Patricia v Ngitira (Originating Summons E001 of 2022)
[2024] KEHC 12912 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12912 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

ORIGINATING SUMMONS E001 OF 2022

RN NYAKUNDI, J

OCTOBER 25, 2024

BETWEEN

NACHERIAN LOLENY PATRICIA ..... APPLICANT

AND

BENSON EKAI NGITIRA ..... RESPONDENT

JUDGMENT

1. The applicant approached this court vide an Originating Summons dated 7th March 2022 seeking the following orders;

    a. Spent

    b. A declaration that there exists a presumption of marriage between the applicant and the respondent and the two are legal wife and husband.

    c. An order that property on Plot No. Nawotorong/Narewa Block No. 3/2020/01 measuring 0.00646 ha and any other unknown properties (movable and immovable) owned during the time of cohabitation be declared as matrimonial property and the same be registered jointly between the applicant and the respondent.

    d. The honourable court be pleased to order the sale/division and/or apportionment of the properties between the parties equally.

    e. A permanent injunction restraining the respondent, servants, hiring or any other person acting on their behest from selling, evicting and or denying access to the applicant and the minors to the suit premises.

2. The applicant contended that she began cohabiting with the respondent in 2013 and two minors were born out of the relationship. During the pendency of the relationship, the respondent purchased

Nanograting/Narewa Bloc No.3/2020/01 measuring 0.0646 Hectares where the applicant and the minors currently reside.

3. The applicant averred that she took a loan to help develop the property. However, in 2017, the relationship irretrievably broke down and the respondent has consistently threatened to evict the applicant. As such, she resorted to filing the present application to restrain the applicant from interfering with her right to property.

4. The respondent opposed the application vide a replying affidavit dated 6th June 2022. The respondent deponed that the application was an abuse of the court process and marred with inconsistencies and falsehoods. He denied having contracted a marriage with the applicant and further, he refuted that he had ever entered into any joint investment or development with the applicant. He maintained that he single handedly constructed the home and that he acquired the suit property before they entered into a relationship therefore it is not matrimonial property. He stated that there was no prima facie case by the applicant and prayed that the court dismiss the application.

5. The parties were directed to file written submissions on the application.

Applicant's case

6. The applicant filed submissions dated 27th April 2024 through the firm of. Maryanne K and Company Advocates. Counsel for the applicant submitted that the Respondent's Advocate consented that there was a presumption of marriage between the Applicant and the Respondent and the fact that the Respondent at the DC office accepted putting the Applicant in his N.H.I.F as wife is proof that there existed a presumption of marriage between the two parties herein. Further, that cross -examination confirmed that he has placed the petitioner in his medical cover as a wife, has tried to educated the petitioner has tried to help her get a job and has always worked for the last more than ten years to better the petitioner's life, all those are acts done by a man to his wife and clearly not to a temporary girlfriend or woman in life.

7. Counsel urged that it is evident that the two parties herein cohabited together. He cited the Black's Law Dictionary, 9th Edition Pg. 296, and the provisions of the *Marriage Act*, 2014 where it stated at section 2 as follows;

> In this Act, unless the context otherwise requires —
>
> "cohabit" means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage;

8. Counsel submitted that in the Deputy Registrar report dated the 28th day of July 2023, it concluded that the parties cohabitated in the old house together which is proof that there was a presumption of marriage. In support of this submission counsel cited the case of *Hortensia Wanjiku Yahweh v. Public Trustee Civil Appeal No. 13 of 1976* and additionally, the cases in BCC v JMG [2018] eKLR and NTS v BRP [2016] eKLR where the Court held that there was a presumption of marriage because the parties cohabited over a period of time. Counsel also cited the case of Re-estate of Cosmas Kinyua M'mbwiria (Deceased) Succession cause E893 of 2020 sand the case of SWG v. AM 2015, urging that on a balance of probabilities it is evident that the two parties had a presumption of marriage. Additionally, she submitted that the court in its own motion summoned the Dc who had conducted a reconciliation meeting between the petitioner and the respondent and when asked by the court if the petitioner and the respondent were married, his answer was in the affirmative; that even though they did not bring any certificate of marriage in his office, their conduct and words before the DC and the Baraza left no doubt in his mind and of those present in the meeting that they were husband and wife.

