IN THE COURT OF APPEAL AT NAKURU

(CORAM: WARSAME, KORIR & J. NGUGI, JJ.A.)

CIVIL APPEAL NO. 16 OF 2019 (CA NO. 84 OF 2019) BETWEEN

RESMA COMMERCIAL AGENCIES........................APPELLANT

AND

JOEL KARUMBA NGATTAH (Suing as the Legal Representative of The Estate of LEAH WANGUI NGATA (Deceased)....................1ST RESPONDENT

FRANCIS NGATA KINGORI..............................2ND RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nakuru (J. Mulwa, J.) dated 7th April, 2016

in

HCCC No. 161 of 2006)

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JUDGMENT OF WARSAME, J.A.

1. Here is a case involving a civil servant in his twilight age, falls into gradual health and financial decline, has no money and resources to salvage his ailing health, the children are of no help to him. One of his sons threatens to harm him and remove him

from his own home. As a natural consequence, he sells the home where he was staying with his wife. He secures a ready cash from a neighbour,

who gives them a notice to vacate the premises, giving raise to the current dispute.

2. None of them (husband and wife) are alive, as I determine this dispute. The lady (Leah Wangui) passed on 10th March 2010 as the matter was pending before the trial court, while the man (Francis Ngata) equally passed on 21st July 2021, a sad and unfortunate reality that we must exit this world despite our actions and omissions no matter the consequences.

3. As Judges are sometimes thrust into the role of morticians for justice, we are called upon to answer questions raised by deceased and living litigants and hence this judgment.

4. The dispute centers upon property registered as NAKURU/MUNICIPALITY BLOCK 3/325 (the suit property), which became the subject of contention between the 1st and 2nd respondents, Leah Wangui Ngata and Francis Ngata Kingori respectively, who were married under Kikuyu Customary Law on 15th March 1970. Their union was blessed with five children and endured for over three decades. Throughout their marriage, they put down roots in various places, first in Laikipia, then in Eldoret, and eventually in Nakuru.

5. The 1st respondent contends that in 1978, they acquired a 5-acre farm in Laikipia, where they resided as their matrimonial home for 10 years, raising their children and farming on that land. During this period, the 2nd respondent procured the suit property through a mortgage arrangement with his former employer, Kenya Posts and Telecommunications Corporation (KPTC). When servicing this obligation became burdensome, the 2nd respondent convinced her that they should dispose of their Laikipia homestead and apply the proceeds toward discharging the mortgage debt. The family would then relocate to Nakuru town where they would seek their fortunes anew.

6. Thus persuaded, they sold their farm in 1989. Upon relocating to Nakuru, however, the 1st respondent discovered that the 2nd respondent had not honoured his representation; instead of settling the mortgage as promised, he had diverted the sale proceeds to establish three hotels in Eldoret. The 1st respondent and their children subsequently found themselves labouring in these establishments to generate the funds necessary to satisfy the very mortgage obligation the farm sale was purportedly meant to discharge.

7. The 1st respondent further maintains that notwithstanding the 2nd respondent's registration as sole proprietor, she possesses a beneficial interest in the suit property arising from her substantial financial contributions to its acquisition and preservation. She avers that beyond her efforts in the Eldoret hotels to discharge the mortgage obligation, she operated a retail shop in Nyahururu and engaged in farming enterprises, cultivating crops and keeping livestock. The income generated from these ventures, she contends, was consistently invested into the suit property by financing the construction of buildings, effecting improvements, and developing the property into the family residence. She further asserts that when the 2nd respondent found himself unable to meet obligations, she assumed financial responsibility, including paying their children's school fees from the proceeds of her commercial activities.

8. The family resided on the suit property for over seventeen years, during which time the 1st respondent continued to invest her earnings into the home while raising their children. The storm clouds gathered in May 2006, when the appellant, Resma Commercial Agencies, a commercial entity whose proprietor was the respondents' neighbour, entered into a Sale

Agreement dated

17th May 2006 with the 2nd respondent, for the purchase of the suit property. The agreed purchase price was Kshs. 1,100,000/=, paid through a combination of cheque (Kshs. 1,050,000/=) and cash (Kshs. 50,000/=).

9. The circumstances of this sale would become the subject of sharply divergent accounts. The 1st respondent maintained that the transaction was conducted in stealth and secrecy, entirely without her knowledge or involvement despite the property being the matrimonial home where she and her children had lived for more than 17 years. The appellant, on its part, contended that proper due diligence was conducted: searches were made confirming the 2nd respondent as the sole registered proprietor, the appellant acted in good faith as a bona fide purchaser for value, and any domestic arrangements between husband and wife were not matters that could be verified through official searches, nor were they necessary at the time. The appellant further asserted that the 1st respondent was aware of and had even participated in discussions concerning the transaction, and that objections materialized only when the time came to deliver vacant possession.

10. According to the 1st respondent, she discovered that the property had been sold on 28th July 2006, a mere two months

after the

transaction was concluded, when the appellant's agent arrived at the matrimonial home bearing a letter from the appellant's lawyers demanding rent of Kshs. 13,000/= failing which eviction would ensue within seven days. The sale triggered litigation before the trial court.

11. In September 2006, the 1st respondent filed a suit before the High Court (the subject of this appeal) naming both her husband (as 1st defendant) and the appellant (as 2nd defendant). In a further amended plaint dated 5th December 2011 the appellant sought:

    a. A permanent injunction restraining the defendants by themselves, agents and or servants from evicting, effecting transfer of title, collecting rent or interfering in any manner whatsoever, with the title, ownership, quiet possession and enjoyment of the suit property.

    b. A declaration that NKU/MIN/BLOCK/3/325 is a matrimonial property and that the 1st defendant held the title thereto in trust in equal shares for himself and the plaintiff and any transfers effected to the 2nd defendant by the 1st defendant is null and void and the same be and is hereby cancelled or in the alternative an order directing the 1st defendant to pay the plaintiff half the market value of the suit property.

12. The appellant filed its defence and counterclaim on 11th September 2006, seeking orders of vacant possession. In the

alternative, should vacant possession not be granted, the appellant sought a

refund of the entire purchase price together with mesne profits for the period from 1st July 2006 computed at the rate of Kshs. 450/= per day until payment in full, plus 15% of the purchase price and a right of lien over the suit property pending final payment.

