2) of the *Matrimonial Property Act*.
156. The defendant contends that if this court finds that it is matrimonial property then the plaintiff has not proved monetary or non-monetary contribution to its acquisition improvement or development and therefore not entitled to a share of the property.
157. The defendant contends that he paid directly from his personal bank account and not pooled resources as claimed by the plaintiff to secure his interest and those of his two sons, who shall inherit the property. He produced a bank statement (GVB 19) that showed transfers to facilitate the conveyance of the properties to his name following the succession. Therefore, the plaintiff could not have contributed to its acquisition, improvement, or development. The deal was brother to brother agreement and her advice was never needed or sought or obtained.
158. The defendant contends that during the subsistence of marriage, the couple did not live in the UK. The two times they visited the UK were to attend his brother's wedding and the funeral of his mother. During the visits, they did not stay at his mother's house. They were hosted by his cousin.
159. This court finds that this property was acquired during the subsistence of marriage. However, other than claiming that she advised the defendant to buy off his brothers and keep the property, the plaintiff has not demonstrated any monetary or non-monetary contribution towards the property in the UK.



160. This court finds that the plaintiff has not proved contribution in respect of this property.
161. This court finds that the Defendant is entitled to a 100% of Title No.90 Moor Lane, XXXX(freehold).

CIS Mara/ Oleleshwa /XXXX,XXXX,XXXX,XXXX AND XXXX.

162. The plaintiff contends that these properties were purchased jointly from their joint account. They were registered in their joint names in the year 2014. According to her, there was a clear intention for joint and equal ownership.
163. Z claimed that she funded the joint account from income gotten from a) hairdressing, b) selling household goods, c) money-lending business, and d) being a property manager Real estate business.
164. The defendant contends that he purchased the six properties lying in a 4-acre parcel of land in four installments in July 2014 at a total cost of Kshs. 1,320,000 from his friend John Gatua partly through cash transfer as shown in GVB 13. The balance was paid through credit for materials remaining from deposits left from his hardware store. He argued that the purchase price was not paid from a joint account as alleged by the plaintiff.
165. Further the estimates of the value of the properties based on the valuation report (GVB 24) match the monetary contribution by the defendant to acquire develop and improve the properties. The defendant emphasized that the registration of the properties in his wife's name was merely a matter of convenience but the true ownership and equitable interest rest with him due to his direct monetary contribution towards their acquisition. He did so purely for the affection he had for his wife at the material time and in good faith. He has confirmed to provide a non-monetary contribution to the improvement of the properties through supervision and management without any assistance or input from the plaintiff.
166. The defendant disputes the imputation of a joint venture, ownership, or any non-monetary contribution from the plaintiff.
167. The defendant evaluated the monetary contribution and non-monetary contribution at 100: 0 in his favour. According to him, she therefore does not acquire any beneficial interest owing to lack of contribution.
168. This court finds that these properties were acquired and developed during the subsistence of marriage.
169. Zubeda claimed that she funded the joint account from income gotten from a) hairdressing, b) selling household goods, c) money-lending business, and d) being a property manager Real estate business.
170. Nevertheless, she did not show the specific amounts in monetary contribution towards acquisition or development of these properties. The defendant stated that the properties were registered as joint ownership in good faith and for the great love and affection he had for his wife at the time.
171. But, as real property manager, her advice was valuable towards the acquisition of the properties which earns her a proportion of these properties. The joint ownership is also a signification of the intention to confer some proprietary rights upon the plaintiff. The properties were purchased during the subsistence of marriage. Accordingly, it will be most unfair to deny her a share in the properties as proposed by the defendant.
172. This court finds that the plaintiff is entitled to 10% of these properties.
173. This court finds that the defendant and the plaintiff is entitled to 90% and 10% share, respectively, of parcel numbers Cis Mara/ Oleleshwa /XXXX,XXXX,XXXX,XXXX It is so ordered.



