REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 174 OF 2015 (O.S)

(FORMERLY HCCC NO. 30 OF 2005)

N S G.....APPLICANT

VERSUS

S C G.....RESPONDENT

JUDGMENT

By an Originating Summons dated 6th September 2005, the applicant sought the following orders against the respondent:

1. That the joint ownership in respect of L.R No. […] Kilimani (hereinafter referred to only as "the suit property") be severed.

2. That the suit property be sold and the proceeds thereof shared equally between the parties.

3. That the deputy registrar be empowered to sign any documents that the respondent may refuse to sign.

4. That the court be pleased to grant such further or other relief as it may deem just in the circumstances.

5. That the respondent be condemned to pay the costs of and incidental to the application.

In her affidavit in support of the application, the applicant stated that the suit property was registered in her name and the name of the respondent jointly and that the respondent and she got divorced on 7th June, 1994. The applicant stated that she was desirous of having the joint tenancy severed, the property sold and the proceeds of sale shared equally between them. The respondent opposed the application through a replying affidavit sworn on 18th October, 2005 in which he denied the applicant's claim and contended that the court lacked jurisdiction to entertain the application. The respondent averred that the suit property was subject to an encumbrance.

The hearing of the suit commenced on 15th March, 2012 when the applicant gave her evidence in chief. The applicant testified as follows: The respondent was her ex-husband. Her marriage to the respondent was dissolved in 1994 and a decree absolute issued in March, 1998. In 1985 while she was in India, she donated to the respondent a general power of attorney to enable the respondent purchase the suit property in their joint names. The purchase price for the suit property was Kshs 800,000/-. She returned to Kenya in January, 1986. In September, 1987, they started a business by the name [particulars withheld] Limited. The company had a stationery shop at Hurlingham Nairobi. She was in charge of running the shop while the respondent who was the finance director of the company kept all the accounts. The shop generated about Kshs. 3,000/- daily which income was used in paying rent, business expenses, their house expenses as well as the mortgage loan repayments for the suit property. She never saw the agreement for sale for the suit property. All the information she had about the suit property was from the respondent who kept all the documents relating to the property. The stationery business which was being run by them ceased operations in March 1992 when she separated from the respondent.

The applicant stated further that between 1981 and 1987, she was a housewife during which period, she relied on the respondent for financial support. She stated that she filed Divorce Petition No. 57 of 1992 on 7th July, 1992 against the respondent and moved out of the suit property on 15th April, 1995 on the advice of the advocate who was handling the said petition on her behalf. The applicant averred that she contributed towards the acquisition of the suit property since she ran the stationery business which paid for the property and also helped the respondent as a wife when the property was being purchased. She averred that the suit property was worth Kshs.50 million and that she wanted it sold and the proceeds thereof shared equally. She produced a letter dated 2nd June, 2005 which her advocates wrote to the respondent, a valuation report on the suit property by Tysons dated 12th February, 2004 and a certificate of postal search dated 9th December, 2009 as exhibits 2, 3 and 4 respectively.

The applicant stated that she was not aware of a deed of conveyance dated 27th May, 1991 and a second mortgage amount of Kshs. 165,000/-

that was secured by the suit property. The applicant stated that she was not aware that the respondent had borrowed this amount. The applicant admitted that the respondent wrote the letter dated 6th March, 1992 about the closure of the shop that was being ran by [particulars withheld] Limited. She stated however that she was not aware whether the letter was received by the addressee or not. She stated that the respondent who was a trained accountant by profession was the one handling the accounts of the business and spending the income. The applicant admitted that she signed the statement of accounts for [particulars withheld] Limited. She contended however that she did not participate in their preparation.

The applicant stated that although she and the respondent were directors of [particulars withheld] Limited, she had no personal bank account and was not receiving any salary or income from the business which they operated from September 1987 to March 1992. She averred that the respondent used to take all the money from the shop which he claimed to have been using to pay suppliers, rent for the shop and mortgage loan. The applicant averred that having worked in the shop and looked after the children and the respondent's mother, she was entitled to a half share of the suit property. She stated that the respondent should buy her out and in the alternative, the suit property should be sold and the proceeds thereof shared.