9. Counsel submitted that MNK v POM*; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021*) [2023] KESC 2 (KLR) (Family) (27 January 2023) (Judgment) laid out the parameters in determining what amounts to a marriage by cohabitation.

10. Counsel for the applicant urged that the applicant and the respondent have lived together for more than ten years, both were single and never married before they met although the applicant had a child she had never cohabited or been married before, she got pregnant while in school. The parties held themselves out in a manner that showed they intended to marry, the neighbours saw them living as husband and wife and confirmed this during the site visit ordered by this court. They were never forced to live together thus; they were both adults hence could give consent to marry. Their neighbours, parents and the DC including the committee that sat down to try and resolve their issues viewed them as husband and wife. The conduct of the parties in this case including raising and siring kids together and investing together clearly showed that they were husband and wife.

11. Counsel cited Section 6(1) of the *Matrimonial Property Act*,2013 and submitted that when the Respondent was buying the said land from one Mr. Josephat Esinyeu, the Applicant herein was a witness in the sale agreement and this is proof of a relationship between the two parties. According to the petitioner the respondent told her to sign the sale agreement to witness the purchase as his wife in case anything were to happen in future. A statement the respondent confirmed before this honourable court that indeed he asked the petitioner to append her signature on the sale agreement but declined to give reasons why her and not anybody else in his life.

12. According to the Applicant, it is her case that after the Respondent had purchased the said land in which she was a witness thereof, they agreed on her taking a loan in order to develop a house for the family. Since the Respondent had used all his money in the purchase of the said land. During hearing of this case the Respondent had all along denied ever being given any monies by the petitioner ,until when the Dc confirmed that indeed he had agreed to refund the petitioner her money amounting to two hundred thousand but upon the day of refund the petitioner refused to take the money and it was later given to the father of the respondent ,a fact that was denied by the petitioner ,who indicated that the said amount of money was less than what she had used in the construction and that she never received any compensation from her father or the respondent in this case.

13. Counsel submitted that on 6th June 2019, the Applicant took a loan facility of Kshs. 505,152.00 from Co-operative Bank, Lodwar Branch using her pay slips as a security with the sole intention of developing the said plot to ensure that the family has a proper housing and in this regard she used the whole amount in building a house on the land evidenced by the attached bank statements marked as NLP-2 and also the receipts indicating the purchase of the materials for building. It is not rebutted that the land was purchased by the Respondent but the development therein were done jointly by both parties and this made the land to become a matrimonial property. She cited the case of the Court of Appeal in M V M Civil Appeal No. 7 of 2002 (2008) IKAR 247 which recognized the fact that a person who is gifted should be allowed to own the gift.

14. Counsel reiterated that the Applicant contributed both directly and indirectly to the development of the disputed property and further, that apart from the direct contributions, she contributed through non-financial terms in that she stayed at home with the children when the Respondent was in school and also did domestic care and management of the matrimonial home, child care and companionship.

15. The applicant during cross examination confirmed that some of the monies sent to the Respondent mother, sent to an owner of a shop near where they reside was for food purposes and for helping the family of the respondent through his mother, the respondent has lived in a union with the petitioner for over ten years ,all this time the petitioner played her wifely and motherly duties with no complain