174. The plaintiff contends that she purchased these properties using Kshs. 6 million gifted to her. Therefore, they were never intended to be owned jointly.
175. The defendant contends that he advanced monies to the plaintiff. He submitted various bank statements tracing monies sent to the plaintiff in GVB 14 and 15 totaling Kshs. 9,035,000/=
176. Of gifts between spouses, Section 15 of the *Matrimonial Property Act* provides as follows: -
Gifts between spouses
Where a spouse gives any property to the other spouse as a gift during the subsistence of the marriage, there shall be a rebuttable presumption that the property thereafter belongs absolute to the recipient.
177. The presumption that a gift belongs absolutely to the recipient is nonetheless, rebuttable presumption. Rebuttable presumption is: -
“An inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence’ (The blacks law dictionary).
178. The spouse claiming was gifted property must, nonetheless, prove the gift; ‘the voluntary transfer of property to another without compensation’ (The blacks law dictionary).
179. The plaintiff claims that she was given a sum of Kshs. 6 million as a gift by the defendant during their marriage anniversary in June. She also claims that she used the money gift to buy the properties in question.
180. The defendant claims the money was given for purposes of investment. The evidence by the defendant shows that the transfer of the said money to the plaintiff was for purposes of investment. The evidence negates any gifting of the money to the plaintiff. This court therefore finds that the plaintiff has not proved the alleged gift. The said sum of money was not a gift as claimed by the plaintiff.
181. The next hurdles are a twining of; whether the property purchased using the said money was matrimonial property. And, whether the registration of the properties in the name of the plaintiff confer exclusive rights upon the plaintiff or is a trust?
182. These properties were acquired during the marriage and were registered in the name of the plaintiff. Section 14 of the *Matrimonial Property Act* tackles this issue by creating rebuttable presumptions of; trust; and equal sharing of joint owned property, as follows: -
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.
183. The decision in Njoroge v Ngari[1985] KLR, 480, although was made before the *Matrimonial Property Act*, addressed the rebuttable presumption of trust of matrimonial property being held in the name of one spouse, and even if the property is registered in the name of one spouse, but the



- other spouse made contribution towards its acquisition, each spouse has proprietary interests in that property.
184. The trust form- constructive remedial trust- has been used in law to remedy situations where one of the spouses in full control of or in whose name the matrimonial property stands intends to assume or claim absolute ownership of the matrimonial property to the exclusion and detriment of the other spouse.
 185. The evidence before the court shows an undisputed causal link between the idea of the business ventures from the defendant, his agreement to the investment, the transfer of funds to the plaintiff's account, and the subsequent acquisition of properties that are registered in the name of the plaintiff.
 186. The defendant contends that he made a monetary contribution to the acquisition of the above properties. Therefore, said properties were acquired from monies totaling Kshs. 9,035,000/= given to the plaintiff by the defendant and not gifts; and are matrimonial properties.
 187. The defendant tabulated a total of Kshs. 4,400,000/=. The plaintiff has conceded to receiving Kshs. 6 million which she used to purchase the above properties. She stated that she used the balance from the 6 million and proceeds from the sale of Cis Mara/Oleleshwa/XXXX to acquire Cis Mara/Olopito/XXXX,XXXX,XXXX and XXXX.
 188. The defendant contends that there was a restriction on property known as cis Mara/Oleleshwa/XXXX. He is surprised at how the plaintiff sold the same yet the official search (GVB 16) shows that she is still the registered owner. He called upon this court to rescind the sale agreement thereto as the same is matrimonial property held in trust for the benefit of the defendant. He contends the transaction violates section 36 of the Land Registration Act and section 12 of the Matrimonial Property Act. Further, the defendant argued that if monies have been received by the plaintiff she should account for the same. Any proceeds of the funds in the form of investments or properties should form part of the matrimonial property.
 189. These arguments introduce a rather nascent subject of tracing and following trust property to the traceable product of the original trust property.
 190. Tracing is an evidential process by which one asset is permitted to stand in place of another asset for which the claimant claims rights arising from the original asset.
 191. Where the claimant's asset is used to acquire or is exchanged for another asset (traceable product), the rights in the original asset are transmitted in law to the traceable product, and the traceable product is treated as to be subject to the claimant's rights in the original asset, and is recoverable as such. This premise is also the basis for recovery of proceeds of crime.
 192. This court finds that these properties are matrimonial property as they were acquired and developed during the subsistence of marriage, thus, trust property under section 14 of the Matrimonial Property Act.
 193. The plaintiff admitted that she used the 6 million shillings provided by the defendant to purchase these properties. She has not proved any gift. She has not also proved any contribution in respect of these properties.
 194. Nevertheless, the defendant has proposed a ratio of 95:5 sharing of the above properties in favour of the defendant.
 195. On that basis, and the fact that she identified the properties and concluded the transactions thereto, this court orders 95:5% sharing of parcel numbers Cis Mara /Oleleshwa/XXXX,XXXX, and XXXX between the defendant and the plaintiff, respectively. On the basis of tracing and following of trust



