IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GATEMBU, MURGOR & OCHIENG, JJ.A.)

CIVIL APPEAL NO. E086 OF 2022

BETWEEN

AYUB ALI GITONGA.....APPELLANT

AND

MARIAM IKINYA Alias

GLADWELL KAGUU IKINYA

.....

RESPONDENT

(*An appeal from the Judgment and Orders of the High Court of Kenya at Mombasa (Thande, J.) delivered on 9th October 2020*

in

Mombasa HCCC No. 5 of 2013 (0.S)

****

JUDGMENT OF THE COURT

This Appeal concerns an Originating Summons filed in the High Court on 11th October 2013 by ***the Respondent, Mariam Ikinya alias Gladwell Kaguu Ikinya*** against ***the Appellant,***

Ayub Ali Gitonga seeking various orders in respect of division of the matrimonial properties.

As a background to the Originating Summons, the Appellant and the Respondent were married under Islamic Law. But, due to a breakdown of their relationship, the Respondent filed a Cause before the Kadhi's court being *Kadhi's Cause No 23 of 2013*, against the Appellant seeking for a dissolution of the marriage, *mut'a* compensation and distribution of the matrimonial property. During the hearing, the Respondent withdrew the prayer for distribution of matrimonial property, whereupon the suit proceeded to hearing.

In determining the marriage cause, the Kadhi ordered that the parties attempt to reconcile themselves, failing which, the matter be fixed for mention when the court would dissolve the marriage. It was further ordered that the claim for distribution of the matrimonial property and *mut'a* compensation were not applicable.

Aggrieved, the Respondent filed an appeal to the High Court being *High Court Civil Appeal No 21 of 2014* where the Judge allowed the appeal, set aside the decision of the Kadhi's court, and ordered that the matter be placed before another Kadhi to issue a Certificate of dissolution of the marriage. The Judge also

set aside the decision on the distribution of matrimonial property on the basis that the prayer had been withdrawn.

Subsequently thereto, the Respondent filed the Originating Summons, subject of this appeal in the High Court against the Appellant pursuant to the Married Women's Property Act, 1882 *(repealed)* seeking declarations that:

> *"…the Properties registered in the name of the Appellant are owned jointly by the Appellant and the Respondent:-*
>
> *1. a) CR 56950, Subdivision 18803 (Original No. 14007/1 of Section 1MN (Nyali)*
>
> *b) L.R. Nyeri Municipality /5467/29;*
>
> *c) Motor Vehicle Registration Number KBL 375C and KBG 595A;*
>
> *d) Plot and house in Nyeri; and*
>
> *e) Plot in Ruai –Nairobi.*
>
> *2. The court be pleased to order the Sale, Division and/or Apportionment of the properties between Parties equally.*
>
> *3. The Appellant does render Accounts for the Rents and Profits obtained from L.R. Nyeri Municipality/5467/29 and the same be shared equally.*
>
> *4. Further and in the alternative and in the event that Title and Ownership in any way of the Suit Properties has/have already been transferred in favour of any third party an order that the Appellant do account for the proceeds and the same be divided equally between the Appellant and Respondent.*
>
> *5. An Order that the Appellant does execute all documents where necessary to transfer the Respondent's portion in the properties or in default the same be executed by Chief Registrar, Deputy Registrar, Lands Registrar or Registrar of*

Titles or in the alternative that the Suit Properties be valued by a qualified and reputable Valuer, sold and the proceeds be shared equally between the Appellant and the Respondent.

6. a Temporary Injunction do issue restraining the Appellant his servants and/or Agents from evicting the Respondent from the properties and or selling, alienating, wasting, damaging or otherwise interfering with the properties pending hearing

and determination of the Originating Summons, and costs of the suit be awarded to the Respondent.

The Respondent's case was that during their marriage they were blessed with 3 children who at the time of filing the Originating Summons were aged 10, 14, and 18 years, respectively. She stated that the marriage had since been dissolved and that during the subsistence of the marriage, the parties acquired the specified properties being:

a) CR 56950, Subdivision 18803 (Original No. 14007/1) Section I MN (NYALI) (*the Nyali property);*

b) Motor vehicle KBL 375C and KBG 595A.

c) L.R. Nyeri Municipality/5467/29 *(the Nyeri Municipality property);*

d) Nyeri Plot and house; and

e) Plot in Ruai, Nairobi *(the Ruai plot).*

The Respondent stated that the family lived in the Nyali property and that the Nyeri Municipality plot comprised of rental houses from which the Appellant collected the rent exclusively. She claimed that she used motor vehicle KBG 595A for her own use as well as for the children, while the Respondent used KBL 375C exclusively.

She stated that the properties were acquired during their marriage and that she substantially contributed to their

development with earnings from her employment at Kenya Ports Authority from 2006, and from her businesses of

selling clothes and motor vehicles as well as from loans that she obtained from her SACCO. She contended that she took care of her family whilst developing the properties. It was her case that during the subsistence of the marriage, she was the primary and sole care giver of their children, particularly the youngest child who is autistic.

The Appellant opposed the Originating Summons in a Replying Affidavit sworn on 7th March 2014 where he averred that the parties are practicing Muslims and that the matter relating to division of matrimonial property should be dealt with under the Kadhi's Courts Act. He contended that he solely purchased and developed the properties without any contribution from the Respondent. He claimed that the Nyeri Municipality plot was purchased from his own savings and that he obtained a loan to purchase the Nyali property. He purchased the motor vehicles from his savings and gave KBG 595A to the Respondent as his wife.