13. The 2nd respondent filed his defence, disputing that the property was the matrimonial home and contending that he had single- handedly paid for the mortgage on the suit property. He denied that the sale was illegal, averring that he had informed his wife of his intention to dispose of it, and maintained that his children had not worked in the hotels to help pay the mortgage. However, during the pendency of the proceedings, the 1st respondent passed away and was substituted by her son, Joel Karumba Ngattah. Following his wife's death, the 2nd respondent's position in the litigation underwent a dramatic shift. During testimony before Mulwa J., he admitted that the property was indeed the matrimonial home, conceded that he had sold it secretly without the knowledge of the 1st respondent, and acknowledged that his wife had contributed to its purchase and construction from income earned through her shop and business. He consequently expressed willingness to

refund the purchase price to the appellant so that the matrimonial
home could be returned to his children.

14. In a judgment delivered on 7th April 2016, Mulwa J. found in favour of the 1st respondent and held as follows:

> ***"Upon analysis of the evidence the pleadings and the applicable law, the court is satisfied that the plaintiff's claim is merited and that the plaintiff has proved her case on a balance of probability. The first defendant supported the plaintiff's claim in all aspects. He informed the court that he was willing to refund the purchase price to have the matrimonial home returned to his children. The court finds that the plaintiff had a beneficial interest in the property as the spouse of the registered owner through her financial contributions to its acquisition. The court also makes a finding that the sale of the property was shrouded in secrecy, collusion, fraud and illegality. Spousal consent is an overriding interest and necessary for any matrimonial property under the old order, though not expressly required, equity demanded that before selling a matrimonial home, spousal consent had to be obtained, and the spouses share had to be ascertained. The registered spouse was holding the unregistered spouses share in trust."***

15. Consequently, the trial court issued a permanent injunction restraining the appellant from evicting the 1st respondent's family, collecting rent, or interfering with their quiet occupation of the suit property; held that the transfer to the appellant was

null and void; and directed the Land Registrar to rectify the register by cancelling

the appellant's name as proprietor and substituting it with the names of Francis Ngata King'ori and Joel Karumba Ngattah (as legal representative of the estate of Leah Wangui Ngata) to hold in equal shares. The court further ordered that the 2nd respondent refund to the appellant the full purchase price of Kshs. 1,100,000/= plus interest at court rates from 16th May 2006. The appellant's claim for mesne profits was disallowed, the court finding that it had not been sufficiently substantiated.

16. Aggrieved, the appellant now appeals to this Court on the grounds that the learned Judge erred by:

    a. ***Finding that 1st respondent contributed financially to the purchase and construction of the matrimonial home standing on the suit property***

    b. ***Finding that the 1st respondent proved her case on a balance of probabilities;***

    c. ***Concluding that the sale of the property was shrouded in secrecy, collusion, fraud and illegality in the absence of cogent evidence;***

    d. ***Finding that the appellant was not an innocent purchaser for value whereas the appellant had conducted due diligence and satisfied itself that the 2nd respondent was the registered proprietor with capacity to transfer;***

    e. ***Holding that the 1st respondent had a beneficial interest in the property as the spouse of the registered owner***

f. ***Placing undue weight on the testimony of the 2nd respondent to support the 1st respondent's claim while disregarding the interest of the appellant;***

g. ***Upholding the allegation that the 2nd respondent was willing to refund the purchase price to have the matrimonial home returned to his children;***

h. ***Disregarding the appellant's claim for mesne profits at the rate of Kshs. 450/= per day;***

i. ***Ordering a refund of the purchase price rather than directing the 2nd respondent to pay the 1st respondent half the market value of the property as prayed in the alternative***.

17. When the appeal came up for hearing before us on 22nd September 2025, learned counsel Mr. Kahiga Waitindi appeared for the appellant and learned counsel Mr. Steve Biko appeared for the 1st respondent. The 2nd respondent was not represented, having passed away on 21st July 2021. Both counsel confirmed the death of the 2nd respondent, and that the appeal against him abated. Parties relied on their written submissions and made oral highlights.

18. Mr. Kahiga Waitindi, for the appellant, submitted that the trial court erred in its evaluation of the evidence. He contended that there was no proof adduced to show that the 1st respondent had contributed financially to the property. Relying on **<u>Peter Mburu Echaria v. Priscilla Njeri Echaria</u> [2007] eKLR**, counsel

emphasized that according to English law principles on trusts as articulated in **Gissing v. Gissing (1971) AC 888**, it is only through a wife's financial contribution, direct or indirect, towards the acquisition of property registered in the name of her husband that entitles her to a beneficial interest in the property. He argued that the proper way to prove monetary or financial contribution by a spouse is through adduction of evidence in the form of financial statements or reports, which the 1st respondent failed to do.

19. Counsel further submitted that the appellant was a bona fide purchaser for value who had conducted due diligence by searching the register, which confirmed that the 2nd respondent was the sole registered proprietor with capacity to transfer. He maintained that domestic arrangements between spouses were not discernible from official searches and could not be verified through the usual channels of inquiry.

20. Counsel argued that the suit essentially became a matrimonial dispute between husband and wife, with the appellant caught in the crossfire as an innocent third party. He submitted that the evidence suggested the 1st respondent was aware of and participated in discussions concerning the transaction, and that

her objections arose only when vacant possession was demanded. He further submitted that the appellant adduced evidence in the form of correspondences between the company, the respondents' advocates, and its housing agents, which demonstrated that the 1st respondent was aware of and took part in the transaction. It was emphasized that the 2nd respondent's character was illustratable from his goal-shifting stances, noting that he was an untrustworthy individual who had colluded with his wife to defraud the appellant.

21. On the issue of procedure, the appellant submitted that the trial court erred in failing to account for the fact that the suit had not been properly instituted in accordance with the provisions of **Section 17 of the Married Women's Property Act, 1882**. He contended that the Act categorically provides that questions between husband and wife as to title or possession of property ought to be instituted through a summary manner, which requires institution by way of Originating Summons rather than plaint.

22. The appellant also contended that the trial court erred in disregarding the appellant's claim for mesne profits at the rate of Kshs. 450/= per day, as the basis for the mesne profits

demand

was not merely a prayer but was evidenced and substantiated by the Sale Agreement signed between the appellant and the 1st respondent, specifically Clause E of the Special Conditions in the Sale Agreement dated 17th May 2006. Consequently, there was a contractual basis for the demand for mesne profits, and the trial court ought to have fully analyzed the evidence adduced by the appellant to ascertain this fact.