In cross-examination, the applicant stated that she was not trained in any profession and had no prior experience in running a business when they started the family business. She stated that there was no initial capital for setting up the company and that she took goods on credit for 3 months. The applicant stated that she became a Christian in 1994 after the dissolution of her marriage to the respondent. She stated that in the business that they were running, they were selling stationery, doing photocopying and photography and also acting as a collection point for a laundry firm. She stated that the monthly rent for the shop was about Kshs. 5,000/- and that the business had no rent arrears. The applicant stated that the business which had ran for 5 years was doing well and that the rent arrears were only shown for accounting reasons. She stated that apart from the business that she was managing, she did not make any financial contribution towards the purchase of the suit property. The applicant stated further that the suit property was not paid for in full as the respondent took several loans on the security of the property. She stated that after the business was sold, she separated from the respondent who remained in occupation of the suit property and had also rented out a portion thereof.

In re-examination, the applicant stated that she was not involved in the sale of their business which transaction was handled solely by the respondent. She contended that selling goods in the shop which they were operating did not require experience or expertise. She stated that she did not sign the mortgage instrument for the house as she was away in India. She stated that she gave the respondent a power of attorney to sign the document on her behalf. She stated that she did not see the statements of account for the mortgage loan and reiterated that the respondent handled all their finances. She stated that she could not tell whether the suit property was paid for in full as she was not involved in the various mortgage loans which the respondent took on the security of the suit property. On examination by the court, the applicant stated that their children were married and were living on their own.

On his part, the respondent testified as follows: He owned the suit property jointly with the applicant. He worked with [particulars withheld] Limited which he joined as an assistant accountant in 1971. He rose through the ranks and became Assistant General Manager and Company Secretary in 1980. The suit property was not the first property which he purchased. In 1979, he had purchased a house in Ngumo Estate before his marriage to the applicant. To purchase this property, he took a building loan from his employer to pay for the deposit and secured the balance of the purchase price from Housing Finance Company of Kenya (HFCK). He got married to the applicant in 1980 and had two children born in 1981 and 1985. During this period, the applicant was a house wife and he was the sole bread winner. He had a disagreement with the applicant as a result of which the applicant went to stay with her parents in India.

After the applicant left for India, the company he was working for agreed to assist him to buy a bigger house in a better location. He identified the suit property and informed his superior in the company that the purchase price was Kshs. 800,000/-. On the advice from the company, he sold Ngumo Estate property for Kshs. 470,000/- to raise the deposit for the suit property and legal fees. He used part of the sale proceeds to clear the mortgage loan he had with HFCK which was secured by the Ngumo Estate property. He remained with a balance of Kshs. 200,000/- which he took to the said company he was working for so that they could assist him in acquiring the suit property. His superior in the company introduced him to the Head of East Africa Building Society (EABS). He later met the mortgage manager who gave him loan forms which he filled in his name. When he returned the forms, the mortgage manager advised him to include the name of his wife in the said forms. It was not his intention to purchase the suit property jointly with the applicant. Although this was against his wishes, he proceeded to fill the forms in their joint names. The applicant who was in India executed a power of attorney to allow him sign the application on her behalf. The application was approved and he moved into the suit property with his mother in September, 1985.

He stated further that the purchase price for the suit property was Kshs. 840,000/-and that he used a loan of Kshs. 650,000/- from EABS, the balance of the proceeds from the sale of the Ngumo Estate property and a loan of Kshs 106,000/- from his employer to pay for the property. He stated that the loan from EABS was given to him on condition that his employer would deduct and remit to EABS Kshs. 9,717.50 from his salary every month. He stated that the loan was to be repaid from his salary for a period of 15 years. He stated that when he was purchasing the suit property, the business that they were running with the applicant was not in existence and they had no plan of running any business. The respondent stated that the said business was started in 1987 in a bid to get for the applicant who was sitting at home something to do. He stated that the said business was his idea and that he paid goodwill to the person who left the shop for them.

