

**IN THE COURT OF
APPEAL AT NAIROBI**

(CORAM: KIAGE, MUCHELULE & KORIR,

JJ.A.) CIVIL APPEAL NO. 547 OF 2019

BETWEEN

NJERI WA MUTHONI.....APPELLANT

AND

JOHN ANDREW VIRTUE.....RESPONDENT

*(An appeal from the judgment and decree of the High Court of
Kenya at Nairobi (Ougo, J.) dated 28th November 2018*

in

HCCC No. 6 of 2013 (OS)

JUDGMENT OF KIAGE, JA

When the flame of love and affection is extinguished the marital bound is severed and a couple decouples, way too often there follows the unedifying tangle and tussle over matrimonial property, and it is regrettable business.

Take this case. Sometime in 1998, the appellant Njeri wa Muthoni, met John Andrew Virtue in Tanzania. She was a director of the accountancy firm KPMG, while he was working with the British Council in that country. They fell in love and were soon

married on 31st October 1998. Their marriage was celebrated at the

idyllic and romantic Sweet Waters Tented Camp in Laikipia under the **Marriage Act, Cap 150** before its repeal.

Following the marriage and by reason of the respondent's high mobility job, the parties cohabited as husband and wife in various countries including Kenya, Uganda, Tanzania, the United Kingdom, China, Cambodia, Ethiopia and Indonesia. In between, they both enrolled for and completed Master's Degree courses in the United Kingdom at different times, but paid for by the respondent. It is not in dispute that the appellant did not take up formal employment after resigning the Tanzania position but she did accompany the respondent to all of his postings. During this time, they tried to have children but the applicant could not get pregnant save once when she conceived twins while in Uganda. Unfortunately, the pregnancy was high risk and she lost it in a miscarriage. They eventually chose to adopt a daughter in 2007 whom they named Muthoni Virtue.

In the course of time, the romance waned and died. Things unravelled between the parties and they made accusations and counteraccusations each blaming the other for the breakdown of the marriage. He accused her of willingly refusing to find a job

despite her high academic qualifications. Instead, she spent most of her time indoors getting inebriated day long and eventually became an alcoholic. This led to her being irritable with a bad and uncontrolled temper. She, on the other hand accused him of being cold, distant and secretive and wanting to kill her and their adopted child by poisoning. She filed a Maintenance Cause No. 522 of 2012 in the Children's Court on 27th April 2012 in which she obtained orders excluding him from the matrimonial house in Karen as well as orders for him to pay school fees and school related expenses and maintenance of Kshs.40,000 per month. On 19th June 2012, the appellant filed Divorce Case No. 99 of 2012 seeking dissolution of the marriage. The respondent filed an answer to that petition and a cross petition, and the marriage was duly dissolved by divorce decree.

By an originating summons dated 21st February 2013 under section 17 of the Married Women's Property Act, the applicant prayed as follows:

1. A declaration that the properties (movable and immovable) listed herein with all buildings and developments thereon acquired and developed by the joint funds and efforts of the applicant and respondent during their marriage and registered in the name of the

respondent and/or in the name of companies are jointly owned by the applicant and respondent.

a) Land Reference number 12159/21 situated in Nairobi, Karen, Marula Lane - a four bedroomed house.

b) Title number Kwale/Shimoni ADJ/735 situate in Kwale Shimoni Kenya.

c) Title number CH453250, the Yonne, St. Martins, Chester, CH1 2NH, United Kingdom, a 3 bedroom semi-detached house.

d) One car, Toyota held in Jakarta, Indonesia; and one car Honda, held in Nairobi Kenya.

e) Funds held in the following bank accounts and bonds;