property, sale of Parcel No. Cis Mara/Oleleshwa/XXXX would be in breach of trust and is recoverable by the trust.

CIS MARA/OLOPITO/XXXX,XXXX and XXXX..

196. The plaintiff contends that these properties she purchased from the balance of 6 million gift and income from a) property management/real estate, b) printing campaign materials for the 2017 elections, and that is how she met the seller d) financial support from his father, PO) proceeds from the sale of Cis Mara /Oleleshwa/XXXX.
197. She established her separate home having moved out of the shared house sitting on parcel no. Cis Mara/ Oleleshwa/ XXXX. She obtained a loan from Golden Chance Sacco to develop the said property. Beckwith never utilized the same as a family home and only visited when trying to reconcile with Z.
198. The defendant contends that he advanced monies to the plaintiff. He submitted various bank statements tracing monies sent to the plaintiff in GVB 14 and 15 totaling Kshs. 9,035,000/=
199. The evidence before the court shows an undisputed causal link between the idea of the business ventures from the defendant, his agreement to the investment, the transfer of funds to the plaintiff's account, and the subsequent acquisition of properties that are registered in the name of the plaintiff.
200. The defendant contends that he made a monetary contribution to the acquisition of the above properties. Therefore, the said properties were acquired from monies totaling Kshs. 9,035,000/= advanced to the plaintiff by the defendant and not gifts but are matrimonial properties.
201. The defendant contends that the plaintiff has not satisfactorily quantified her monetary contribution to the acquisition of these properties or income from her 'business ventures'. The plaintiff tendered bank statements (ZWO 10)- cooperative bank statements-transactions between 05/10/2016 and 05/11/2016. Narok's golden chance Sacco statements indicate a loan of Kshs. 3,500,000/= between 31/07/2019 and 25/11/2022.
202. The defendant contends that the transactions reflected in the statement from the cooperative bank for one month only and goes on to confirm that the plaintiff was only liquid after receiving Kshs. 6 million from the defendant. They do not present a true picture of her financial status.
203. The defendant relied on the testimony of John Gatua (GVB 17) during the divorce cause to show that the plaintiff was engaged in potentially fraudulent activities as the Sacco and as such the statements from the Sacco are potentially forgeries and have little if any probative value. In any event, if at all she obtained a loan, then the same was used to develop matrimonial property and can account for her contribution.
204. The defendant contends that the practice in Sacco's, individuals are granted loans based on making a deposit. The defendant posits that the deposit of Kshs. 1.4 million in the statements reflect part of the funds obtained from him. No evidence has been tendered towards the purchase of any of the properties, the plaintiff has admitted that some of the funds were obtained from the defendant proving the defendant's monetary contribution to the acquisition, development, and improvement.
205. On non-monetary contributions, the defendant contends that he continued to undertake domestic work, child care, companionship, and general house repairs during construction between 2015 and 2019. He continued even after the plaintiff deserted the marriage.
206. The defendant evaluates the monetary contribution of the defendant as Kshs. 9,035,000/= and the plaintiff as Kshs. 3.5 million equivalents to a ratio of 70:30 in favour of the defendant. The total of



both figures equals Kshs 12,535,00 which is not far from the estimated value of Kshs. 11,831,000/= during the period.