The respondent stated further that the applicant did not run the business in a manner that would generate income. He stated that the audited accounts showed a business that was unhealthy and had bank overdrafts. He stated that rent for the shop in which the business was being operated was always in arrears. He stated that the business never generated money that could be used to pay the mortgage loan and that at times, he had to pay some creditors from his salary. He stated that he left [particulars withheld] in 1989 and that his sister in Leeds, United Kingdom helped him pay the loan which he had with Phoenix.

He stated that when he left Phoenix in June 1989, he was given 6 months' salary as severance pay which covered his mortgage repayment for 6 months. He stated that on 1st February, 1990, he joined [particulars withheld] where he worked as an Assistant General Manager for 7 months before joining [particulars withheld] as Chief Accountant and Company Secretary. He stated that [particulars withheld] took over his loan from EABS and made deductions in his salary to recover the loan. He stated that EABS discharged the suit property after being paid by General Accident which in turn registered a mortgage against the property in its favour.

The respondent stated that the applicant vacated the suit property in April, 1995 and that a decree absolute in the divorce case was issued in April, 1998. He stated that he remarried in April, 1998 and that their children went back to stay with him. He stated that his new wife had 3 daughters from a previous marriage and that he had a total of 5 children to look after in addition to his mother. The respondent stated that the said children were all married and that he cleared the loan with [particulars withheld]in December 2006. The respondent stated that all along, the mortgage loan was entirely paid from his salary with no contribution from the applicant. He contended that the suit property was not registered in their joint names because the applicant contributed to its purchase. The respondent maintained that the applicant was not entitled to a share of the suit property. He produced documents attached to his bundles of documents dated 6th June, 2012, 17th September, 2012 and 21st February, 2007 as exhibits 1, 2 and 3 respectively.

In cross-examination, the respondent stated that he married the applicant in Mumbai, India in December, 1980 and that they came to Kenya together in January, 1981. He stated that his mother who was living with them was thrown out of the suit property in 1992 during the divorce proceedings. He stated that the applicant had no professional training and averred that he had employed 3 house-helps to assist her. He stated that he signed the agreement for sale on behalf of the applicant on the strength of a power of attorney that the applicant had donated to him.

The respondent stated that out of the sum of Kshs. 470,000/- which he received from the sale of Ngumo House, he utilized Kshs 130,000/- to pay for the suit property while another portion was used towards clearing the mortgage debt with HFCK. He stated that he included the applicant's name in the agreement for sale on the advice from a friend and that he did not understand the implications of a joint tenancy. He contended that his initial intention that the applicant and he be joint owners of the suit property had changed following the divorce.

The applicant stated that he took three loans on the security of the suit property from EABS, Akiba Bank and General Accident Insurance Company Ltd. He stated that Akiba Bank loan was utilised towards resolving the problems that he had at the shop which was making losses. He reiterated that [particulars withheld] Limited was his idea. He stated that he set up the business so as to get peace and that he did not expect any income from the business. He contended that the money from the business was used for paying rent and suppliers and that the same was banked in the business's account by both of them. He stated that he could not recall if the applicant received any salary. He stated that the annual rent for the business was Kshs 118,000/- and that the business was sold to Sai Stationeries with an outstanding rent for 1 year.

In re-examination, the respondent stated that the purchase price for the suit property was Kshs. 840,000/-of which a deposit of Kshs. 84,000/- was paid by [particulars withheld] while EABS paid Kshs 650,000/-. He stated that the balance of Kshs. 106,000/- left was paid by [particulars withheld] on his behalf. He stated that he had deposited part of the proceeds from the sale of the Ngumo Estate property with Phoenix. He contended that [particulars withheld]paid a total of Kshs 190,000/- and disbursements in the form of legal fees and stamp duty. He stated that had he known that the applicant would claim 50% share in the suit property, he would not have had her registered as a co-owner of the property. He contended that the applicant did not place before the court any evidence of her contribution towards the purchase of the suit property.