23. Opposing the appeal, Mr. Steve Biko, for the 1st respondent, submitted that proof of matrimonial contributions could only be matters between spouses, and that the appellant was unqualified to challenge such contributions between husband and wife. He emphasized that his client was never present at any alleged meeting and was not a party to the sale agreement, questioning why she would be called to a meeting if the agreement did not concern her. He submitted that if such a meeting had occurred, it would confirm that the 1st respondent had a stake in the property which the appellant acknowledged. Counsel argued that the allegation of collusion between the spouses was unsupported by evidence, noting that the 2nd respondent had admitted his wife's contribution in testimony before Mulwa, J. He pointed out that the appellant and

the 2nd respondent were neighbors with abutting properties, making it implausible that due diligence was properly conducted when the appellant knew a family lived on the property. He submitted that the demand for rent three months after the sale could only have been made by someone who knew the parties well and understood that this was a family home.

24. Relying on **Beatrice Bonareri Nyabuto v. Eldad Kanyanya Wapenyi [2006] eKLR**, which articulated the doctrine of coverture that in marriage the husband and wife are one person in law, it was submitted that the property was held in trust for the family. Citing **Pettit v. Pettit [1970] AC 777 385 and Gissing v. Gissing [1971] AC 888** on the powers of the court under **Section 17 of the Married Women's Property Act**, it was further contended that the property was registered in the 2nd respondent's name on the understanding that he held it in trust for the 1st respondent and her children. It was submitted that although section 17 of the Act gives the court wide powers, it does not give the court power to substitute title from one spouse to the other or to give a portion of title to one of the spouses.

25. The 1st respondent drew the Court's attention to the established principles governing the liability of third parties to a trust for breach of trust, namely the doctrines of dishonest assistance and knowing receipt. The 1st respondent submitted that under the dishonest assistance principle, a person who is neither trustee nor beneficiary may be personally liable for dishonestly assisting in a breach of trust, even without receiving proprietary rights in the trust property. The test for dishonesty asks whether the defendant acted as an honest person would have acted, with the notion of dishonesty extending beyond straightforward deceit and fraud to potentially include reckless risk-taking with trust property.

26. The 1st respondent contended that the appellant, being in such close physical proximity as a next-door neighbor, knew or ought to have known that the 1st respondent lived on the property with her husband for over 17 years. Under these circumstances, it was argued that the appellant could not claim to be an innocent purchaser but was instead caught in the illegality of the sale agreement, having either dishonestly assisted in or knowingly received property subject to a trust. The Court was urged to affirm the judgment of the trial court and award costs.

27. As this is a first appeal, it is this court's duty to analyze and re-assess the evidence on record and reach its own conclusions in the matter. As put more succinctly in **<u>Selle v. Associated Motor Boat Co.</u> [1968] EA 123**:

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs- Ali Mohamed Sholan (1955), 22 EACA 270)."***

28. Having considered the record of appeal, the submissions by the parties, and the law, the issues for determination in this appeal are:

    a) Whether NAKURU/MUNICIPALITY BLOCK 3/325 is matrimonial property and whether the characterization of property as a "matrimonial" automatically vests beneficial interest in both spouses;

    b) Whether the 1st respondent established that she contributed to the acquisition and development

of the suit property resulting in some beneficial interest;

c) ***Whether the appellant was obligated to ascertain the 1st respondent's unregistered equitable interests in***

the suit property before completing the purchase, and what consequences, if any, flow from failure to do so;

d) Whether the trial court erred in its award of reliefs.

29. The 1st respondent seeks a declaration that NAKURU/MUNICIPALITY BLOCK 3/325 constitutes matrimonial property in which the 2nd respondent held the legal title as trustee for himself and the 1st respondent in equal shares. If granted, this declaration would establish that her consent was a prerequisite to any valid alienation of the property and that the sale to the appellant, executed without such consent, stands vitiated from its inception.

30. The factual foundation of the 1st respondent's case is straightforward: she resided upon the suit property for seventeen years during which time it served as the matrimonial home and family residence. From this fact of prolonged residence, coupled with her financial contributions to its acquisition and development, she invites the Court to find that she acquired beneficial interest in the property notwithstanding that legal title stood registered solely in the name of her spouse. The logic of her position is thus: seventeen years' residence establishes the property's matrimonial character; this

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matrimonial character, together with her financial

contributions, vested in her a beneficial interest; and such beneficial interest rendered her consent essential to any disposition of the property.

31. The question that arises is whether a home by virtue of being impressed with the character of being a family home automatically becomes matrimonial property in which both spouses hold beneficial interest in equal share.

32. The answer to this question is to be found in the principles established by the House of Lords in **Pettit v. Pettit [1970] AC 777** and **Gissing v. Gissing [1971] AC 888**. In these landmark decisions, the House of Lords rejected the notion that descriptive labels such as "family assets" or "matrimonial home" could determine beneficial ownership. In **Pettit (supra),** Lord Upjohn stated:

> "***My Lords, In my opinion, the expression 'family assets' is devoid of legal meaning and its use can define no legal rights or obligations.***"

33. In **Gissing (supra)** Lord Diplock defined family assets as follows:

> ***"In the cases examined the practice had developed of using the expression " family asset" to describe the kind of property about which disputes arose between spouses as to their respective beneficial interests in it. I***

myself adopted the expression as

a convenient one to denote " property, " whether real or personal, which has been acquired by either spouse in " contemplation of their marriage or during its subsistence and was intended " for the common use or enjoyment of both spouses or their children, such " as the matrimonial home, its furniture and other durable assets "; but without intending any connotation as to how the beneficial proprietary interest in any particular family asset was held."

34. In the same case, Viscount Dilhorne stated thus:

Use of the expression "family assets" was deprecated by my noble and learned friends Lord Hodson and Lord Upjohn in Pettit v. Pettit (supra) as devoid of legal meaning and conducive to the error of supposing that the legal principles applicable to the determination of the interests of spouses in property are different from those of general application in determining claims by one person to a beneficial interest in property in which the legal estate is vested in another…

It is no doubt a useful loose expression to refer to the possessions of a family but family assets are not a special class of property known to the law. The motor car owned by a member of the family, the wife's money and the husband's the television set and many other things are aptly covered by the expression but the application of this expression does not resolve from the question to whom does a particular " family asset " belong. Is it to the husband or the wife or to both jointly?