During the hearing, the Respondent testified that she is an adult female Christian, aged 47 years, having been born in 1972. She resides in Nairobi, where she has lived since January 2019,

and is employed at the Inland Containers Depot, Nairobi Branch, under the Kenya Ports Authority. Prior to her transfer to Nairobi, she was stationed in Mombasa and lived in Nyali.

She met her spouse in 1991 when she was 19 years old. By then he was a police officer attached to the General Service Unit (GSU). They married in December 1993 and initially lived in a one-bedroom house at GSU Headquarters in Nairobi. She worked with Aviation and General Securities Consultants from September 1990 to May 1996, and by this time, her spouse earned a modest salary, while her earnings were more than his. They jointly struggled to purchase basic household items together.

She told the court that she is a mother of three children, one of whom suffers from autism and glaucoma, and requires constant care. She relocated with the children to Nairobi in 2019 so as to access appropriate schooling and medical care for them.

Throughout the marriage, she was the primary income earner. After resigning from employment in 1996, she undertook various business ventures, including running a telephone booth, operating matatus registered in her name, and later engaging in an importation business buying and selling motor vehicles and clothing which involved frequent trips to Dubai. She stated that due to her spouse's position as a police officer, he was discouraged from engaging in business, and so all business

activities were conducted in her name. She solely financed the purchase and furnishing of several properties acquired during the marriage.

She was solely responsible for the children's upbringing, education, medical care, and general welfare. She paid their medical bills, therapy costs, and special dietary requirements for the autistic child. She stated that she only received Kshs. 5,000 per week from her spouse, which she stated was grossly insufficient given the child's special needs. She also supports two daughters who are in university, meeting their daily upkeep, transport, and personal needs.

During the marriage, her spouse was frequently absent and rarely participated in parenting responsibilities. He did not attend school meetings, medical appointments, or therapy sessions for the child. She has always lived with the children, while her spouse never had time for their special needs child.

With respect to the matrimonial home in Nyali, she stated that it was purchased in 2010. She identified the property, negotiated the purchase, and contributed 60% of the purchase price, about Kshs. 3.5 million; that she obtained a loan from her employer and contributed the additional funds through cash deposits made into the Appellant's account. The purchase price of the Nyali property was Kshs. 12.5 million. She also paid the

brokerage fees and incurred costs in furnishing the house; that her spouse did not know the location of the house until after the purchase and only saw it for the first time after she had completed the transaction. She exclusively managed the Nyali home, paid utility

bills, maintained the compound, and catered for all household needs.

With respect to other matrimonial properties, the Respondent stated that she financed the purchase and development of several plots and rental houses in Nyeri, Ruai, and other locations; that although some of the properties were registered in her spouse's name, she provided the funds through loans, business proceeds, and savings. She also contributed to the construction of the rental units on some of the plots, but has never received any rental income from them.

Regarding the motor vehicles, she stated that they were acquired during the marriage, using proceeds from her businesses, including matatu operations and vehicle importation from Dubai. She was responsible for their maintenance, insurance, and fuel, despite some being registered in her spouse's name.

The Respondent testified extensively on her medical condition, stating that she suffers from osteoporosis, asthma, and cervical spondylosis with neck dislocation, conditions that significantly affect her health and ability to cope with stress leading to severe depression in 2012 following marital difficulties.

She maintained that throughout the marriage, she was the principal contributor to the acquisition of matrimonial property and the primary caregiver to the children. She concluded her testimony by praying that the Nyali matrimonial home be awarded to her and the children, that rental income from the Nyeri properties be shared equally, that the Ruai plot be divided equally, and

that enhanced financial support be ordered for the upkeep and medical care of the child with autism.

For his part, the Appellant testified that he was a career police officer who served in the Kenya Police Force for over 34 years. At the time of giving evidence, he was the Commissioner of Police in charge of Trans-Nzoia County. During his service, he was posted to various stations including Mombasa, Embu, and the General Service Unit (GSU). He also served on United Nations peacekeeping missions in Croatia between 1996 and 1997 and in Vukovar, Serbia between 2002 and 2003.

After he married the Respondent under Islamic law the marriage was blessed with three children; that throughout the marriage he was the sole and principal provider for the family and met all financial obligations. He stated that the Respondent has been in employment with Kenya Ports Authority since 2007, and denied that she made any financial contribution towards the acquisition or development of any of the family properties; that although she engaged in occasional small-scale business ventures, including a clothing business and a matatu business, the ventures were either funded by him or did not generate profit,

and any income earned was applied towards family upkeep rather than property acquisition.

On the upbringing of the children, the Appellant stated that he personally paid the school fees and met all the educational expenses for the children. He confirmed that their third child experienced health complications from birth, including delayed growth and prolonged hospitalization, and that he had paid the hospital bills. He denied allegations of neglect and maintained that he was actively involved in the welfare and upbringing of the children.

He confirmed that marital difficulties arose over time, culminating in divorce proceedings before the Kadhi's Court.

With regard to the matrimonial properties, the Appellant testified that the Ruai property was acquired through Embakasi Ranching Company. Although the Respondent held certain receipts, she did not produce an allotment letter. He testified that he was the Officer Commanding Station (OCS) in the area at the time and facilitated the acquisition of the plot, but that the Respondent retained custody of the documents. As he was unaware of the precise location of the plot he conceded that the Respondent could retain it.