Submissions:

After the close of evidence, the parties were directed to make closing submissions in writing. The applicant filed submissions and further submission on 8th August, 2018 and 22nd November, 2018 respectively. The applicant submitted that it was not in dispute that the parties owned the suit property jointly and that the suit property was acquired during the subsistence of their marriage which had since been dissolved on 7th June, 1994. The applicant argued that when this suit was filed in 2005, there was no marriage between the parties herein. He submitted that a certificate of official search confirmed the joint ownership of the suit property by the parties.

As to whether this court had jurisdiction to determine this suit, the applicant cited Article 162(2)(b) and Article 260 of the Constitution, sections 2, 4(3),13(1) and (2) of the Environment and Land Court Act, 2011 as well as the case of Jane Wambui Ngeru *v* Timothy Mwangi Ngeru [2015] eKLR and submitted that this court had concurrent jurisdiction to hear disputes relating to matrimonial property rights which involve or relate to land.

The applicant submitted further that none of the reasons given in the respondent's replying affidavit constituted valid answer to her claim. The applicant cited the cases of Isabel Chelangat *v* Samuel Tiro Rotich & 5 others [2012] eKLR and OKN *v* MPN [2017] eKLR and submitted that from the evidence adduced, it was the parties' intention that the suit property and the family business be jointly owned by the parties.

The applicant submitted that the issue of contribution that had been raised by the respondent in his evidence was extraneous as the same was never raised in the pleadings. The applicant cited the cases of Dakianga Distributors(K) Ltd. *v* Kenya Seed Company Ltd. [2015] eKLR and Independent Electoral and Boundaries Commission & another *v* Stephen Mutinda Mule & 3 others [2014]eKLR in support of her submission that parties are bound by their pleadings and that any evidence which does not support the averments in the pleadings must be disregarded.

In the alternative, the applicant submitted that the evidence adduced did not support the respondent's averment that he purchased the suit property through a mortgage loan which he solely paid. The applicant contended that the respondent did not produce the agreement for sale, the mortgage instrument, the statements of bank account number 1349904 or pay slips in respect to the original mortgage.

On the issue of contribution, the applicant submitted that it was not in dispute that she was never paid her dues as director of the family business, [particulars withheld] Limited. The applicant submitted that by not paying the applicant, the family business made a saving which was the applicant's direct financial contribution to the family business. The applicant argued that the respondent had not disclosed the source of additional payments made over and above the monthly deductions from his salary towards the mortgage loan. The applicant submitted that the additional payments could only have been from the family business.

The applicant submitted further that the suit property was for all purposes and intents a matrimonial property and that the applicable law was the Matrimonial Property Act, 2013. The applicant relied on section 2 of the said Act and submitted that the Act recognised both monetary and non-monetary contribution to the acquisition of matrimonial property. The applicant submitted further that non-monetary contribution

included domestic work and management of matrimonial home, child care, companionship and management of family business or property. The applicant submitted that Jeje Enterprises Limited was a family business within the meaning of the Act. The applicant relied on PNN *v* ZWN [2017] eKLR and submitted that her non-monetary contribution towards the acquisition of the suit property entitled her to an equal share of the suit property.

The respondent filed his submissions on 2nd October, 2018. The respondent referred to section 49 of the Land Act, 2011 and the case of Isabel Chelangat *v* Samuel Tiro Rotich & 5 others(supra) for the definition of a joint tenancy. The respondent submitted that a joint tenancy carries with it the right of survivorship and the four unities. He cited the case of OKN *v* MPN(supra) where the court stated that the presumption that each party made equal contribution towards acquisition of a property owned jointly is rebuttable by either party showing that their contributions were not equal.

The respondent concurred with the applicant that the suit property was matrimonial property within the meaning of section 6 of the Matrimonial Property Act,2013. The respondent referred to the definition of contribution in section 2 of the Act and reiterated that the applicant did not contribute financially or otherwise towards acquisition of the suit property. The respondent argued that from the outset, there was no common intention to own the suit property jointly as the decision to have the property registered in their joint names was made by the respondent on the wrong advice of a friend. The respondent submitted based on the case of Jones *v* Kernott [2011] UKSC 53 that the respondent had rebutted the presumption of common and equal beneficial ownership of the suit property. The respondent urged the court to infer from the applicant's conduct that there was no common intention to have equal beneficial ownership of the suit property as the applicant made no financial contribution towards the purchase of the suit property. The respondent submitted that even if it could be argued that originally parties intended to establish a common home for their family, this subsequently changed following the divorce.