35. Property is deemed matrimonial where it is acquired during the subsistence of the marriage between the parties unless otherwise

agreed. However, the mere characterization of property as the matrimonial home or a family asset does not answer the legal question of beneficial ownership; it merely describes the use to which the property has been put. Nor does the status of marriage automatically confer entitlement of equality to 'matrimonial property'. The law draws a clear distinction: beneficial ownership must be established through contribution, not through labels or status. Proprietary rights are created by contribution to acquisition or improvement, not by occupation or marital status.

36. Consequently, the 1st respondent cannot establish beneficial interest merely by alleging that the property was a matrimonial home and that she resided there for seventeen years. The fact that a family lived on the property, that children were raised there, or that it served as the center of domestic life; all of these circumstances, however moving, do not create proprietary rights. To hold otherwise would be to resurrect the very concept of family assets that the House of Lords emphatically rejected as having no place in English property law, a principle this Court has consistently followed and which our laws have encapsulated in the Matrimonial Property Act of 2013. Property may thus

serve as the

matrimonial home and may be matrimonial in character and use without both spouses holding beneficial ownership in it.

37. The critical question, then, is what transforms property from being merely the home where a family lives, into property in which both spouses hold enforceable beneficial interest? The answer is contribution. Proof of contribution is the legal mechanism by which the non-titled spouse establishes that, notwithstanding the register, beneficial interest is shared. Without such proof, the property remains what the register declares it to be: the sole property of the registered proprietor, even if used as the family home.

38. The burden rests squarely on the person alleging beneficial interest in matrimonial property to adduce credible, cogent, documentary evidence where available, to establish the fact and quantum of contribution. Assertions, however confidently made, do not suffice. Allusions to contributions, however plausible they may sound, do not establish proprietary rights. Inferences drawn from prolonged occupation do not prove financial contribution. The burden of proof is a heavy one, but necessarily so: property rights affect not only the immediate parties but all who may deal with the property.

39. The 1st respondent must therefore prove, by cogent evidence, that a trust arose in her favour through contribution, whether direct or indirect, to the acquisition or substantial improvement of the property. In the absence of such evidence, courts have no jurisdiction under Section 17 of the Married Women's Property Act to vary proprietary rights already established. This principle has been consistently applied by our courts.

40. In **<u>Peter Mburu Echaria v. Priscilla Njeri Echaria</u>, Civil Appeal No. 75 of 2001 [2007] eKLR**, this Court held that:

> ***"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…"***

41. The Supreme Court in **<u>Joseph Ombogi Ogentoto v. Martha Bosibori Ogentoto</u>**, **Petition No. 11 of 2020,** affirmed the decision in **Echaria (supra**), holding: *"We have no hesitation in finding that Echaria is still good law for all claims made under the Married Women's Property Act,1882."*

42. Having established the legal principles, the question that now falls for determination is whether the evidence adduced at trial

supports

the trial court's finding that the 1st respondent acquired beneficial interest through contribution to the suit property. This is not a question of law but of fact, to be determined upon a careful evaluation of the evidence on record. As this is a first appeal, I am obliged to conduct that evaluation myself giving due weight to the trial court's assessment while remaining mindful that I neither saw nor heard the witnesses.

43. The appellant contends that the 1st respondent failed to adduce any credible evidence of contribution to the acquisition of the suit property. No bank statements were produced showing withdrawals or transfers of funds toward the purchase. No financial records were tendered documenting payments for construction or improvement. No receipts were exhibited evidencing expenditure on materials or labor. No documentary proof of any description was placed before the court to demonstrate monetary contribution, and in the absence of such proof, the appellant submits, that the finding of beneficial interest cannot stand. In short, the appellant maintains that the 1st respondent's claim to beneficial interest stands or falls on proof of contribution. Without such proof, no beneficial interest arises. Without beneficial interest, there is no

entitlement to a share in the property. And without entitlement, her consent to the sale was irrelevant.

44. The jurisprudence on what amounts to direct or indirect contribution is well settled before this Court. In **Gissing v. Gissing** Lord Diplock stated as follows:

> ***"Where the wife has made no initial contribution to the cash deposit and legal charges and no direct contribution to the mortgage instalments nor any adjustment to her contribution to other expenses of the household which it can be inferred was referable to the acquisition of the house, there is in the absence of evidence of an express agreement between the parties, no material to justify the court in inferring that it was the common intention of the parties that she should have any beneficial interest in a matrimonial home conveyed into the sole name of the husband, merely because she continued to contribute out of her own earnings or private income to other expenses of the household. For such conduct is no less consistent with a common intention to share the day-to-day expenses of the household, while each spouse retains a separate interest in capital assets acquired with their own monies or obtained by inheritance or gift. There is nothing here to rebut the prima facie inference that a purchaser of land who pays the purchase price and takes a conveyance and grants a mortgage in his own name intends to acquire the sole beneficial interest***

as well as the legal estate: and the

difficult question of the quantum of the wife's share does not arise..."

45. In **Echaria** (supra), this Court in discussing the nature of the contributions referable to acquisition of a house, reiterated the words of Fox LJ in **Burns v. Burns** **[1984]** as follows:

> ***"If there is a substantial contribution by the woman to the family expenses, and the house was purchased on a mortgage, her contribution is, indirectly referable to the acquisition of the house since in one way or another, it enables the family to pay the mortgage instalments.***
>
> ***Thus a payment could be said to be referable to the acquisition of the house if, for example, the payer either:***
>
> > ***a) Pays part of the purchase price, or***
> >
> > ***b) contributes regularly to the mortgage instalments, or***
> >
> > ***c) pays off part of the mortgage, or***
> >
> > ***d) makes a substantial financial contribution to the family expenses so as to enable the mortgage instalments to be paid.***
>
> ***That list is not of course exhaustive."***

46. Building upon these well-established principles, the Supreme Court has recently clarified how the concept of indirect contribution should be understood in the Kenyan context. In **JOO v. MBO,**

<u>Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)</u> [2023] KESC 4 (KLR) the Supreme Court held:

> ***"… [E]ach party's contribution to the acquisition of matrimonial property may not have been done in an equal basis as a party may have significantly contributed more in acquiring property financially as opposed to the other party. Equity further denotes that the other party, though having not contributed more resources to acquiring the property, may have nonetheless, in one way or another, through their actions or their deeds, provided an environment that enabled the other party to have more resources to acquiring the property. This is what amounts to indirect contribution. Equity therefore advocates for such a party who may seem disadvantaged for failing to have the means to prove direct financial contribution not to be stopped from getting a share of the matrimonial property."***

47. I have painstakingly examined the evidence on record and have found no documentary evidence of the 1st respondent's direct financial contribution to purchasing the suit property.