He further stated that the Nyeri Municipality plot was purchased by his mother and she had put it in his name. He developed the plot in 2007 by constructing 10 rental rooms. He stated that income from the property is devoted to charitable purposes, including madrassa teachers' salaries, mosque expenses,

and religious obligations, and that the property was dedicated as a waqf in honour of his late mother. He denied any contribution by the Respondent towards its acquisition or development.

He stated that the Nyeri plot is ancestral land, measuring approximately a quarter acre; that it was allocated to him by his father prior to the marriage. He constructed the house in 2017 using his own resources. He stated that the Respondent made no contribution towards the development of the ancestral property.

With respect to motor vehicles, the Appellant stated that he owned Motor vehicles, Registration Nos. KCF 473D, KCF 473, and KBG 595A, and that he purchased KBG 595A in Mombasa in 2009 which was used by the Respondent throughout the marriage, and he conceded that she may retain the vehicle. He denied that the Respondent contributed towards the purchase of any motor vehicle, stating that the remaining vehicles were acquired through his savings, loans, and proceeds from the sale of earlier vehicles.

Concerning the Nyali property, the Appellant stated that he purchased it for a sum of Kshs. 12.5 million using his own savings,

SACCO loans, and business income. He produced bank statements showing salary deposits and business-related cash deposits; that he personally paid stamp duty, legal fees,

and instalments towards the purchase price. He stated that the Respondent made no financial contribution towards its acquisition. He confirmed that the Nyali property is their matrimonial home where he and the children continue to reside and that the Respondent voluntarily vacated their home. He opposed the Respondent being awarded the Nyali house, maintaining that it should remain as his and the children's home.

The Appellant further testified that throughout the marriage he remained continuously employed, maintained household staff, paid medical expenses and insurance where applicable, and met all family obligations. He denied allegations of abuse, cruelty, or neglect and stated that he never chased the Respondent from the matrimonial home. He testified that despite the breakdown of the marriage, he did not remarry and remained focused on the welfare of the children.

In conclusion, the Appellant testified that all the listed properties were acquired either before the marriage, through inheritance, or solely through his efforts during the marriage without contribution from the Respondent.

The trial Judge upon considering the suit concluded that the parties being Muslims at the time of the marriage and divorce the applicable law was Islamic Law. And after considering the evidence the trial Judge held:

> ***"…on a balance of probabilities, the Applicant made both monetary and non monetary contribution towards the acquisition of the suit properties which contribution entitles her to a share of the same. I must now make a determination of the share which the Applicant is entitled".***

In the end, the learned Judge allowed the Respondent's claim and held that Motor vehicle Reg No. KBG 595A and plot in Ruai were the sole property of the Respondent and that the Nyali property, the Nyeri Municipality plot and the house in Nyeri are jointly owned by parties to be shared out equally and that the Appellant shall execute transfer documents to give effect to the orders and in default, the same shall be executed by the Deputy Registrar of the High Court.

Aggrieved the Appellant filed this appeal on grounds that; the learned Judge misapprehended the concept of division of matrimonial property particularly with regard to its definition, the material and other contribution towards its acquisition, improvement and development and the primary purpose of its acquisition, improvement development. It was contended that the learned Judge failed to consider the Appellant's evidence pointing to his sole ownership of the matrimonial properties, and

erroneously relied on the description of matrimonial property as defined under the Matrimonial Property Act, and wrongly applied the notion that property acquired during the union is prima facie to be regarded as matrimonial property based on unspecified contribution. It was also contended that the learned Judge relied on evidence that was

expunged from the record to arrive at a finding of joint ownership of the suit properties, and disregarded the Respondent's admission that during the acquisition, improvement and development of the suit properties she was unable to contribute to their acquisition and development; that the Judge failed to appreciate that the Respondent had initiated proceedings for distribution of matrimonial property whilst the parties marriage persisted; that the learned Judge failed to arbitrate impartially as between the Appellant and the Respondent, and by so doing rendered a biased decision against the Appellant. Finally, it was contended that the learned Judge failed to consider the Appellant's submissions on the concept of matrimonial property and unspecified contribution under the Matrimonial Property Act; and failed to accord the Appellant a fair hearing.

Both parties filed written submissions, and when the appeal came up for hearing on a virtual platform, learned counsel, ***Mr. Ngonze*** appeared for the Appellant while learned counsel, ***Ms. Okata*** appeared for the Respondent.

Briefly highlighting their submissions, counsel for the Appellant begun by submitting that, the Judgment should be set

aside for the reason that the Judge having heard an appeal from the Kadhi’s Court in respect of the same parties and the circumstances, ought not to have heard and determined the Originating

Summons; that by proceeding to hear the suit, the Judge was biased and did not afford him a fair hearing.

Counsel went on to submit that the learned Judge was in error in distributing the properties, subject of the Originating Summons, equally (50:50) yet, the Respondent did not lead any direct or indirect evidence that was demonstrative of her contribution towards the acquisition, development or improvement of the suit properties, including the Appellant's ancestral home. It was submitted that the suit was brought by way of Originating Summons under ***Section 17*** of the ***Married Women's Property Act 1882*** *(repealed),* which should have governed division of the parties' matrimonial property.