The court was further referred to the cases of UMM *v* IMM [2014] eKLR and PN vs. ZWN [2017] eKLR where the gist of the courts' findings was that at the dissolution of marriage, matrimonial property must be distributed on the basis of fairness and conscience depending on the parties' respective contribution whether monetary or non-monetary and not an automatic 50:50 basis. The respondent urged the court to find that the applicant did not make any contribution, monetary or otherwise and as such she was not entitled to any share of the suit property.

Issues arising for determination by the court:

From the pleadings and the evidence adduced by the parties, the issues arising for determination in the application before the court are whether the joint tenancy between the applicant and the respondent should be severed and if so, on what terms and whether this court has jurisdiction to determine the dispute.

Whether the court has jurisdiction to determine the dispute:

This suit was originally filed in the High Court. It was transferred to this court by consent of the parties on 23rd October, 2014. In his replying affidavit sworn on 18th October, 2005 in response to the Originating Summons, the respondent had raised an objection to the jurisdiction of the court. The respondent did not come out clearly in the said affidavit as to the aspect of jurisdiction of the High Court it was objecting to. The respondent did not also make any submission on the issue. This court will assume in the circumstances that the objection was abandoned. I will therefore not consider jurisdiction as an issue arising for determination by the court. If I was called upon to determine the issue, I would have agreed with the applicant that this court has jurisdiction to determine the dispute. The applicant's case as framed is for the severance of a joint tenancy. Under Article 162(2)(b) of the Constitution and section 13 of the Environment and Land Court Act, 2011, this court has jurisdiction to determine all disputes relating to the environment and the use and occupation of, and title to land. Section 13(1) and (2) of the Environment and Land Act provides as follows:

> ***"13. Jurisdiction of the Court***
>
> ***(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.***
>
> ***(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—***
>
> ***(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;***
>
> ***(b) relating to compulsory acquisition of land;***
>
> ***(c) relating to land administration and management;***
>
> ***(d) relating to public, private and community land and contracts, chose in action or other instruments granting any enforceable interests in land; and***
>
> ***(e) any other dispute relating to environment and land."***

There is no doubt from the foregoing that this court has jurisdiction to determine the dispute before it which revolves around title to land. On whether the court can determine a dispute over matrimonial property, my view is that so long as the dispute is over the use, occupation or title to land, this court has jurisdiction to determine it whether such land is classified as matrimonial property or not. My view finds support in the decisions in the following cases:

In Jane Wambui Ngeru *v* Timothy Mwangi Ngeru (supra) the court stated as follows:

> ***"In addition if rights to matrimonial property are in dispute, section 17 of the Matrimonial Property Act of 2013 provides as follows:***
>
> ***(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.***
>
> ***(2) An application under subsection (1)—***
>
> ***(a) shall be made in accordance with such procedure as may be prescribed;***
>
> ***(b) may be made as part of a petition in a matrimonial cause; and***
>
> ***(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.***
>
> ***No particular Court is identified by the Act, and can therefore be any Court that has been given jurisdiction to hear matrimonial disputes. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by the Constitution under Article 165(3). The Marriage Act of 2014 in addition provides that the courts that will hear matrimonial causes arising under the Act are resident magistrate's courts and within the limits provided under the law as to their jurisdiction.***
>
> ***It is thus the current legal position that concurrent jurisdiction is given to various courts to hear disputes relating to matrimonial property rights including this Court. The only limitation applicable to this Court is that it can only hear such disputes if they involve or relate to land."***

In B W M *v* J M C, Murang'a **ELC Case No. 379 of 2017[2018] eKLR, the court stated as follows:**