48. It is not in dispute that the 2nd respondent purchased the suit property from the Housing Corporation using a loan provided by his then employer, Kenya Posts and Telecommunications

Corporation (KPTC). The 1st respondent has admitted as much. In addition, the 1st respondent did not demonstrate in any form that

she contributed a single cent to the mortgage payments despite the 2nd respondent's alleged difficulty in repaying the mortgage for the suit property, either through income from her alleged businesses or income generated from working in the 2nd respondent's hotels. In fact the 1st respondent in her own testimony admits that she did not contribute to the mortgage payments for the suit property. She stated thus:

> ***"The 1st defendant was unable to pay off the loan of the house. The demand notice was sent to us. He sought my assistance and that of my son Joe Karumba. We did not do anything towards the loan repayment because I was still paying the household requirements. I then suggested that we should sell our Nyahururu farm…"***

49. Having admitted by her own testimony that there was no direct contribution, the 1st respondent urges this Court to find that her contributions to the acquisition of the suit property were indirect and non-monetary. Her case for indirect contribution is twofold: first, that by devoting her income from various business ventures entirely to raising the children and shouldering household and family expenses, she freed up the 2nd respondent's income to service the mortgage on the suit property; and second, that she

labored in the 2nd respondent's hotel businesses, the proceeds from which were used to make the mortgage loan repayments.

50. The critical question is whether the 1st respondent adduced any evidence to prove the existence of the income-generating activities upon which her claim of indirect contribution rests. The 1st respondent testified that she reared chickens and sheep, cultivated crops, operated a retail shop, and ran a hotel. She claimed that proceeds from these farming and business ventures paid school fees for the children, catered to household expenses and helped develop the property. The record, however, contains no proof that such businesses or activities actually existed. Indeed, the 2nd respondent's affidavit dated 29th August 2006; deposed at a time when he was vigorously contesting the 1st respondent's claim and disputing that the suit property constituted matrimonial property, directly contradicts these allegations. In that affidavit, the 2nd respondent deposed that the 1st respondent was jobless and relied on him for her upkeep and the upkeep of the family.

51. If, as the 2nd respondent attested on oath when the parties' interests were adverse, the 1st respondent had no employment and consequently no independent source of income during this

critical

acquisition period, then the burden rested squarely on the 1st respondent's shoulders to prove otherwise and show some semblance of evidence highlighting her contributions. This burden did not diminish when the 2nd respondent, following his wife's death, reversed his position and testified that she had contributed through income from her shop and business. On the contrary, having adopted this new stance, the 2nd respondent assumed an equal burden to adduce evidence substantiating the very claims he had previously contested.

52. The claims regarding the 1st respondent's money generating activities remain entirely unparticularized and unsupported by any documentary proof. No witnesses were called to corroborate the claimed shop in Nyahururu; no customers, suppliers, or neighbors testified to its existence. No business records whatsoever were produced: no business licenses, no tax returns, no sales books, not even a simple ledger. No bank statements were tendered showing business income or withdrawals for construction of the matrimonial home. No receipts for building materials were exhibited despite claims of financing construction. No school fee receipts showing the amount paid or the period of education were

produced despite claims of paying the children's education. No farming records evidencing livestock or crop cultivation were tendered. There are no dates of establishment for any of these ventures, no evidence of the hotel's location, capacity, or operations, no financial statements, and critically, no documents showing the quantum of her alleged contributions whether to construction, school fees, or mortgage payments.

53. The deficiency in proof extends equally to the 1st respondent's central claim that she worked in hotels in Eldoret which generated income used to discharge the mortgage obligation. The 1st respondent testified that after the 2nd respondent allegedly diverted proceeds from the sale of their Laikipia farm to establish hotels in Eldoret rather than paying the mortgage as promised, she and their children laboured in these establishments to generate funds for mortgage repayment. Yet no evidence was adduced regarding the profitability of these hotels, their turnover, or what income was actually generated. Even the most rudimentary hotel operation maintains records of daily sales, expenses, and income. No such records were produced. No employment contracts or pay slips were tendered. No accounts showing income from hotel

operations were exhibited. Most tellingly, the 1st respondent could not even state what amount the mortgage required in monthly repayments, making it impossible to assess whether the claimed hotel earnings could plausibly have serviced the debt.

54. The evidence on record reveals that the 2nd respondent himself established the hotels from his own funds and was also active in their operation. If both spouses were working in the same hotel businesses, the claim that income generated therefrom constituted the 1st respondent's separate contribution to the matrimonial home becomes difficult to sustain without documentary proof showing what portion of the hotel income, if any, was attributable specifically to her efforts. Any competent hotelier, as the 1st respondent claimed to be, would have maintained some form of basic financial records. The complete absence of such documentation speaks volumes about the veracity of her claims.

55. Indeed, while the Supreme Court's decision in **Joseph Ombogi Ogentoto (supra),** recognized that indirect contributions such as caring for children and household management may be considered in determining beneficial interest, the Court

reaffirmed the guiding principle established in Echaria : that a spouse does not acquire

beneficial interest by the mere fact of marriage; rather, specific contribution whether direct or indirect must be proved to entitle a spouse to a share of the property. Apportionment and division of matrimonial property may only be done where parties fulfill their obligation of proving what they are entitled to by way of contribution.

56. This Court is unable to assess and ascertain the 1st respondent's contribution for the simple reason that nothing has been placed before us to enable us to undertake this task. The 1st respondent did not discharge this burden during her lifetime. Nor did the 2nd respondent, despite his subsequent support for her claims, adduce any evidence to support them.