The Appellant extensively cited the Supreme Court case of ***JOO vs MBO;***

Federation of Women Lawyers (FIDA Kenya) & Another (Amicus Curiae) [2023] KESC 4 KLR for the proposition that the Originating Summons having been filed under the Married Women's Property Act, 1882 *(repealed),* the Matrimonial Property Act 2013 was incapable of being applied retrospectively; further, that the principles of ***Echaria vs Echaria*** ***[2007] KECA 504 KLR***

and ***Pettit vs Pettit*** ***[1970] AC 777*** remain the basis upon which matrimonial property should be distributed for matters filed before the commencement of the Matrimonial Properties Act, 2013; that consequently, for one to be entitled to a share of the

matrimonial property, the court should consider the circumstances of each case independently in assessing contribution, and that, the Judge ought to have appreciated that for the wife to be entitled to a share of the property registered in the husband's name, she had to prove financial contribution towards the acquisition of the property. It was also submitted that in this case, contrary to the findings by the Judge, it was the Appellant who took care of the family and provided all their requirements, while the Respondent kept her earnings for her own benefit; that she did not sacrifice her career for her family, and made no specific contribution to the family upkeep; that as a consequence the division of 50:50 was inequitable and erroneous.

On the other hand, counsel for the Respondent submitted that the Originating Summons was filed under the Married Women's Property Act *(repealed),* after the promulgation of the Constitution 2010, but prior to the enactment of the Matrimonial Property Act, 2013. It was also submitted that the parties were married under Islamic law and the marriage was dissolved on 21st September 2018. Counsel went on to submit that the Respondent was gainfully employed during the subsistence of the marriage

and made financial contributions of medical care, and that it was her businesses that took care of the family; that at all times she provided companionship, childcare and domestic support to the household; that therefore, the learned Judge cannot be faulted for

the manner in which the parties' matrimonial property was divided in the Judgment. The cases of ***Supreme Court Petition No 11 of 2020, JOO vs MO (supra)***, ***Echaria vs Echaria (supra***) and ***MGNK vs AMG, CACA 280 of 2020*** were cited in support of the application of the Married Women's Property Act, *(repealed)* to the circumstances of the case, and for the proposition that each party to a marriage is entitled to their fair share of the matrimonial property based on their contribution to the marriage as defined under ***section 2*** of the ***Matrimonial Property Act, 2013***, meaning, monetary and non-monetary contributions which include; domestic work and management of the matrimonial home, childcare, companionship, management of family business of property and farm work.

The mandate of this Court on a first appeal as set out in ***Rule 31(1) (a)*** of the rules of this Court is to reappraise the evidence and draw its own conclusions.

In the case of ***Peters vs Sunday Post Limited [1958] EA 424,*** the Court of Appeal for Eastern Africa, the predecessor of this Court, stated that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”

See also See the case of ***Mwangi vs Wambugu, [1984] KLR 453***:

> ***"A Court of Appeal will not normally interfere with a finding fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

Having considered the Record of appeal and the submissions by parties, though the Appellant raised a raft of issues, we consider that the issues for determination are; i) whether the learned Judge was biased for having heard an appeal from the Kadhi's Court in respect of the same parties and so ought not to have heard and determined the Originating Summons; and ii) whether the trial court rightly determined that the matrimonial property should be distributed equally.

Regarding the complaint that having heard an appeal from

the Kadhi’s Court in respect of the same parties and the circumstances, ought not to have heard and determined the Originating Summons which did not afford him a fair hearing, a consideration of the record does not reveal that this issue was raised

by the Appellant before the trial court, and as a consequence it is being raised before this Court for the first time.

This Court has had occasion to consider the effect of raising an issue on appeal for the first time in the case of ***Kenya Commercial Bank Ltd vs James Osede*** ***[1982] eKLR*** where Hancox, JA. had this to say:

> ***"It is not permissible for matters and issues not raised at the trial court to be raised for the first time on appeal. In this instance, permitting an issue to be raised for the first time in reply to the appellant is improper, as the appellant had no fair notice of this issue. Such an issue should not be decided on appeal."***

Given that this is a matter upon which there is no determination by the trial court, we have no basis on which to determine it, and would accordingly dismiss this ground.

The Appellant's next complaint is that the trial Judge was in error in the mode of division of the matrimonial properties, particularly as regards to the parties financial contribution towards its acquisition, improvement and development; that the trial Judge failed to consider the Appellant's evidence that pointed

to his sole ownership of the matrimonial properties; that the trial Judge relied upon the wrong principles and to arrive at an erroneous conclusion that the Respondent was entitled to an equal share of the matrimonial properties; that such finding was in disregard of the Married Women’s Property Act, 1882

(repealed), and the ensuing jurisprudence, in particular ***Echaria vs Echaria (supra)***

which require that, matrimonial properties be distributed according to the financial contribution of a spouse at the time of acquisition of the property.

Upon consideration of the Judgment, it becomes apparent that the learned Judge reached the conclusion that the applicable law to the parties' marriage was Islamic Law, needless to say, the Judge went on to find that:

> ***"In light of the forgoing it would be unjust that the applicant would leave the marriage empty-handed. Her monetary and non-monetary contribution must be re-organised and taken into account. To fail to consider this contribution by the applicant would be to go against what is expressly prohibited by Surah an***
> ***-Nisa 4:29 of the Quran…".***

In addressing the issue of division of the matrimonial property, we consider it necessary to determine first, whether the trial Judge ought to have applied the Married Womens' Property Act *(repealed)*, to the circumstances of this case, and second, whether the matrimonial property should be divided equally between them.