> ***"For avoidance of doubt, the Court notes that the matrimonial Property Act does not to define the Court that disputes relating to the Matrimonial property disputes should be referred for determination. It is thus the current legal position that concurrent jurisdiction is given to various Courts to hear disputes relating to matrimonial property rights including this Court. The only limitation applicable to this Court is that it can only hear such disputes if they involve or relate to occupation use and title to land. I find nothing to oust the jurisdiction of this Court and I proceed to determine the Preliminary objection"***

Whether the joint tenancy between the applicant and the respondent should be severed and if so, on what terms:

From the evidence on record, there was no dispute that the applicant and the respondent were registered as joint tenants of the suit property. It was also common ground that the two had divorced and that they both wished to severe the joint tenancy. What was disputed were the terms of severance of the tenancy. Whereas the applicant contended that she was entitled to 50% share of the suit property on account of her registration as a co-owner of the property, the respondent contended that the respondent made no contribution of whatsoever nature to the acquisition of the suit property and as such she was not entitled to any share of the same.

In O K N *v* M P N [2017] eKLR, the court stated as follows concerning joint tenancies:

> ***"Where a property is registered, in the joint names of the parties, there is normally a presumption that each party made equal contribution towards its acquisition (See Kivuitu -v- Kivuitu, [1991] KLR 248. The presumption is however, rebuttable by either party showing that their contributions were not equal…. In determining the beneficial interest of cohabitees who are registered as joint owners of a property, it is the duty of the court to, first ascertain the parties' actual shared intentions whether expressed or inferred from their conduct and secondly, it must determine what, in all the circumstances is a fair sharing of what they acquired in the course of the union. See Stack V Dowden (supra) and Jones V Kernott, Gissing V Gissing (1971) AC 866."***

In R.M.M vs. T.S.M [2015] eKLR, the court stated as follows:

> ***"Starting with the applicable law that guides distribution of matrimonial properties, we do not agree that the learned judge did not consider the relevant principles as submitted by the appellant's counsel. The learned judge was alive to the fact that the matter before her was filed in 2002, long before the Constitution of Kenya, 2010 came into being. The learned judge stated:***
>
> ***"It is now an established principle that a spouse's contribution in a marriage can be in any of 3 forms:***
>
> ***Direct financial contribution***
>
> ***Indirect financial contribution***
>
> ***Non-financial contribution."***
>
> ***24. The learned judge observed that under the new Constitution, Article 45(3) now 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. The court could***

not have applied the provisions of the new Constitution since the case was filed in 2002, long before the new Constitution was promulgated.

25. The Matrimonial Property Act, 2013, stipulates that ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved. As this Act had not been enacted when the matter was heard and determined in the High Court, its provisions were inapplicable to this case.

26. In the circumstances aforesaid, the learned judge was right in applying the provisions of section 17 of the Married Women's Property Act, 1882, under which the originating summons had been brought. The principles set out by this Court in ECHARIA V ECHARIA [2007] eKLR were the applicable ones in guiding the trial court in its determination of the matter before it. Those principles were summarized by this Court in FRANCIS NJOROGE V. VIRGINIA WANJIKU NJOROGE [2013] eKLR as follows;

"a) A wife's non-monetary contribution cannot be considered in determining the amount of contribution of the wife towards the acquisition of the property. The performance of domestic duties would also not be considered as contribution towards acquiring the property.

b) Where the property in dispute is not registered in the joint names of the parties, then they have no joint legal interest. It is erroneous to presume that they have an equal beneficial interest in the property.

c) Joint tenancy connotes equality for there is a rebuttable presumption that where two or more people contribute to the purchase price of property in equal shares, they are in equity joint tenants. Equal contribution results in a joint tenancy unless there is contrary evidence to show that irrespective of the registration there was no equal contribution.

d) Where the disputed property is not registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would 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'.

e) A court has jurisdiction to allocate a portion of the disputed property as it deems just. It may also order a transfer of the share to the rightful beneficial owner."