or neglect .Until the day the respondent found another woman and chased the petitioner from their matrimonial hone insisting that she leave with her first born child since he is not the biological father. She urged that the following is the way she contributed financially;6/06/2019: She sent to her husband Ksh.120,000.00 to buy construction materials.6/06/ 2019; Payment of water boozer of amount Kshs. 10,000.006/06/2019: Payment of a food debt from the shop amounting to Ksh.20,500/ =7/ 06/2019; Sent to the Mother-in-law Kshs. 14,500 as payment for braiding materials7/ 06/2019: Purchased building materials worth Kshs. 54,500/= attached herein are the receipts.7/06/2019: Payment of transport + sand amounting to Kshs. 40,000.009/06/2019; Sent to the Respondent Kshs. 87,500.00 for purchases of building materials.13/06/2019: Payment for foundation labour amounting to Ksh.35,000.0015/06/2019: Payment of water boozer for construction amounting to Kshs. 31,000.0015/06/2019; Payment of food of amount Kshs. 6,800.0017/ 06/2019: Payment of fundi of Kshs. 12,000.0022/06/2019: Payment of construction materials of Kshs. 10,500.0024/06/2019: Payment of fundi Kshs. 3,800.0004/07/2019: Purchase of family food of Kshs. 5,200.00Total Kshs. 1,000,000.00 /=

16. Counsel urged that the petitioner has had to fend for herself since leaving the matrimonial home and is also taking care of the children. She is seeking for compensation for taking a loan which she is still paying to date over a property she is no longer allowed to set foot on. Counsel cited the case of Republic vs Rosemary Wairimu Munene; Ex parte applicant vs Ihururu Dairy Farms Cooperative Society, in support of this submission and urged the court to allow the application as prayed.

Respondent's case

17. The respondent filed submissions through the firm of Ekusi Lore & Company advocates. Learned counsel for the respondent submitted that the question of whether there was any of the marriages contemplated under the *Marriage Act* of 2014 between the Applicant and the Respondent is not subject to debate because no such marriage was ever contracted. The only available argument by the Applicant is that there is presumption of marriage and the Respondent's response to the allegations of the existence of a marriage by presumption is in line with the case of N L S VERSUS B R P (2016) eKLR);

> "Given the evidence herein, I am satisfied that no presumption of marriage can be made. There is no long period of cohabitation and neither did the parties take themselves to be married. What existed was a simple friendship which led to the birth of the child. Giving birth to a child during such sexual relationship cannot lead to a presumption of marriage. The relationship cannot be held to be a marriage."

18. Counsel urged that the applicant has had a myriad of inconsistent allegations of facts. First, at paragraph 3 of her supporting affidavit to the Originating Summons, she alleged that she met the Respondent in the year 2013 and alleged further at paragraph that together they had had two sons namely Brian Nanok and Humphrey Ekai. During trial, it was evident that the two had met in the year 2015 and it had resulted in the birth of one Humphry Ekai whom the Respondent acknowledged as the father. Second, the Respondent testified to the "adventures" of the Applicant over the period since they allegedly cohabited and the moment at which the Respondent got wind of the fact that the Applicant had another child from her previous relationship, which the Applicant had a kept a top secret until the Respondent independently discovered. To give credence to this, the Respondent produced a mobile phone screenshot that showed the NHIF details of the Applicant which revealed that she had one Eregae Lochoki Longolelekiruk as her Husband. The Applicant and the Respondent never intended to marry: The Respondent urged that owing to the applicant's unfaithfulness and hiding of her first child from his knowledge, he never had the intention of marrying the applicant. In any case, there is

nothing written or unwritten to found the implication that the Applicant and the Respondent ever intended to marry.

19. Intention to marry is a factor to be considered in presuming marriages, pursuant to paragraph 64(3) of the Supreme Court's judgment in MNK VERSUS POM; INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA (ISLA) (AMICUS CURIAE) (PETITIO 9 F 2021) (2023) KESC 2 (KLR): This lack of any intention to marry only demonstrates that the Applicant and the Respondent simply aspired to have an interdependent relationship outside of marriage, therefore this court should decline to impose a presumption of marriage on the Respondent. Counsel urged the court to find that no marriage existed between the parties.