Bank	Location	Account number
I & M Bank • Kshs. • US \$ • Sterling £ • Euro €	Nairobi, Kenya	0248342001 0248346000 0248341202 0248341210
Commercial Bank of Africa (CBA)	Nairobi, Kenya	0152648006 (closed)
Natwest Bank	United Kingdom/Isle of Man	71188266
Nationwide Bank	United Kingdom	
Cahoot Bank Current Account	United Kingdom	14511610
Northern Rock	United Kingdom	(Closed)
Barclays Bank	United Kingdom	00498939
UK government/Municipal bonds	United Kingdom	
HSBC Bank • USD • GBP • IDR	Jakarta, Indonesia	107-012049-821 107-012049-806

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2. A declaration that an order should issue declaring that fifty (50%) percent or such other or higher proportion of the properties aforesaid, is held by the Respondent in

trust and for the beneficial interest of the applicant and the children of the marriage namely M Virtue and LWN.

3. A declaration that the properties listed above constitute matrimonial property jointly owned by the applicant and respondent and should only be dealt with, appropriated, and charged for finance or otherwise disposed of in a manner acceptable to and compatible with the rights of the applicant and children of the marriage namely Muthoni Virtue and Lula W. Ngware.

4. A declaration that the properties listed above constitute matrimonial property jointly owned by the applicant and respondent and held in trust by the respondent for the benefit of the applicant and the children of the marriage namely Muthoni Virtue and Lula W. Ngware.

5. A declaration that the properties should be shared equally and/or sold and the net proceeds be shared equally between the applicant and the respondent or in such manner as the court may deem just.

6. A declaration that the Deputy Registrar ought to be empowered to sign any documents that the respondent may refuse to sign.

7. Costs to be provided for.

8. Any other further or better relief that this court deems fit and just to grant.

The summons was supported by the appellant's affidavit sworn on 21st January, 2013 in which she stated that the marriage "was blissful up until the respondent commenced emotional and psychological abuse causing the marriage to be untenable" leading to her filing of the divorce case. She stated that she tried

to amicably settle the matter of division of property by engaging
the respondent

directly, but he frustrated those efforts. She swore that she had heavily invested and contributed to the development of the matrimonial properties and that she believed the respondent was “bent on depriving [her] of the interest in the properties” and was apprehensive that he might at any time dispose of them to her detriment.

By a replying affidavit sworn on 15th May 2013, the respondent gave a detailed response to the summons and supporting affidavit. He denied the allegations of physical, emotional and/or psychological abuse and claimed that it is the appellant who solely caused the breakdown of the marriage and that he had filed a cross-petition for the dissolution of the marriage. He denied any attempts to settle the matter of division of property, stating that he became aware of the issue of division on learning that the originating summons had been delivered to his lawyer’s offices. He agreed that the parties jointly owned the Karen, Shimoni and Chester properties. As to the joint bank accounts, he averred that the mandates of all of them was that either party could withdraw/transfer funds therefrom with no requirement for joint authorization.

He went on to state that between April 2012 and February 2013, the appellant withdrew huge sums of money from those accounts transferring the funds to herself, and attached bank statements indicative of the same. Regarding the withdrawals he swore in paragraph 9 as follows:

- d) The timing of the withdrawals/transfers demonstrate that, since my wife decided to initiate the proceedings from 25 April 2012, my wife systematically withdrew the vast majority of funds from all of these accounts as soon as funds were available in these accounts.*
- e) It can be seen that for the I&M (Kenya) Bank accounts she withdrew/transferred the majority of funds in late April/early May 2012 - and another Kshs.7,200,000 as soon as it was paid into that account (from Treasury bill) in late August 2012. Further that since that transfer on 31 August 2012 the account has not been used (leaving a small balance of Ksh.31,180.17)*
- f) That for the HSBC (Indonesia) Bank accounts, following the events of April 2012 when my wife withdrew/transferred the vast majority of our funds from the I&M Kenya Bank joint accounts, I started to have any income from employment, which was previously paid into the I&M Kenya US\$ account, paid into the HSBC Indonesia US\$ account. I had thought that my wife the applicant was unable to withdraw/transfer funds from this account, however, on 7 February 2013 she transferred US\$ 93,000 from this account without consulting me or getting my permission."*