As to whether the Married Women's Property Act, *(repealed)* was applicable to the circumstances of this case, a consideration of the Originating Summons discloses, that it was filed on 11th October 2013, and that indeed the Respondent sought declaratory orders for division of the matrimonial property in accordance with the Married Women's Property Act 1882 (repealed), which

was the applicable law at the time. But, it is worthy of note that by the time of the hearing and determination of the suit, the Matrimonial Property Act, 2013 had been enacted. This notwithstanding, it goes without saying that since the Originating Summons was subject to the provisions of the Married Women's Property Act 1882 *(repealed),* the trial Judge ought to have determined it in accordance with the provisions of the repealed Act. Having determined it without reference to the repealed Act, we find that the Judge misdirected herself. As a consequence, we will proceed and determine the appeal on the basis of the applicable law at the time, that being the Married Women's Property Act *(repealed).*

Section 17 of the repealed Act under which the Originating Summons was brought provides:

> ***"In any question between husband and wife as to the title to or possession of property, either party …… may apply by summons or otherwise in a summary way to any judge of the High Court of Justice …… and the judge of the High Court may make such orders with respect to the property in disputes, and to the costs of and consequent on the application as he thinks***

fit”.

As such, ***Section 17*** of the repealed Act vested the court with jurisdiction to issue appropriate orders in disputes between spouses relating to ownership or possession of property. Over time, this Court has developed guiding principles

on how matrimonial property is to be dealt with under that provision. What this means, and it is important to point out at this juncture that, by the time the suit was filed, the Constitution 2010 had been promulgated and was to have a bearing on matrimonial disputes filed under the Married Women's Property Act *(repealed)*. On marriage, ***Article 45 (3)*** of ***the Constitution*** specified 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."***

Faced with similar circumstances in the case of ***RMM vs BAM [2015] eKLR***

this Court stated:

> ***"The progressive provisions of the old Constitution and the jurisprudence on the application of international treaties and conventions were vindicated by the current Constitution, 2010 especially in Articles 2 and 45 and the new Matrimonial Property Act 2013, which has declared the cessation of the application of the Married Women's Property Act, 1882. The Constitutional provisions and jurisprudence that went with it were in our view germane for discussion in this matter and could only have been effectively discussed under the forum of the Married Women's Property Act, 1882 which was invoked in the pleadings. We therefore***

find that the trial court erred in principle in failing to apply such laws and in declining the jurisdiction to determine the suit".

Given the interplay between the Married Women's Property Act, *(repealed)* and ***Article 45 (3)*** of ***the Constitution***, the trajectory of matrimonial property law in Kenya, and the corresponding judicial interpretation, is settled

and need not be revisited at length. As Waki, JA succinctly observed in the case of ***PNN vs ZWN [2017] eKLR***, the jurisprudential shifts in this area are well documented. Broadly, the courts moved away from the earlier approach exemplified in the cases of ***Essa vs Essa [1996] EA 53*** and ***Nderitu vs Nderitu [1995–1998] 1 EA 235***, where, under ***Section 17*** of the ***Married Women's Property Act***, a wife's direct and indirect contributions were generally presumed to be equivalent to those of the husband. This position was later recalibrated in ***Echaria vs Echaria (supra),*** which rejected an automatic presumption of equality and instead underscored the requirement that a party seeking a beneficial interest must establish measurable financial contribution. In ***Echaria vs Echaria (supra),*** the Court drew a critical distinction between jointly registered property and property registered in the name of one spouse. It held that where property is registered in the name of one spouse, the beneficial share of each spouse depended on their proven respective proportions of financial contribution, whether direct or indirect, towards acquisition of the property. The Court

acknowledged that where both spouses have made substantial but unascertainable contributions, it may be equitable to apply the maxim *“equality is equity”*, while cautioning that courts should not feel compelled to award either one half or nothing where the contribution is clearly less than equal. See ***Gissing vs Gissing [1971] AC 886***.

This Court further observed in ***PNN vs ZWN (supra)*** that, although in

several oft cited cases of the time, wives were ultimately awarded equal shares, those decisions were not based on any automatic principle of equality. Rather, in each case, the court should carefully examine the peculiar circumstances and independently assess the wife's contribution before concluding that it was equal to that of the husband.

In this regard it was held that;

> ***"In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this Court, the court has invariably given the wife an equal share (see Essa vs. Essa (supra); Nderitu vs. Nderitu, Civil Appeal No. 203 of 1997 (unreported), Kamore vs. Kamore (supra); Muthembwa vs. Muthembwa, Civil Appeal No. 74 of 2001 and Mereka vs. Mereka, Civil Appeal No. 236 of 2001 (unreported). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution***

towards the acquisition of the property. The court considered the peculiar circumstances of each case and independently assessed the wife's contribution as equal to that of the husband.

Further that "Contribution" is defined under Clause 2 of the Act expansively to include: - Monetary contributions (actual funds committed to purchase, mortgage repayments, improvements, etc.), non-monetary contributions (domestic work, childcare, companionship, care and management the matrimonial home,

> ***management of family business or property, and farm work). However, mere ownership or occupation does not confer proprietary rights. For an asset to be divisible as matrimonial property, it must be both "acquired during marriage" and be the subject of spousal contribution.***

And with respect to the impact of the Constitution on ***Section 17*** of the repealed Act, it was stated thus:

> ***"It seems to me that each case must be examined on its own facts particularly where retrospectivity would affect accrued rights. Generally, however, the Constitution ought to be given a broad and purposive interpretation that enhances the protection of fundamental rights and freedoms. The right to equality, for example, is inherent and indefeasible to all human beings. It would therefore matter not that the cause of action accrued before the current constitutional dispensation. In sum, I do not fault the High Court in this matter for seeking guidance of the Constitution 2010 and the Covenants which Kenya has ratified to inform its application of Section 17, MWPA."***

Essentially, what is patently clear from the above excerpts is that, contribution would comprise monetary contributions, actual funds committed to purchase, mortgage repayments,

improvements inter alia, while, non- monetary contributions would include domestic work, childcare, companionship, care and management of the matrimonial home, management of family business or property, and farm work.