20. On the question of whether there was contribution, the Respondent relies on the following set of facts ad seriatim: The Respondent points to this Honourable Court is that there is an Agreement on record dated 20th March, 2020 where the Applicant and the Respondent agreed among other things that the Respondent pay the Applicant Kshs. 212,100 as refund for any monies extended towards the development of the said property. The Kshs. 212,100 figure was arrived after calculating all the monies sent to the Respondent by the Applicant allegedly for the construction of the house. These Monies were received by the Applicant's Father, who was here representative in the meeting. The Respondent complied and the Respondent avers that at the point of compliance and the Applicant does not deny receiving the money, the Respondent was fully indemnified and had no further claim. Additionally, the said house is still under construction as per the Report dated 28th July, 2023 by the Deputy Registrar. In essence, it was and never has been completed. This creates the impression that the Applicant could be talking of a different house.

21. The Applicant by taking out loans is not evidence that she contributed towards the development of the estate but rather the question this court ought to entertain is how much of the loan was allegedly used to develop the said property. The Respondent during trial produced evidence to show that majority of the Applicant's loan money bar the Kshs. 212,100 figure were used to her own personal financial endeavours including but not limited to tithes, all this evident in her MPESA financial statements and bank statements.

22. Counsel cited the case of ZJN VERSUS CNN (2024) KEHC 1593 (KLR) and urged the court to find that the suit land & property is not matrimonial property and that on a balance of probabilities, there can be no presumption of marriage between the Applicant and the Respondent.

Analysis & Determination

23. In resolving this issue, I have taken into account originating summons, affidavits and submissions by both counsels seized of the subject matter. I consider the following core issues to be of such a nature to acquit this court on the dispute;

    a. Whether there existed a valid marriage

    b. Whether the applicant is entitled to the orders sought

Whether there existed a marriage by way of presumption of marriage.

24. Under the current legislation, the *Marriage Act*, 2014 codifies five types of marriage recognized in Kenya, i.e. Civil, Christian, Customary (which now has to be registered), Hindu and Islamic marriage. Presently, the doctrine of presumption of marriage is the exception rather than the rule. The parameters to establish whether there existed a presumption of marriage were outlined by the Supreme Court in Petition No. 9 of 2021 MNK vs. POM [2023] which, notably, applied to a marriage dispute that arose

from a marriage that was contracted before the enactment of the *Matrimonial Property Act* and the *Marriage Act*. Therefore, the parameters to establish the presumption of marriage are as follows;

1. The parties must have lived together for a long period of time.
2. The parties must have the legal right or capacity to marry.
3. The parties must have intended to marry.
4. There must be consent by both parties.
5. The parties must have held themselves out to the outside world as being a married couple.
6. The onus of proving the presumption is on the party who alleges it.
7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.
8. The balance of proof is on a balance of probabilities.

25. In Phyllis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another [2009] eKLR the Court of Appeal stated as follows:

> " Before presumption of marriage can arise a party a needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed."

26. More recently, Ngaah J, in CWN v DK [2021] eKLR was of the view that;

> " as far as presumption of marriage is concerned, it is a status of relationship that turns much on evidence as much as it is a presumption of law."

27. It is trite law that he who alleges must prove. From the evidence before the court the applicant and the respondent had been living together for a long period of time and further, it is evident that they had 2 issues arising from their cohabitation. It is not dispute that there was consent for them to live together. From the documents produced by the respondent, it is evident that at some point they presented themselves to the world as husband and wife, to the extent that there is a ruling from the Deputy County Commissioner on the end of the marriage, which was to be settled vide a payment of Kshs. 212,100 through the Deputy County Commissioner's Office.

28. Upon considering the facts and the evidence presented before this court, is my considered view that there was a presumption of marriage between the parties herein.

Whether the applicant is entitled to orders for apportionment of the Matrimonial Property

29. The facts and the context of the instant case reveal both the complexity entailed to the parties as well as the ramification on distribution of the matrimonial property. Section 2 of the *Matrimonial Property Act* made great strides in defining what indeed should constitute Matrimonial Property upon divorce of the parties. The Act further provided in Section 7 that where there was no pre-nuptial agreement, ownership of the matrimonial property was vested in the spouses according to their contribution towards its acquisition. In the same statute, it is trite law that contribution could be either monetary or non-monetary. Notwithstanding that, Section 9 goes further to state that a spouse who made

contribution to improve the property acquired by another spouse, acquires a beneficial interest in the property equal to his/her contribution.