In tabular form, the respondent swore that the appellant's withdrawals for that 10-month period in various currencies amounted to slightly over Kshs.42million leaving the total of all

the

joint accounts at an equivalent of Kshs.82,537.82. The withdrawals, which depleted the accounts, were made without his permissions, notification or consultation notwithstanding that he had “tirelessly worked and denied [him]self to earn money and put it in the bank accounts.” He prayed that the court do consider the high unilateral withdrawals as part of the matrimonial property. Also, to be so considered were funds invested in Central Bank of Kenya Treasury bills which he invested in the appellant’s name. He also prayed that monies held in various individual bank accounts in Kenya and the United Kingdom be considered as part of the matrimonial property. He disclosed that the total balance in his 3 UK bank accounts was about \$5,000 but complained that the appellant had deliberately not disclosed to court the balances in her accounts held at Barclays Bank (UK), Barclaycard (UK), Kenya Commercial Bank (Kenya) and Standard Chartered Bank (Kenya).

The respondent averred that he had worked hard and contributed all his earnings during the marriage which were substantial amounts, and substantial savings from before the marriage, to the accumulation of joint finances, property and other assets, as well as supported his wife and family. He

attached bank

statements and tabulated his employment income since marriage as totalling £1,046,833.60. At the time of the marriage he contributed Sterling £54,896.92 bringing his total income contribution to the marriage to Sterling £1,101,730.52. He attached statements, summarized in tables, showing how his employment income was largely paid into the joint accounts and any that was earlier deposited in his UK accounts was transferred to the joint accounts at various times since they were opened in June 2006. The income in his UK accounts was also used to purchase in October 2000 and service the mortgage for the house in Chester until full payment in November 2009.

By contrast, the appellant's employment income, as reckoned and tabulated by the respondent, and which would be her financial contribution to the marriage, was approximately Sterling £25,000 so that her contribution to joint finances and to acquisition and development of properties was "little, almost negligible." He asserted that he contributed over 97.5% to the appellants' 5% based on the recorded and tabulated contributions.

The respondent suggested that the parties each take a car

out of the two they owned and that he keep the many personal

possessions that were in the appellant's possession at the Karen house including most of his clothes, sports equipment, photographs and a large collection of books and music. He blamed her for not disclosing that they had accumulated significant other assets kept at the Karen residence including many items of furniture, oriented rugs, original art, decorative kitchenware and electronic appliances including those shipped from Indonesia in a container. The conservation estimated value of those was US\$ 30,000 which he prayed be included in the division of matrimonial property. He termed as "outrageous and malicious" the appellant's claim that he had depleted monies from the joint accounts. He concluded by swearing:

"That I deny that the applicant has contributed heavily and directly towards development of properties in question. She has elected not to work or exert herself notwithstanding her academic qualifications and her ability to earn a living unlike myself who has worked tirelessly to put food on the table and acquire assets for the family and marriage which my wife, the petitioner herein has single-handedly destroyed,"

The matter was tried through viva voce evidence before Rose Ougo, J., with the parties being the sole witnesses on their respective sides. The appellant adopted her supporting affidavit

as

evidence in the trial. She stated in chief that the Kshs.6.5 million she withdrew on 25th April 2012 was funds from Central Bank on account of her mentally ill sister. She said she moved the same to the sister's trust account asserting the money was not part of the parties' property. She admitted to moving Kshs.10million on 7th May 2012 but explained that she moved it "for safe-keeping so that it was not moved out of Kenya" by the respondent. That was the same reason for her moving cash from the Euro and Sterling accounts. She testified that:

"On the N.S.B.C. we lived in Indonesia and he would give me allowances. John left the country in early May 2012. I paid fees for the 2 children and I adopted the little one. I realised that funds in Jakarta were going out quickly and I transferred it to a children's fund account and I did shopping for the house with part of the money. I did not transfer the funds to deny him use of the said funds. I had moved my savings which I had prior to the marriage after he nagged me. He then started controlling the accounts so that I would not control any money. I realised that control and when I realised that the marriage was falling apart I moved the funds for maintaining the family in Kenya."