More recently, the Supreme Court in the case of ***JOO vs MBO (supra)*** gave guidance on the application of ***Section 17*** of the ***Married Women Property Act*** *(repealed).* First, the Supreme Court reaffirmed the settled principle on retrospectivity of statutes, holding that:

> ***"As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature."*** (para. 58)

Upon examination of the Matrimonial Property Act, 2013, the Court conclusively found that:

> ***"Having perused the Act in contention and considered the submissions by parties as well as the law as expressed above, we have come to the conclusion that there is no retrospective application of the Matrimonial Property Act and hold that the applicable law to claims filed before the commencement of that Act is the Married Women Property Act, 1882."*** (para. 60)

Turning to the question of contribution and proprietary entitlement, the Supreme Court in the same case reiterated that,

the governing framework for disputes filed under the Married Women Property Act *(repealed)* is grounded in proof of contribution, whereupon the court upheld the High Court's finding that MBO made indirect non-monetary contribution towards the family welfare as such she should benefit to some degree as she contributed towards the family**.**

However, the court cautioned against elevating factors such as long occupation or duration of marriage into proprietary rights, restating that:

> ***"The guiding principle, again, should be that apportionment and division of matrimonial property may only be done where parties fulfil their obligation of proving what they are entitled to by way of contribution."*** (para. 83)

In reaffirming the continued authority of ***Echaria vs Echaria (supra)***, the Supreme Court restated the governing rule 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."*** (para. 76)

The Court unequivocally concluded that:

> ***"Having considered the law as above, we have no hesitation in finding that Echaria is still good law for all claims made under the Married Women Property Act, 1882."*** (para. 80)

Finally, addressing ***Article 45 (3)*** of ***the Constitution***, the

court clarified that constitutional equality does not translate into automatic proprietary rights, holding that:

> ***"The equality provision in Article 45(3) does not entitle any court to vary existing proprietary rights of parties and take away what belongs to one spouse and award half of it to another spouse***

> ***that has contributed nothing to its acquisition merely because they were or are married to each other."*** (para. 81)

The court explained that equity in matrimonial property disputes recognizes indirect contribution, observing that a spouse who may not have contributed substantial financial resources may nonetheless, *"...through their actions or their deeds, [have] provided an environment that enabled the other party to have more resources to acquiring the property."* Such conduct, the court observed, *"amounts to indirect contribution,"* and equity therefore requires that a party who lacks the means to prove direct financial input *"...not be stopped from getting a share of the matrimonial property..."* merely on that basis.

Also relying on ***Gissing vs Gissing (supra)*** the Supreme Court reaffirmed that the maxim *"equality is equity"* remains applicable in matrimonial property disputes. The Court emphasized that equity is concerned not with *"...quantitative contribution by each party..."* but rather *"...the contribution by any party in any form, whether direct or indirect."* It held that *"... any substantial contribution by a party to a marriage that led to acquisition of matrimonial property, even though such*

contribution is indirect... amounts to significant contribution." Further, the court adopted the guidance set out in the case of ***Burns vs Burns [1984] 1 All ER 244,*** where acts contributing to family expenses, caring for children, running the home, and easing the financial burden of the spouse paying for the property were identified

as forms of indirect contribution. The approach taken in the case of ***White vs***

White ***[2001] 1 A 596,*** where Lord Nicholls held that fairness requires courts to consider *"all the circumstances of the case"* and that there should be *"...no discrimination between husband and wife and their respective roles."* was endorsed, as was the principle that there should be *"...no bias in favour of the money-earner and against the home-maker and the child-carer,"* since contributions to the welfare of the family are equally valuable, even if made in different spheres.

The Court went on to hold;

> *"**To our minds, equity is an important principle when it comes to matrimonial property since what is fair as it relates to equity is not a question of the quantitative contribution by each party but rather the contribution by any party in any form, whether direct or indirect. Any substantial contribution by a party to a marriage that led to acquisition of matrimonial property, even though such contribution is indirect, but nevertheless has in one way or another, enabled the acquisition of such property amounts to significant contribution. Such direct or indirect acts as was discussed by Lord Justice Fox in Burns v Burns [1984] 1 All ER 244 may include:***

i) Paying part of the purchase price of the matrimonial property.

ii) Contributing regularly to the monthly payments in the acquisition of such property. iii) Making a substantial financial contribution to the family expenses so as to enable the mortgage instalments to be paid. iv) Contributing to the running of and welfare of the home and easing the burden of the spouse paying for the property. v) Caring for children and the family at large as the other spouse works to earn money to pay for the property."

When the totality of the Supreme Court's decision is analysed, there is no doubt that the court was unequivocal that, contributions to matrimonial property acquired during the marriage includes financial and non-financial contributions, of which may include contributions towards the running of and welfare of the home and easing the burden of the spouse paying for the property, caring for children and the family at large as the other spouse works to earn money to pay for the property.