57. In the absence of evidence, this Court cannot make a finding of indirect contribution. While raising children and managing household expenses are undoubtedly valuable to family life, they do not automatically translate into proprietary rights without proof that such activities enabled the acquisition or improvement of the specific property in question. As Lord Diplock stated in **Gissing v. Gissing**, a spouse's contribution to day-to-day household expenses, absent evidence that such contribution was referable to

the acquisition of the property, does not create beneficial interest. Without such evidence, there is nothing to rebut the prima facie inference that property registered in one spouse's name is held by that spouse alone.

58. Again, the parties' common intention to own property separately is evident. The 1st respondent admitted to owning Title No. LR 6585/612, which was registered in her name. She also testified that when the 2nd respondent became unable to pay the loan, the decision to sell the 5-acre farm was made and it was sold for Kshs. 500,000/-. The 1st respondent in her testimony confirms that the deposit from the sale was paid into her account and she gave the 2nd respondent Kshs. 100,000/-

59. This version of events is supported by the 2nd Respondent's Replying Affidavit dated 29th August 2006, which was sworn before he reversed his position. The 2nd Respondent avers that:

> *"That at the same time I bought a plot at Nyahururu Muthaiga estate a prime estate in Nyahururu Municipality and I did register the said plot 612/6585 in my wife's name.*
>
> *That the applicant sold land at Nyahururu for over Kshs. 500,000/- I am convinced that the applicant bought a*

plot and if she didn't she should tell the court where the Kshs. 500,000/- was spent

That we decided to sell the plot in Nyahururu and buy one at Nakuru worth Kshs. 300,000/- and with the balance of Kshs. 200,000/- to try and put up business in Nakuru.

That I paid for the advertisement of the plot and cleared all the rates to the Nyahururu Municipal Council but when the Cheque was given to my wife she banked the same in housing finance and she refused to give me the Kshs. 200,000/- for the business and she refused to buy a plot as earlier agreed.

That paragraph 15 is denied since the applicant has Kshs. 500,000/- for the land she sold at Nyahururu and the respondent is willing to settle her at KIAMBOGO/KIAMBOGO BLOCK 2/11600 (Mwariki)"

60. In my view, there is no evidence of a common intention to own property in equal shares between the parties. Instead, the evidence reveals a consistent pattern of separate ownership and individual property rights throughout the marriage. The 1st respondent owned Title No. LR 6585/612, registered exclusively in her name. When the Laikipia farm was sold for Kshs. 500,000/-, the proceeds were deposited into her personal

account, from which she gave the 2nd respondent a mere Kshs. 100,000/-. Most tellingly, in his

Replying Affidavit dated 29th August 2006, sworn at a time when the parties' interests were clearly adverse and he was vigorously contesting her claim, the 2nd respondent deposed that they had agreed she would use Kshs. 300,000/- to purchase a plot and give him Kshs. 200,000/- for business purposes, but that she had refused to honour this agreement and kept the entire sum. This conduct demonstrates that the spouses treated property and financial matters as separate individual concerns, not as joint marital assets.

61. Even their business ventures operated on parallel but separate tracks. The hotels in Eldoret, which the 2nd respondent established using proceeds from the sale of the Laikipia farm, were operated as his separate business ventures. Whatever other businesses the 1st respondent purported to operate remained entirely separate from the 2nd respondent's ventures. This pattern of conduct: separate property ownership, independent business operations, and individual rather than communal treatment of proceeds, is entirely inconsistent with any alleged common intention that the suit property, registered solely in the 2nd respondent's name, was held on trust for both spouses in equal shares. As Lord Diplock observed

in Gissing v. Gissing, conduct showing that each spouse retained separate interests in capital assets acquired with their own monies rebuts any inference of common beneficial ownership. The evidence before us does precisely that.

62. Having carefully evaluated the evidence, I find that the 1st respondent has failed to discharge the burden of proving that she acquired any beneficial interest in the suit property. No direct or indirect financial contribution to the purchase of the property was established. What I do find is a claim unsupported by documentation, assertions unverified by independent evidence, and a belated alliance between spouses whose previous affidavits suggested discord rather than harmony. This is an insufficient foundation upon which to establish proprietary rights that would defeat a registered title and dispossess a purchaser who paid valuable consideration

63. In the absence of proven contribution, no trust arose in favour of the 1st respondent. The suit property remained, in law and in equity, the sole property of the 2nd respondent as registered proprietor. Consequently, the 1st respondent's consent was not required for its sale. The 2nd respondent possessed full legal

capacity to transfer the property to the appellant, and the transaction concluded on 17th May 2006 was valid and enforceable.

64. It therefore follows that the appellant, having purchased the property from the registered proprietor, conducted searches confirming his capacity to transfer, and paid valuable consideration, acquired good title to the suit property. The appellant was entitled to rely on the register, and the doctrine of indefeasibility of title protects the interest so acquired. The trial court erred in setting aside the transfer and in directing rectification of the register.

65. For the foregoing reasons, I find that the trial court misdirected itself in law and fact. The learned Judge erred in finding that the 1st respondent had established beneficial interest through contribution; erred in concluding that her consent was necessary for the sale; and erred in holding that the transfer to the appellant was null and void.