207. The defendant evaluated the non-monetary contribution of both parties at 70: 30 in favour of the defendant.
208. This court notes that, on the evidence by the plaintiff, these properties were purchased and developed partly using the balance from the 6 million shillings which she claimed was a gift, and sale of Cis Mara /Oleleshwa/XXXX, which also had been purchased using part of the said 6 million. These are matrimonial property.
209. The plaintiff identified the properties. She has also on a balance of probability proved contribution to this property. She established the matrimonial home here after moving out of the original matrimonial home to which the court has assigned her 50% ownership.
210. The defendant proposes a 95:5 sharing of the Cis Mara/ Olopito XXXX,XXXX. The defendant proposes a 60:40 in favour of the defendant in respect of Cis Mara/Olopito/ XXXX.
211. In all fairness, although the defendant made a substantial contribution towards the acquisition and development of these properties, this court finds that the plaintiff is entitled to a 40% share of Cis Mara/ Olopito XXXX,XXXX,XXXX. The defendant is entitled to a 60% share of the said properties.

CIS Mara /Ilmashariani/Morijo/5197, 5484 and 5848

212. The plaintiff contends that these properties were funded by Beckwith's account. She scouted for them, facilitated the conveyancing process, fully participated in litigation to secure a clean title, and developed it. She started a farm, and planted 300 trees, now mature for harvest, she put up servant quarters and structures for poultry, rabbits, and other livestock and installed massive water tanks, farming pumps, and pipes. Beckwith is still farming on these parcels and generating income therefrom.
213. The plaintiff argued that the lion's share of the family's upkeep was largely shouldered by her while Beckwith was away working at the Maasai Mara. She was responsible for the purchase of household supplies, food clothing furniture, and fittings and payment of all water and electricity bills. She also catered for her child's food clothing, medical care, and other subsistence not catered for by Beckwith. She also paid legal fees of stamp duty costs involved in doing physical and formal due diligence and searches and general conveyancing expenses. Beckwith only paid the purchase price and did not cater for preliminary and follow-up expenses.
214. ZWO-7 was an except from her bank's account statement proof of her income and expenditure towards domestic and business ventures. For instance, lots of payments to Tusky's Oltalet Mall for domestic purchase, Furniture Palace and Gantroniqs for home furniture and electronics, and Maish Boutique for clothes among others. She contends that just because Beckwith deposited over 22 million in his Kenyan bank accounts does not translate to him using the entire sum in the purchase and development of the matrimonial property. She argued that the transactions 12/01/2019, 16/11/209, and 29/01/2019 those monies were utilized by Beckwith for his own needs given that Zubeda had moved out of the shared home.
215. The plaintiff contends that contrary to Beckwith's allegation that she did not do domestic work as he hired a house help; no evidence supports that allegation. Further, an African wife does not stop doing domestic chores when a household is employed.
216. The plaintiff contends that Beckwith relied on the expertise in land matters to scout for prime parcels, negotiate purchase prices, and pursue registration in their favour. She was diligent and secured all titles.