27. We reiterate that under the repealed Constitution, the above principles were the applicable ones in dividing matrimonial property after divorce. It is against the background of the said principles that we turn to the issue of the parties' contribution towards acquisition of the matrimonial properties. We would agree with the learned trial judge that the appellant failed to tender any credible evidence to show that she had made any direct financial contribution towards acquisition of the properties in dispute so as to entitle her to half share of the same. That notwithstanding, we cannot say that she did not make any indirect financial contribution. The appellant ceased to be in formal employment on 12th day of July, 1991. By 1996 the parties were no longer staying together as husband and wife. Although the appellant may have participated in running a family business, there was no evidence that the said business generated reasonable profits, if any, that could have been used to finance the acquisition of the properties in contention.

With great respect to the learned judge, she did not state what the proven direct or indirect financial contribution of the appellant amounted to. On the basis of the evidence on record, the learned judge ought to have exercised her discretion and assess the respective proportions of financial contribution (direct or indirect) of each spouse. In the absence of such assessment, the learned judge's finding that the appellant is entitled to 30% of the rental income is without firm legal basis.

In the circumstances, we are inclined to interfere with the exercise of the trial judge's discretion. In our view, the appellant's indirect financial contribution towards acquisition and development of plot No. [particulars withheld] can be assessed at no more than 30%. Instead of awarding her a percentage of the rental income therefrom, we order that the property be valued by a reputable valuer, to be agreed upon by the parties within 45 days from the date hereof, and failing agreement, by such valuer as shall be appointed by the Chairman of the Institution of Surveyors of Kenya. The valuation costs shall be shared between the appellant and the defendant in the ratio 30:70 respectively. Thereafter the defendant shall pay to The appellant 30% of the assessed value of the property within 6 months from the date of the valuation, failing which the appellant shall be at liberty to institute execution proceedings to recover the sum due to her in terms of this judgment."

Upon careful evaluation of the evidence that was adduced by the parties as a whole, I am satisfied that the respondent has rebutted the presumption that the applicant and he contributed equally towards the acquisition of the suit property that was registered in their joint names. The respondent adduced uncontroverted evidence that he solely conceived the idea of purchasing the suit property in the absence of the applicant who was out of the country at the material time and that he had no intention of owning the suit property jointly with the applicant. The respondent testified that he made the applicant to be registered as a joint owner of the suit property while she was out of the country on the advice that he received from a friend that the arrangement would ease the burden of succession processes in relation to the property in the event that he was to die leaving the applicant behind. He contended that he had no intention whatsoever of making the applicant a 50% owner of the suit property. The evidence that was led by the respondent on the circumstances under which the applicant came to be registered as a joint owner of the suit property was not rebutted. The applicant did not lead any evidence from which the court can infer that there was any intention to make her an equal owner of the suit property. Due to the foregoing, it is my finding that there was no intention by the parties when the suit property was acquired that they would own the same in equal shares.

The fact that there was no intention express or inferred that the parties would own the suit property in equal shares does not mean however

that the applicant did not make any contribution towards the acquisition of the suit property. From the evidence before the court, I am convinced that the suit property was purchased by the respondent through the proceeds of sale of a property that he owned in Ngumo Estate, Nairobi, a loan from his employer, [particulars withheld]Ltd. and a loan from East African Building Society. The loans that the respondent acquired for the purposes of purchasing the suit property were paid over a period of time. It was common ground that the suit property was purchased in 1985 when the applicant was a house wife. The applicant did not therefore make any direct or indirect financial contribution for the deposit that was required to be paid for the property and the disbursements such as stamp duty and legal fees that had to be met by the purchasers before the bank loan was made available to them. The evidence that was placed before the court shows that these expenses were met by the respondent through his employer, [particulars withheld] Ltd. There was also sufficient evidence that the respondent paid the loan that was advanced to him by his employer through deduction from his salary while the loan obtained from East African Building Society was paid by the respondent through a standing order.