She disputed that the monies she transferred amounted to Kshs.42,226,494, asserting that she transferred "less than 30 million shillings." She spoke of the miscarriage after which they moved to the UK where the respondent did his masters and so did

not work for a period of 1½ to 2 years while she worked for
a

“company called something-Smith.” She joined him in Japan where he worked with the British Council. He then moved to China where she “worked partly” with British Council before going to do her Masters in the UK. She joined him in Cambodia and did consultancy before coming to Kenya in 2005 where she did freelance work in consultancy. Her testimony was that:

“In 2006 we did negotiations to buy the Karen property. He travelled on duty. I was at home doing freelance consulting. We did so till 2007. By then we remodelled the Karen property. He moved to a job in Ethiopia. I stayed in Nairobi with the children. I continued with construction. We got swindled by a constructor with the child I could not work. When I could I worked. I looked for work in every country we went despite him discouraging me from working.”

She vehemently denied as completely untrue the claim that she was totally dependent on the respondent and his hard work and completed her evidence in chief by saying the respondent was a habitual liar who would paint her as badly as he could and who, had he his way, would not support the family.

Under cross examination, the appellant admitted the accuracy of the bank statements tendered in evidence by the respondent. When questioned about her work history, she had this to say:

“I do not recall the exact duration. It was in Beijing from for less than the 6 months. I have no record on

how long I worked here but I worked during that period. I cannot say yes or no if I worked in Kenya for 2 months. I cannot tell if I worked for 10 months only during the marriage of 13 years. I would have to guess my earning then in the 10 minutes on the temporary jobs. I have a few payment slips from the UK. I have not produced them.”

She admitted that it was the respondent who paid for the gardener and househelp as well as food, entertainment, medical and insurance expenses for the family. She also admitted that she travelled to Jakarta and withdrew money from the joint account without telling the respondent, but denied that it was Kshs.63 million. She denied the suggestion that she was a liar, greedy and ungrateful. She admitted the money she moved was in Kenya but contested that it was jointly owned. She admitted that the respondent paid school fees for their adopted daughter at Hillcrest School as well as Kshs.40,000 monthly for her maintenance. She asserted that she contributed 50% in the form of “free labour raising children” and settling the respondent. She also said she became the engineer to finish the Karen house and denied the suggestion that she spent her time doing nothing from 10.00am to 9.00pm.

On his part, the respondent stated that during the marriage the appellant worked for about 12 months only while he provided totally. He purchased the Chester and Karen properties from his employment income and serviced the Mortgage solely. The same were, however, registered in the joint names of the parties. He also bought the Shimoni property using funds in the joint accounts that came from his income but as it was agricultural land, it was registered in the appellant's sole name. He was emphatic that he was the sole bread winner save for the 12 months that the appellant worked. He reiterated his affidavit averments about the withdrawals totalling of Kshs.44.6 million that the appellant made and the Treasury bills worth Kshs.16.5 million in her name that were bought using the money from his employment income that was in their joint accounts. He stated that the appellant's salaries for the short time she worked went into her personal bank accounts. His contribution to the family upkeep and property was about 97%. He maintained the contents of his replying affidavit during cross examination, in particular reiterating that he only withdrew some 11,000 dollars from the dollar accounts from which the applicant withdrew 88,000 US Dollars of his salary deposits to

his shock. The USD11000 is all he had left when the appellant took all the money in Jakarta and he had to borrow money from colleagues there to survive.

In her judgment dated 28th November 2018, the learned judge distilled three issues for determination and proceeded to make the following core findings:

“(i) I find that the amount of money withdrawn by the applicant and the balance in the joint accounts forms part of matrimonial property. Further the T-Bills valued at Kshs.7,200,000 as at the time of purchase in 2011, having been purchased with funds from the joint account and the furniture, furnishing, art, appliances, electronics and kitchenware imported from Indonesia to Kenya costing approximately 50,000USD all form part of matrimonial property.