In the instant case, what this means is that, contrary to the Appellant's assertions that for the division of matrimonial property only financial contribution and no other should be considered, and that since the Appellant, and not the Respondent, had contributed substantially to all the matrimonial properties, she was not entitled to an equal share, the Supreme Court's decision has dispelled this notion. Instead, the court clearly pronounced that, under the Married Women's Property Act *(repealed),* division of matrimonial properties acquired during the subsistence of the marriage rested squarely on the couples' contribution, both financial and indirect or non-financial.

Having so found, this would lead us into the next issue of

whether the matrimonial property should have been divided equally between the parties. In addressing this issue, we consider the recent case of ***Nyakeya vs Nyamweya*** ***[2025] KECA 20 (KLR)*** to be of pertinence, where this Court held that:

> ***"…for the court to distribute matrimonial property under Section 17 of MWPA, the court must be satisfied that the property was acquired during the subsistence of the marriage through the joint efforts of the parties; and in order to determine the respective shares, the court must consider evidence regarding the earning of the respective spouses, the direct or indirect contribution of each spouse towards the family welfare, and the acquisition of the matrimonial property, each case being dependant on its own peculiar circumstances."***

Our understanding of the above case is that to arrive at the respective shares of each party, the court is required to consider the circumstances of each case on its own set of facts.

As stated earlier, the Appellant's grievance against the impugned Judgment was the division of the matrimonial properties in equal shares between the Appellant and the Respondent, the argument being that the Respondent did not demonstrate any financial contribution toward the purchase of either the Nyali property, the Nyeri Municipality plot or the Nyeri plot and house.

Indeed, the trial Judge shared the matrimonial properties

between the Appellant and the Respondent in the following manner: i) the Motor vehicle Reg No. KBG 595A and the Ruai plot were the sole property of the Respondent;

ii) that the Nyali property, the Nyeri Municipality plot and the Nyeri plot and house were jointly owned by parties and that the Appellant shall execute transfer

documents to give effect to the orders and in default, the Deputy Registrar of the High Court to execute the documents.

Before interrogating the contributions to the matrimonial properties, we are cognizant that the Ruai plot, was not contested, as the Appellant conceded that the Respondent being aware of its location and was in possession of the title documents, she could retain ownership of that property. The same could be said of Motor Vehicle Registration No. KBG 595A which the Appellant conceded that she could also retain. This would mean that, we uphold the decision of the trial court that the Ruai plot and Motor Vehicle Registration No. KBG 595A is solely owned by the Respondent.

We now turn to the question of whether financial contributions were made towards the matrimonial properties. In respect of the Nyali property, the Judgment of the trial court took into account that, the Appellant made a significant contribution of Kshs. 12.5 million, and that the Respondent also contributed financially to the purchase of the house with payments totaling Kshs. 3,500,000 which included proceeds of a bank loan of Kshs. 1,800,000. The trial court was satisfied, on a balance of

probabilities, based on the available evidence that, both the Appellant and the Respondent made financial contributions towards purchase of the Nyali property.

Our reanalysis of the evidence would lead us to similarly conclude that both the Appellant and the Respondent contributed towards the Nyali property. The record clearly shows that, it was the Respondent who initiated the process of purchasing the house. She identified the house, negotiated the purchase price and concluded the sale. She stated that most payments were paid through the Appellant. However, though the Respondent made discernible indirect contributions towards its purchase through proceeds obtained from her ongoing businesses and from a bank loan, the Appellant seemed to contribute a substantial part of the purchase price. Given that the Appellant contributed a larger portion of the purchase price than the Respondent, we find that, on a balance of probabilities, the Appellant would be entitled to slightly larger share of the Nyali property than the Respondent.

Concerning the Nyeri Municipality plot, the trial court observed that:

> ***"The Respondent provided no evidence as to how he purchased it. The Applicant on the other hand exhibited a loan application for 400,000/- which she stated was utilized for the purchase of the plot. This was not counted by the Respondent in any way beyond a denial. The Applicant's claim in***

respect of the house and plot in near is opposed by the respondent. He (sic) Respondent stated that it was purchased by his mother and his name but did not state when. He however built 10 rooms on the plot in 2007. The plot is dedicated to his mother his mother's wakf and all income goes towards paying the madrassa teacher, the Imam and the Adhan of Ruringu mosque. The respondent

did not however produce any evidence of the alleged wakd (sic) nor of payments to the madrassa teacher, Iman or Adhan of the Mosque."

Our reevaluation of the evidence discloses that again, it was the Respondent who initiated, and was responsible for the purchase of the Nyeri Municipality plot after she was advised by her mother-in-law that it was available for sale. She proceeded to obtain a loan of Kshs. 400,000 in 2008 for purchase of the property, whereupon it was registered in the Appellant's name. For his part, the Appellant averred in his Replying Affidavit dated 7th March 2014, that he purchased the Nyeri Municipality plot from savings, he then turned around and contradicted himself by stating that the plot was purchased by his mother and thereafter registered in his name, and that he built 10 rooms on the plot from which the rent goes towards his mother's waqf. The waqf was not produced to evidence. Upon weighing out the evidence, what becomes apparent is that, the Appellant failed to demonstrate his contribution towards purchase of the Nyeri Municipality plot, or prove it was purchased by his mother, while the record showed that the Respondent indeed contributed towards purchase of the Nyeri Municipality plot. On this basis, find

that since the Respondent purchased the Nyeri Municipality plot, upon which both the Appellant and the Respondent constructed the 10 rooms through their combined

financial, and non-financial contributions, they are both entitled to equal shares of the plot and developments.