30. Matrimonial Property is defined as follows;

> Meaning of matrimonial property
>
> (1) For the purposes of this Act, matrimonial property means—
>
> (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.
>
> (2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.
>
> (3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
>
> (4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust

31. The new approach illustrative from the provisions of the *Marriage Act* and the *Matrimonial Property Act* deals with entitlement and rights to the family home established by both spouses during the subsistence of the marriage. Family home means the dwelling house owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principle family residence together with any land, buildings or improvements appurtenant to such dwelling house and used wholly or mainly for the purposes of the household but shall not include such a dwelling house which is a gift to one spouse by a donor who intended that one spouse to benefit. (see Yew Bon Tew v Kenderaan Bas Mara (1982) 3 ALL ER 833)

32. It is in the case of NJOROGE -V- NGARI [1985] KLR, 480, where the court stated that if a matrimonial property is being held in the name of one person, even if that property is registered in the name of that one person but the other spouse made contribution towards its acquisition, then each spouse has proprietary interests in that property. Thus, it is important to mention that the Act takes into account non-monetary contribution and provides that a party may acquire beneficial interest in property by contribution towards the improvement of the property equal to the contribution. Similarly, it was stated in the case of NWM v KNM (2014) eKLR that the court must give effect to both monetary and non-monetary contributions, that both the applicant and the Respondent made during the pendency of the marriage to acquire the matrimonial property. The applicant stated that the matrimonial property was obtained during the pendency of the marriage. However, she has not provided any proof as to the date of acquisition. That notwithstanding, it is evident from the record of the mediation meetings at the Deputy County Commissioner's office that it was agreed that the respondent settle her contribution of Kshs. 212,100/- through the office of the Deputy County Commissioner. The respondent produced evidence that he withdrew the same and unfortunately, that is the last proof of any monies related to the union.

33. Despite the mediation meeting and settling on a particular figure, it appears that there is more to that as it can be seen from the Applicant's submissions where she has come up with an amount close to Kshs. 500,000/=. So that in as much as the court digs into the contributions made by the applicant, a conclusive answer would not commend itself. It is settled now that the parties lived as husband and wife. As regards non-financial contribution, I wish to rely on The House of Lords decision in White vs White (200}UKHL 54 in which the Court cited the greater awareness of the value of non-financial contributions to the welfare of the family, and the increased recognition that, by being home and having and looking after young children, a wife may lose forever the opportunity to acquire and develop her own money-earning qualifications and skills, a position that was reiterated in subsequent decisions of the House of Lords in Miller vs Miller & McFarlane {2006}UKHL 24 with courts endorsing the jurisprudence of equality. From the record in as much as the evidence as to contribution is not conclusive, there are traces of evidence which point to the fact that the Applicant made some monetary contribution towards development of the property. That said, it is equally important to acknowledge the non-monetary contribution made by the applicant besides the contribution of money into developing the suit property.

34. I am also conscious of the provisions of Section 9 of the *Matrimonial Property Act* which provides as follows;

> 9. Acquisition of interest in property by contribution
>
> 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 the property equal to the contribution made."

35. Given that the aspect of contribution has not come out clear, the question then I have to tackle is whether the applicant is entitled to fifty percent share of the suit property. The provisions of *the Constitution* on Article 45(3) state that:

> " Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage"