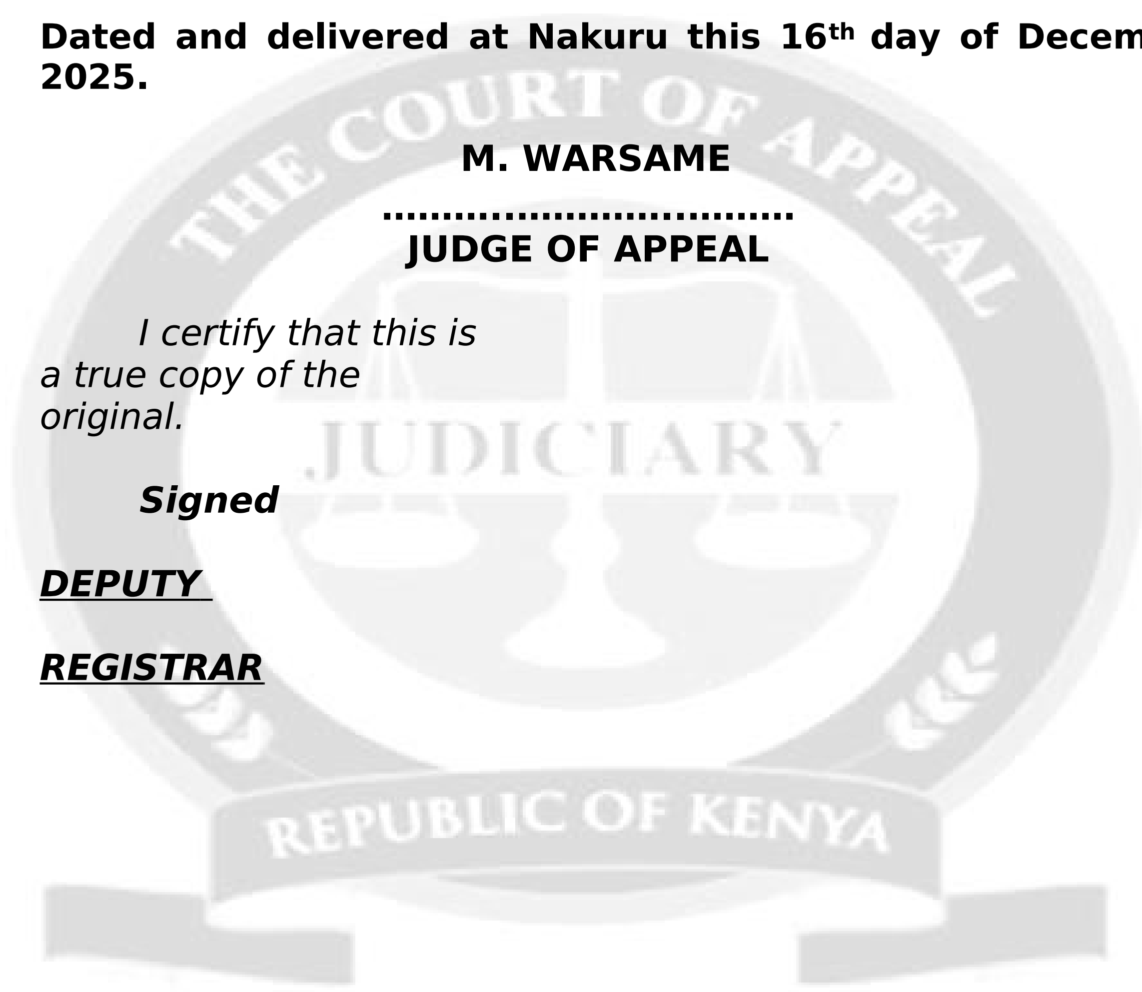
66. Since my learned brother, Korir JA agrees, the orders that commend themselves to me are as follows: I allow the appeal and set aside the judgment and decree of the High Court dated

7th April

2016 in HCCC No. 161 of 2006 and confirm the appellant as the lawful registered proprietor of NAKURU/MUNICIPALITY BLOCK 3/325.

67. Costs to the Appellant.

Dated and delivered at Nakuru this 16th day of December, 2025.



M. WARSAME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY

REGISTRAR

IN THE COURT OF APPEAL AT NAKURU

(CORAM: WARSAME, KORIR & JOEL NGUGI, JJ.A)

CIVIL APPEAL NO. 16 OF 2019 (C.A NO. 84 OF 2019) BETWEEN

RESMA COMMERCIAL AGENCIES.........................APPELLANT

AND

JOEL KARUMBA NGATTAH
(*Suing as the Legal Representative of the Estate of*
LEAH WANGUI NGATA (Deceased)..............1ST RESPONDENT
FRANCIS NGATA KING'ORI .... 2ND RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nakuru (J. Mulwa, J.) dated 7th April 2016

in

HCCC No. 161 of 2006)
****

CONCURRING JUDGMENT OF KORIR, J.A

1. In my view, the key issue in this appeal is whether the 1st respondent directly or indirectly contributed to the purchase of **LR No. Nakuru Municipality/Block 3/325** *(**"the suit property"**)* by the 2nd respondent. As has been clearly demonstrated in the lead judgment of Warsame, JA, the evidence adduced at the trial did not establish any contribution by the 1st respondent towards the purchase of the suit property.

2. In agreeing with Warsame, J.A, I note that in her testimony, the 1st respondent stated that after the 2nd respondent left

employment in 1999 or 2000, she learned of a demand notice

from the bank for the loan used to purchase the suit property, and although the 2nd respondent sought her assistance and that of their son, Joe Karumba, they did not assist in the repayment of the loan.

3. The testimony of the 2nd respondent's brother (**Samwel Wambugu Kingóri-PW2**) that the 1st respondent supported the 2nd respondent to purchase the suit property unraveled after he disclosed that he had a dispute with his brother in respect of the estate of their late father. He, therefore, had an axe to grind, and his evidence cannot be said to have been adduced with the aim of assisting the trial court to establish the truth in the dispute that was before it. As to why the 2nd respondent contradicted his filed statement of defence and affidavit when he testified before the trial court, the answer emerged during cross-examination by the appellant's counsel, when the 2nd respondent stated that:

> ***"It is a clear collusion with the children because the house value has gone up."***

4. It is important to appreciate that the uncontroverted evidence on record shows that the suit property was purchased by the 2nd respondent through a mortgage that was paid from deductions of his salary. Indeed, the 1st respondent did not know or disclose the outstanding loan at the time the 2nd respondent left employment. She even did not know the value of the loan taken by the 2nd respondent for the purchase of the suit property. She never adduced any evidence to

establish the monetary contribution she made towards the purchase of the suit property.

Evidence that the two pursued independent investments is found in the undisputed fact that the 1st respondent sold a plot in Nyahururu that was registered in her name and never accounted for the sale proceeds to the 2nd respondent. The fact that the 1st and 2nd respondents independently conducted their business affairs was also confirmed by their daughter, **Esther Wanjiru (PW3)**, who testified that the 2nd respondent operated hotel business within Moi University after he left formal employment, while the 1st respondent was running her own hotel in Eldoret town. The two were therefore not in any joint venture. As to whether the 1st respondent made any indirect contribution towards the purchase of the suit property, I need not belabour the finding in the lead judgment that she did not.

5. In short, the 1st respondent did not adduce any evidence to demonstrate direct or indirect contribution towards the purchase of the suit property. For the reasons stated in the lead judgment of Warsame, J.A, which I entirely agree with, and the additional reasons given in this judgment, I allow the appeal as proposed in the lead judgment.