As pertained to the Nyeri plot and house, it is not disputed that, the plot was inherited by the Appellant from his father. It is not also in dispute that 6 houses and a family home was constructed on the plot. For his part, the Appellant denied that the Respondent made contributions to development of the plot, but stated that it was developed with savings from peace keeping missions. The Respondent maintained that her financial and indirect contributions towards the developments came from her businesses and a SACCO loan. In our view, it would follow that, the spouses' ability to development of the plot came from direct and indirect financial as well as other contributions from both the Appellant and the Respondent. However, since there is no question that the Appellant inherited the Nyeri plot from his father, and that the developments were carried out together, we find that, the Appellant would be entitled to slightly larger share of the Nyeri plot and house than the Respondent.

On the Respondent's indirect contribution, and whether the record was supportive of such contributions, in the Judgment, the

learned Judge took into account that early in their marriage, the Respondent was working with Aviation and General Securities Consultants from September 1990 to May 1996 when she resigned. Thereafter, she started her own business ventures selling clothes,

buying and selling vehicles and operating a public transport business. The Appellant acknowledged that one of the matatus was purchased by the Respondent in Dubai and was registered in her name. He also admitted that when the business was wound up, the vehicles were sold for Kshs. 800,000 and the sale proceeds were deposited in his account. The record is also clear that she was employed at Inland Container Depot, Kenya Ports Authority from 2006 where she was earning a salary and also had access to bank and SACCO loan facilities.

Further, the trial court took into account that:

> ***"...the Respondent as a senior police officer worked away from home in various stations. From his testimony, it is clear that his stay with his family was intermittent. He was based in Mombasa from 2005 to 2007 he left and returned in March 2008 and stayed up to October 2010. He then left and returned in January 2018 and stayed to February 2019. He was also away on peacekeeping missions out of the country on 2 occasions. During his absence, the Applicant nurtured and took care of the children, took them to school, attended school meetings and events. It is therefor safe to conclude that, the Applicant has been the principal caregiver of the children. She also had the added responsibility of***

taking care of their son Ali, a special needs child who needs constant case (sic) a fact acknowledged by the Respondent. There is evidence of payment of medical supplies for the child made by the Applicant which are not covered by her medical scheme".

When all the evidence is considered in its totality, it is not lost on us that, the Respondent was for the most part of the marriage gainfully employed, and when she was not in employment, she undertook various businesses during which time she acquired sufficient financial capability. She was also a dedicated and committed mother who nurtured and cared for her children, one of whom was a special-needs child requiring particular care and attention. For the larger part of the marriage, the Appellant was constantly away from the home on duty at workstations in different parts of the country, as well as on peace missions abroad. Notably, he paid the children's school fees, but the Respondent was responsible for the children's day to day needs, medical care and general welfare. It is evident from the record that, the Nyali property was the family home for a greater part of the matrimonial years, where the Respondent resided with the children while, the Appellant lived away from the home. It therefore goes without saying that, the Respondent's role in caring for and maintaining the family was significant, notwithstanding that she was a working mother and business woman. Evidently, the Respondent as vanguard supported the

Appellant to earn a salary whilst undertaking his official duties wherever he was deployed, so that he did not have to concern himself with the everyday tasks and responsibilities of the home and the family upkeep.

In the final analysis, we are satisfied that the Respondent's financial and other indirect contributions towards the acquisition and development of the matrimonial properties were significant, and cannot be wished away, ignored or dispensed with. It is these indirect contributions made towards the acquisition and development of properties and maintenance of the family wellbeing that the Married Women's Property Act *(repealed)* and recent jurisprudence, pursuant to ***Article 45 (3)*** of ***the Constitution*** enjoins courts to take into account in the division of the matrimonial properties.

The learned Judge of the High Court took into account erroneous factors, and by so doing reached the wrong decision of which we find it necessary to interfere. Given the parties respective financial and indirect contributions to the purchase and maintenance of the matrimonial properties registered in the name of the Appellant, we would divide them in the following manner: i) For the Nyali property, the Appellant is entitled to 60% and the Respondent 40%; ii) the Nyeri Municipality plot, in equal shares iii) the Nyeri plot - the Appellant 60% and the Respondent 40%.

For the foregoing reasons, we would allow the appeal in part,

and we make the following orders:

1. *The Judgment of the High Court at Mombasa dated 9th October 2020 be and is hereby set aside.*

2. *The Nyali property to be shared with the Appellant to have 60% and the Respondent 40%;*
3. *The Nyeri Municipality plot to be equally shared between the Appellant and the Respondent;*
4. *The Nyeri plot to be shared with the Appellant to have 60% and the Respondent 40%;*
5. *The Ruai plot to be retained by the Respondent;*
6. *The Motor vehicle Reg No. KBG 595A to be retained by the Respondent; and*
7. *Each party to bear their own costs.*

Lastly, this judgment is delivered and signed under ***Rule 34(3)*** of the ***Court of Appeal Rules (2022),*** following the untimely death of the Hon. Mr. Justice Fred Ochieng, JA prior to its delivery.

It is so ordered.

Dated and delivered at Mombasa this 13th day of February,2026.

S. GATEMBU KAIRU FCIArb, C.Arb

.....
JUDGE OF APPEAL

A. K. MURGOR

.....
JUDGE OF APPEAL

I certify that
this is a
True copy of the

original Signed

DEPUTY REGISTRAR