36. In the last two to three decades before the enactment of the new Constitution, the courts in interpreting the 1882 *Matrimonial Property Act* which was largely borrowed from English jurisdiction and applied directly as a domesticated statute in our jurisdiction, the courts appreciated the parameters of non-monetary contribution in determining distribution of the marital estate. Essentially, the determinants revolve around spouses who foresaw domestic work, cared for children, provided companionship, managed family properties and businesses. This was the dicta in the cases of Kivuitu verses Kivuitu (1991) KLR 248 which was incidentally overruled in the case of Echaria versus Echaria (2007) eKLR. What was the import in the Echaria case? The court made a paradigm shift in its decision by stating that contribution in the distribution of the marital estate had to be strictly proven and non-monetary contribution could not be considered as contribution for purposes of matrimonial property, neither could performance of domestic duties be considered. As to whether or not this became the basic minimum criteria, in the distribution of the marital estate, was further affirmed in JOO versus MBO (2023) KESC 4 KLR. The Supreme Court held that the finding principle in determining whether Article 45(3) of *the Constitution* conferred proprietary rights is that apportionment and division of matrimonial property may only be done where parties fulfil their obligation of proving what they are entitled to by way of prosecution. The court went further to state that the status of the marriage does not solely entitle the spouse to a beneficial interest in the property registered in the name of

the other nor is the performance of domestic duties, or the fact that the wife was economical in spending on housekeeping. Therefore, a party must prove contribution to enable the court determine the percentage available to him/her on the distribution of the estate. The court further added that when it comes to matrimonial property, what is fair as it relates to equity is not a question of the quantitative contribution by each party but rather the contribution by any party in any form whether direct or indirect. That by substantial contribution by a party to a marriage that led to acquisition of property although indirect but has nevertheless enabled the acquisition of such property amounts to significant contribution.

37. It is not lost that beside out Constitution, International law in the form of international and regional treaties and conventions, are integral components of Kenyan law pursuant to Art. 2(5) & (6) of *the Constitution*. This instrument addresses any gaps that may exist in interpreting matrimonial property rights. In 1984, Kenya made a key milestone in ratifying the Convention on the elimination on all forms of discrimination against women making it a binding instrument in Art. 6(1)(h) of CEDAW, which provides that state parties to ensure on the basis of equality, identical rights for both spouse concerning property ownership, acquisition, management, administration, enjoyment and disposal whether acquired freely or for valuable consideration. The country did not stop there. In 1990, it became a signatory to the Universal Declaration of Human Rights which meant a commitment to uphold the right of women of full age without limitation based on race, nationality or religion to marry and establish a family. In this context, regionally, Kenya signed the protocol to the African Charter on Human and people's right on the rights of women in Africa commonly referred to as the Maputo Protocol. In Art. 7(d) of the Maputo Protocol, it explicitly asserts that in cases on separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing deriving from the marriage. One need not even look far at the International Law arena. Art. 27(4) of *the Constitution* makes a declaration that every person/individual is equal before the law possessing the right to equal and protection benefit under the law. Hence the essence of sub-section 4 of Art. 27 which provides as follows:

> "(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."

38. It cannot be gainsaid that equality is a difficult and controversial ideal given our multi-cultural and ethnic society. *The Constitution* requires judges to grapple with this difficult issues for Constitution commands us to achieve the goal of equality. For the same Constitution tells us the type of society that we co-created in the new Constitution dispensation is one based on equality, dignity, security and enjoyment of the fundamental rights and freedoms Article 45 (3) came one year after the promulgation in the case of Agnes Nanjala William -vs- Jacob Petrus Nicolas Vander Goes, (Civil Appeal No. 127 of 2011), where this Court stated as follows: -

As stated in the case of PNN vs ZWN (2017) eKLR, "One of the earliest opportunities to interpret the provisions of

> "Article 45 (3) of *the Constitution* provides that parties to a marriage are entitled to equal rights at the time of the marriage during the marriage and at the dissolution of the marriage. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However pursuant to Article 68 Parliament is obligated to pass laws to recognize and protect

matrimonial property, particularly the matrimonial home. Although this is yet to happen, we hope that in the fullness of time Parliament will rise to the occasion and enact such a law. Such law will no doubt direct a court, when or after granting a decree of annulment, divorce or separation, order a division between the parties of any assets acquired by them during the coverture. Pending such enactment, we are nonetheless of the considered view that the Bill of Rights in our Constitution can be invoked to meet the exigencies of the day."