Dated and delivered at Nakuru this 16th day of December 2025.

W. KORIR

.... JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

IN THE COURT OF APPEAL AT NAKURU

(CORAM: WARSAME, KORIR & JOEL NGUGI, JJ.A.)

CIVIL APPEAL NO. 16 OF 2019 (CA NO. 84 OF 2019) BETWEEN

RESMA COMMERCIAL AGENCIES.......................APPELLANT

AND

JOEL KARUMBA NGATTAH (Suing as the Legal Representative of The Estate of LEAH WANGUI NGATA (Deceased)...................1ST RESPONDENT

FRANCIS NGATA KINGORI............................2ND RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nakuru (J. Mulwa, J.) dated 7th April, 2016

in

HCCC No. 161 of 2006)

****

DISSENTING JUDGMENT OF JOEL NGUGI, JA.

1. I have had the benefit of reading in draft the erudite judgment of my esteemed colleagues. With great respect, I am unable to agree with their conclusion that the respondent failed to prove contribution to the matrimonial property. In my view, the learned trial Judge correctly found that the late Leah

Wangui, the 1st respondent, acquired a beneficial interest in the property, and

the evidentiary and jurisprudential foundation for that conclusion is sound. I, therefore, respectfully dissent.

2. As the majority has set out the facts faithfully, I do not repeat them here except to note that the 1st appellant gave clear testimony at the trial that she engaged in poultry and small-scale farming**,** and that income from these activities was consistently applied in part towards household expenses and repayments of loans used to acquire and improve the home. She also testified that she and the 2nd respondent sold a plot in Nyahururu with the aim of applying the proceeds toward the purchase of the matrimonial home. Her testimony was coherent, detailed, and internally consistent. It was corroborated by PW2, her brother- in-law, who confirmed that she ran these enterprises and that the income supported the family's financial obligations.

3. The trial court treated this evidence as credible. It was entitled to do so. Not all contributions in a matrimonial context are documented, and requiring documentary proof of every shilling contributed to the family estate — particularly in the informal economies in which many Kenyan households operate — would impose an impossible burden. The lived experience of many women is that their economic contributions occur in domestic spaces, small family

businesses, and subsistence enterprises where no formal accounts exist. To demand bank statements as

the only acceptable proof of contribution is to privilege a male- coded documentary economy over the reality of women's labour.

4. Such a heightened documentary threshold would, in my respectful view, systematically harm women, whose domestic and informal contributions have historically been undervalued or invisibilized. Feminist jurisprudence teaches that rules of evidence, when framed without reference to social context, may inadvertently reproduce gender hierarchies. Requiring formal records of contribution where none are ordinarily generated risks converting an already unequal social terrain into a legal disadvantage for women. Courts must, therefore, remain attentive to the ways in which evidentiary standards can either mitigate or entrench inequality.

5. The evidentiary record in this appeal is notable for another reason. The registered proprietor, Francis Ngata, the husband (2nd respondent) initially swore an affidavit denying his wife's contributions. Yet when he entered the witness box — under oath and under cross-examination — he radically altered his position. He candidly admitted that his wife contributed economically; that proceeds from her poultry and small-scale farming supported the family and loan repayments; and that the sale of the home was both secret and regrettable. He

went further and

stated that he wished to refund the purchase price in order to restore the property to his family.

6. It is trite law that oral testimony tested in cross-examination carries greater probative weight than untested affidavit material, particularly where it constitutes an admission against interest. A witness rarely invents testimony that weakens his own legal position. The trial court, which had the advantage of observing the witness's demeanour, remorse, and candour, was entitled to accept the later testimony as the more truthful account of the family's financial arrangements. In line with ***Peters v Sunday Post Ltd* [1958] EA 424**, an appellate court should be slow to disturb such credibility-based findings.

7. In my view, the evidence, therefore, established both direct contribution (the sale of the Nyahururu plot and application of its proceeds) and indirect contribution (labour, poultry and farming income, and domestic support). Kenyan courts have long recognised that indirect contributions are sufficient to establish beneficial interest. See ***Kivuitu v Kivuitu* [1991] 2 KAR 241; *Nderitu v Kariuki* [1977] eKLR; *Kimani v Kimani* [1997] eKLR**. None of these cases required formal documentation. Rather, they accepted that matrimonial property ownership is informed by the totality of the spouses'

joint endeavour.

8. The parties resided on the property as their matrimonial home for nearly seventeen years. Jurisprudence on constructive and resulting trusts originating in the English cases ***Pettitt v Pettitt*** **[1970] AC 777;** ***Gissing v Gissing*** **[1971] AC 886** and applied locally permits courts to infer beneficial interest where the conduct of spouses shows shared contribution to the acquisition, improvement, or preservation of the home. The trial court's inference was, therefore, orthodox and legally justified.

9. I do not find persuasive the argument that ***Echaria v Echaria*** **(CA No. 75 of 2001**) **[2007] KECA 504 (KLR)** demands documentary proof of contribution. ***Echaria*** simply reiterated that contribution — monetary or non-monetary — must be proved on a balance of probabilities. The 1st respondent met that threshold in this case. To inflate ***Echaria*** into a requirement of formalised bookkeeping is, in my respectful view, neither doctrinally sound nor socially just.

10. Given the undisputed fact that the appellant took transfer of the property knowing that the family resided there, and in circumstances clouded further by the *status quo* order, I would not have disturbed the trial court's cancellation and rectification orders. However, I would clarify that the appellant is entitled to restitution of the purchase price with

interest, not on the basis of contractual expectation, but on a theory of unjust enrichment.

It would be inequitable for the estates of the 1st and 2nd respondents to retain both the matrimonial home and the purchase price. Equity, therefore, requires a balancing of interests, which in this case should be in the form of refunding the purchase price plus interests at courts from the date of the suit.

11. In the result, I am satisfied that the learned trial judge correctly found that the late Leah Wangui (the 1st respondent) contributed to the acquisition and preservation of the matrimonial home and, therefore, acquired a beneficial interest in it. The evidentiary record, the applicable case law, and the broader constitutional and social context all support that conclusion. I would, therefore, have dismissed the appeal.

12. Those are my reasons for respectfully dissenting.

Dated and delivered at Nakuru this 16th day of December, 2025.

JOEL NGUGI

....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed _

DEPUTY

REGISTRAR