217. The matrimonial home and rental units attached thereto, the Morijo farm, servants' quarters, tanks and pipes plus structures for pigs and rabbits were all done under the direct supervision of Z while Beckwith was away working.
218. The plaintiff was involved directly in pursuing registration of Morijo/5197 and 5481 despite ongoing litigation. She bore litigation costs and related expenses solely. Beckwith came to Kenya on a work permit which was set to expire after retirement but Z supported his application for a dependency pass and he was issued permanent residency. Beckwith was issued permanent residency on 13/05/2016 as a result of the application dated 10/04/2016.
219. The defendant contends that he fully financed the development and management of both the agricultural properties. He paid a total of Kshs. 4,230,000(100%) directly from his personal bank account between February and May 2015 to one Dickson Lemein as per the annexed bank statement (GVB 12). The dates of payment are contemporaneous with the time the property was acquired, registered, and developed. Further, the estimates of the value of the properties based on the valuation report (GVB 24) match the monetary contribution by the defendant to acquire develop and improve the property. The defendant contends that given his qualifications in agriculture. Since February 2015 single-handedly managed the farm; c and agribusiness including the staff and activities in the farm; caring for chicken, livestock, and rabbits and planting various crops and trees, and procurement of various products and services.
220. The defendant disputes the claim by the plaintiff of 50% shares based on non-monetary contributions as she had no role in the management of the farm. Further, she has not provided evidence to support her claim.
221. The defendant contends that there is no dispute in these properties and no evidence has been adduced before the court. The plaintiff's non-monetary contribution is limited to her work as an agent towards facilitating the acquisition. The defendant does not dispute the same should be pegged at a typical agency fee of 5% of the property value at the time of acquisition which is equivalent to Kshs. 211,500/=
222. This court finds that this property is a matrimonial property as it was acquired and developed during the subsistence of marriage.
223. The evidence shows that the defendant made substantial contribution towards the acquisition and development of these properties. The plaintiff, however, did work in identifying the properties, and pursued their conveyance. She also may have contributed in the development of the properties to some proportion. Accordingly, this court finds that the plaintiff on a balance of probability has proved contribution to this property.
224. Good judgment, based on the evidence, is that, the plaintiff is entitled to a 10% share of Cis Mara/ Ilmashariani/Morijo/XXXX,XXXX and XXXX. The defendant is entitled to a 90% share of the said properties.

Orders

225. In the upshot, this court orders and directs that;
- i. The plaintiff and the defendant shall share on 50:50% ratio of Cis Mara/ Oleleshwa/ XXXX.
 - ii. Title No. 90 Moor Lane, York XXXX (freehold) shall remain the property of the defendant.
 - iii. The defendant and the plaintiff shall share on the ratio of 90:10%, respectively, of parcel numbers Cis Mara/ Oleleshwa /XXXX,XXXX,XXXX,XXXX and XXXX.



- iv. The defendant and the plaintiff shall share Cis Mara/ Oleleshwa /XXXX,XXXX and XXXX.on the ratio of 95:5%, respectively. If XXXX is sold, it is recoverable as trust property.
- v. Cis Mara/Olopito/XXXX,XXXX and XXXX. shall be shared between the defendant and the plaintiff in the ratio of 60:40 respectively.
- vi. Cis Mara/Ilmashariani Morijo/XXXX,XXXX and XXXX. shall be shared by the defendant and the plaintiff in the ratio of 90:10, respectively.
- vii. Claim for a share of household goods has not been proved.
- viii. Any property which has been shared to the two parties according to the proportions stated in this judgment, but which stands in the name of one spouse, is declared to be trust property, held by the person registered in trust for the other to the extent of the proportion of ownership determined in this judgment.
- ix. Similarly, if any property stands in the name of one or both of the parties it shall be conveyed or transferred to the person who has been determined to own it absolutely or in the proportion defined by the court in this judgment.
- x. Parties shall follow through the execution of these orders through the applicable institutional and legal instruments established for transfer or conveyance of land in Kenya.
- xi. Given the nature of the orders herein, parties are at liberty to apply for any necessary structural interdict relief.
- xii. In light of the nature of these proceedings, this court directs each party to bear its own costs

226. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 30TH DAY OF APRIL, 2024.

.....

HON. F. GIKONYO M.

JUDGE

In the presence of:

Ms. Sabaya for the plaintiff

Kapiyo for the defendant

The plaintiff

The defendant

Mr. Otolu C/A