39. In the case of PWK vs JKG 2015 eKLR the Court said;

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

40. In FRANCIS NJOROGE vs. VIRGINIA WANJIKU NJOROGE, Nairobi Civil Appeal No. 179 of 2009; Kiage J. stated that:

> " ... a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the Court of Appeal of Singapore in LOCK YENG FUN v CHUA HOCK CHYE [2007] SGCA 33; 'It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and, by its very nature cannot be – a precise mathematical exercise."

41. In PNN vs ZWN (2017) eKLR, Justice Kiage; expressed himself 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 to cash cheque bearing the words "50 per cent."

42. The parties alluded to a mediation settlement between them but cogent evidence was never attached to this end. Nonetheless, it is irrefutable that the District Commissioner received a sum of Kshs. 212,000/= which was meant to refund the applicant and the same was transmitted to the Applicant's father. I share the view that the Respondent ought to pursue a refund of the said amount from the District Commissioner or the Applicant's father and allow the applicant get a share from the suit property. It not very clear from the evidence of both parties as to the reasons the father to the applicant was allowed to receive the purposed amount whereas indeed the dispute was between the couple. In the course of the trial, the mediator who facilitated this mediation was never called as a witness and no mediation agreement was filed with the court to ascertain the terms of the settlement before that forum. As at the close of the proceedings, the issue of Kshs. 212,000/= apparently paid by the Respondent to the mediator domiciled in the County Commissioner's office remains in the realm of conjecture.

43. Notwithstanding that position, in essence there was overwhelming evidence from the applicant that during the survivorship of the marriage, she was working in gainful employment with consistent monthly income capable of making contribution towards the home improvement. The documentary evidence in the form of bank statements, M-Pesa transmissions and receipts attest to the fact of the chain of transactions during the period when the matrimonial home was under construction. Ultimately, the question is one of degree of contribution to be assessed in the concrete setting of the measure paying due regard to the means which was realistically available at that stage during the construction of the family house. One further observation needs to be made. That the Respondent in his defence did not controvert the approach to the facts of this case taken by the applicant. As far as the couple are concerned, during the good times, they planned their life together with the hope and belief that their marriage was headed to the upbringing of their children and creating a model home according to the Christian beliefs or any such religion which each professed. It is true the marriage union has irretrievably broken down and in these circumstances each has parted ways and for the interests of justice, the applicant has approached this court to be compensated in monetary form; the contribution made towards construction of the matrimonial home. It is the object of modern law to encourage the parties to a marital union to put the past behind them and to begin a new life which is not overshadowed by the relation which has broken down.

44. It is a foregone conclusion that when the marriage comes to an end, the court's powers are also flexible. Dependent essentially on the facts of each case. It is no longer a question based on the presumption that there is still the husband being seen as a breadwinner to whom all the resources belong while on the other hand there is a female spouse, a homemaker in need of his support to entitle him to continue providing the necessary maintenance as if they were still husband and wife. The court in such circumstances like the one before me is directly to take into account any unique prevailing facts as at the time of divorce, judicial separation and in that balancing act, be able to make a fair and proportionate decision on the matter. I assume the applicant and the respondent have contemplation of reuniting as husband and wife in the near future but as things stand, the divorce shall take effect to avoid any undue hardships in relations of this nature. The powerful encouragement is that both parties have agreed to co-parent the minor sired during the subsistence of the marriage.

45. So how is the court to operate and apply the principles of fairness, equality and non-discrimination in the less straightforward case like the one between the applicant and respondent. Essentially there is only one property in issue and some sought of rationale for redistribution of it between the applicant and the respondent, one has to look temporarily the period of the marriage and monetary contributions made to establish the matrimonial home. The most common source of monetary contribution by the applicant through the documentary evidence came from her a salary. The couple throughout their lives during the subsistence of the marriage together, they made a choice of putting up a house and each had to make sacrificial contribution in terms of meeting the costs of setting up the house. Indeed, the documentary evidence admitted in court in support of the applicant's case reflect that relationship generated advantage. During this period, one could easily describe their marriage to fall within a widespread perception that marriage is a partnership of equals. Going by this statement, the checklist of factors to accompany the exercise of judicious discretion in proceedings of this nature will be to take into account any contribution which each party had made to the welfare of the family, including the contribution made by looking after the home and caring for the children, which is the traditional role for mothers. In my view, that might be the presumption upon which the widely held view that any such distribution of the marital estate be on a 50%-50% division. Of course from the trending jurisprudence in Kenya as can be seen from the cited authorities elsewhere in this ruling an equal partnership to a marriage does not necessarily dictate an equal sharing of the assets.