Evidence was led by the applicant that was not contested by the respondent that they established a family business in 1987 that was dealing in stationery, photocopying and photography. The business was also handling laundry agency work. The applicant was the one who was managing this family business. The respondent placed evidence before the court in the form of 3 year audited accounts showing that the business was making loses. It was common ground that the business was ran between 1987 and 1992 when it ceased operations. The audited accounts for 1991 and 1992 were not produced in evidence. The applicant gave evidence that was not controverted that it was the respondent who was in charge of banking the money received from the sales made in the shop that they were running. The applicant contended that some of the income received from the business were used by the respondent to pay the mortgage loan. In the absence of books of account for the business, the applicant's contention cannot be ruled out. Evidence was also led by the applicant that was not contested by the respondent that the applicant did not receive any salary for all the years that she managed the family business while the respondent was in salaried employment. In the circumstances, I am satisfied that through the family business, [particulars withheld] Limited, the applicant made direct and indirect financial contribution towards the payment of the mortgage loan.

The applicant had also asked the court to consider her non-financial contribution towards the acquisition of the suit property such as companionship to the respondent and the time spent looking after the children and the respondent's mother. As I have stated at the beginning of this judgment, the applicant's suit was for severing of a joint tenancy. It was not seeking the division of matrimonial property. I am of the view that when the court is considering severance of joint tenancy which is not subject to any marital obligations, non-monetary contribution to the acquisition of the property cannot be considered.

It was however conceded by both parties that the suit property was matrimonial property within the meaning of the Matrimonial Property Act, 2013. It was also common ground that, the Matrimonial Property Act, 2013 recognises both financial and non-financial contribution towards the acquisition of matrimonial properties. The marriage between the parties was dissolved in 1994. This suit was filed on 7th September, 2005 before the promulgation of the Constitution 2010 and the Matrimonial Property Act, 2013. The hearing of the suit also commenced on 15th March, 2012 before the enactment of the Matrimonial Property Act, 2013. As was stated in the case of R.M.M vs. T.S.M (supra), the law that would be applicable to this case for the purposes of division of matrimonial property would be section 17 of the Married Women's Property Act, 1882 as expounded in ECHARIA *v* ECHARIA [2007] eKLR. Under section 17 of the Married Women's Properties Act, 1882, a married woman's non-monetary contribution and performance of domestic duties are not to be taken into account when assessing her contribution to the acquisition of matrimonial property.

It follows therefore that if we consider the applicant's claim under section 17 of the Married Women's Properties Act, 1882, the court cannot take into account the applicant's non-monetary contribution towards the purchase of the suit property. What would count is her direct and indirect financial contribution towards the acquisition of the suit property. All in all, whether the applicant's claim is considered simply as that for severing a joint tenancy or for the division of matrimonial property, the principles that guide the court in determining each party's interest in the property are the same. From my earlier analysis of each party's contribution towards the acquisition of the suit property, I would apportion the suit property between the applicant and the respondent in the ratio of 10%/90% respectively.

In conclusion, I hereby enter judgment for the applicant against the respondent as follows:

(1) The joint ownership in respect of L.R No. […] Kilimani between the applicant and the respondent is severed.

(2) L.R No. […] Kilimani shall be owned by the applicant and the respondent in the ratio of 10%/90% respectively.

(3) A reputable valuer to be agreed upon by the parties within 30 days from the date hereof, and failing agreement, such valuer as shall be appointed by the Chairman of the Institution of Surveyors of Kenya shall carry out valuation of the suit property for the purposes of ascertaining its current market value and a reserve price in the event of a forced sale. The valuation costs shall be shared between the applicant and the respondent in the ratio 10%/90% respectively.

(4) Following such valuation, the respondent shall pay to the applicant 10% of the assessed market value of the property within 3 months from the date of the valuation, failing which the L.R No. […] Kilimani shall be sold subject to the reserve price fixed by the valuer aforesaid and the proceeds thereof shall be shared between the applicant and the respondent in the ratio of 10%/90% respectively.

(5) In the event that any of the parties fails to co-operate in the sale of the suit property should such sale become necessary, the Deputy Registrar of this court shall be at liberty to execute any document that may be necessary to facilitate the sale of L.R No. […] Kilimani and the distribution of the proceeds thereof in accordance with the orders made herein.

(6) Each party shall bear its own costs of the suit.

Delivered and Signed at Nairobi this 12th day of April 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr. Kibanya for the Applicant

Mr. Mikwa h/b for Mr. Gitonga for the Respondent

Catherine Nyokabi-Court Assistant