46. A number of factors must be taken into account in determining the fair contribution by the applicant. The phrase directly or indirectly contribution covers all possible forms of determinants and sometimes it opens a forensic Pandora's Box as pointed out in Cowan versus Cowan (2001) EWCA Civ 679; and in G V. G (financial Provision: Equal Division) (2002) EWHC 1339 thus:

> "What is 'contribution' but a species of conduct? ... Both concepts are compendious descriptions of the way in which one party conducted him/herself towards the other and/or the family during the marriage. And both carry with them precisely the same undesirable consequences. First, they call for a detailed retrospective at the end of a broken marriage just at a time when parties should be looking forward, not back ..... But then, the facts having been established, they each call for a value judgment of the worth of each side's behaviour and translation of that worth into actual money. But by what measure and using what criteria? ..... Is there such a concept as an exceptional/special domestic contribution or can only the wealth creator earn the bonus? .... It is much the same as comparing apples with pears and the debate is about as sterile or useful."

47. The question therefore is whether the applicant has discharged the burden of proof on account of sources of income and the portion of which was spared for purposes of constructing the matrimonial homestead, earlier on the land acquired by respondent. The nature and sources of monetary contribution is supported by the documentary evidence and bank statements generated by the applicant which remained undisturbed and uncontroverted by the respondent approach to the existence of facts on the part of the applicant. There is obviously a relationship of capital sharing to provide for the needs of goods and services required during the construction of their matrimonial home. Now that they are divorced or permanently separated, the Plaintiff is entitled to some share applied in developing the property during the existence of their short marriage. This marriage may well have been doomed but my finding is that the applicant cannot be left to walk out empty handed as a consequence of the breakdown of the relationship.

48. The upshot of it all, taking into account the above observations I am of the view that the applicant has discharged the burden of proof on a balance of probabilities on the basis of her monetary contribution towards the development of the property stated to have been purchased by the respondent in which they covenanted to establish their matrimonial home. That aspect of financial contribution made by the applicant has met the approval of this court for the materials and services rendered during the construction of the house assessed at Kshs. 451,300/=. This guidance in the form of figures has been deduced from the various documentary evidence scrutinized and upheld admissible as cogent evidence on contribution by the applicant. It will be unjust and unreasonable to apply the equal share rule in this case.

49. As a consequence, the following orders shall abide:

    a. That a declaration be and is hereby made that the short marriage which has just ended is a valid union under the name and style of presumption of marriage.

    b. The applicant is entitled to a share in the property quantified at Kshs. 451,300/= as against the Respondent.

    c. That a declaration be and is hereby made to the effect that L.R. Nawotorong/Narewa Block No. 3/2020/01 measuring 0.00646 ha constitutes matrimonial property.

d. That the Respondent be and is hereby ordered in the circumstance of this case to refund the applicant Kshs. 451,300/= within 45 days from today's ruling being the level of contribution to the matrimonial home.

e. That in the alternative, the property if not as of now be registered in the names of the applicant and the Respondent as tenants in common holding in equal shares.

f. That as an order of last resort, in the event the respondent fails to make payment for the sum of Kshs. 451,300/= by either banker's cheque, or transfer to the account of the applicant within 45 days, a valuer be appointed to visit the property and carry out a survey tailored at a valuation report which will form the basis of having it offered for sale in a public auction or private treaty for the determined share which has accrued to be appropriated to the applicant in terms of clause (b) above.

g. Each party to bear their own costs of this litigation.

h. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 25TH DAY OF OCTOBER 2024

.....

R. NYAKUNDI

JUDGE