(ii)Based on the statements of accounts adduced before this court it is evident that the respondent was the major financial contributor in the said marriage. Going as per the amounts given and which have been evidenced in the statement of account adduced as evidence by the respondent it is clear that the respondent contributed over 95% financially to the accumulation of finances in the said marriage. The applicant as per the figures given barely contributed 5% financially to the said marriage.

(iii) Having gone through the statement of accounts adduced by the respondent I find that the amount withdrawn by the applicant ranges to Kshs.42,000,000/- or thereabout.”

The learned judge then proceeded to make the following dispositive orders:

i. The applicant has not explained where she took the said funds. (I will presume that the applicant holds these monies in a personal account. For ease of distribution of the assets forming part of the parties' matrimonial property I order that the applicant can keep the said amount as a share of her matrimonial property.

ii. The applicant will retain the Kwale Shimoni ADJ/135 valued at 8,000,000 which is currently registered in her name.

iii. The applicant will also keep the T-bills she purchased with funds withdrawn from the parties' joint accounts at the time she withdrew from the joint account 7,200,000 by now I know the value of the same has gone up.

iv. The imported furniture, furnishing, art, appliances, electronics and kitchenware imported from Indonesia shall be shared equally between the parties.

v. The respondent John Virtue will take the UK house valued at 36.5m

vi. John Virtue the respondent will also take the Karen home presently valued at 85million.

vii. John Virtue can retain the bank balance in the parties joint accounts.

viii. That the respondent shall also get all his valuable items at the Karen home including his collection of books, clothes, sports equipment and photographs.

ix. The respondent avers that each holds a vehicle himself one in Jakarta and a Honda for the applicant and proposes that each party retains their individual vehicles as they value the same. Each party to bear their cost. It is so ordered.

The appellant is aggrieved by that judgment and has preferred the instant appeal in which she complains in her memorandum of appeal that the learned judge erred in:

- Failing to appreciate the current state of the law on matrimonial property.
- Elevating monetary contribution over non-monetary contribution and thus discriminating against non-monetary contribution.
- Considering non-monetary contribution as indirect contribution to the said marriage.
- Failing to distinguish between properties jointly registered and properties registered in the name of the respective spouses.
- Disregarding the appellant's joint ownership of L.R. No. 12159/21 situated in Nairobi, Karen and Title Number CH453250, Chester, United Kingdom.
- Failing to appreciate and give effect to the fact that L.R. NO. 12159/21 situated in Nairobi, Karen is the parties' matrimonial home and that the appellant and the children currently reside in it.
- Failing to appreciate that in view of the two jointly owned properties substantive justice would have demanded that the appellant retains L.R. No. 12159/21 situated in Nairobi, Karen and that the respondent retains Title Number CH453250, Chester, United Kingdom.
- Interfering with the joint ownership of the two properties.
- Giving the appellant a smaller percentage of the matrimonial property.

- Making a finding without evidence that the appellant had withdrawn Ksh.42,000,000 from the joint account. The court also further failed in not appreciating that whatever amounts that were withdrawn, were withdrawn at different times and that there was authority from each party to withdraw at either time.

She proposes to ask the Court to set aside the judgment and decree of the learned judge and “redistribute the matrimonial property equally and or equitably” or, in the alternative, that the matter be heard afresh.

In written submission filed on her behalf by Judy Thongori & Co., her advocates on record, the appellant complained that it was almost as if the case was determined in the period after 2007 when a 5-judge bench of this Court determined in **ECHARIA Vs. ECHARIA** Civil Appeal No. 75 of 2001 before the country adopted a new legal regime of matrimonial property. According to her;

“To then have judgments that make light of that contribution, that consider it as indirect contribution while even Parliament in its wisdom did not, fail to see spouses as equal, to subject ownership of joint property to only a financial scale, places this country in a worse place than before 2010. It is a serious indictment to our legacy.”

It was next submitted that the learned judge treated the appellant’s contribution as indirect contribution whereas the

Matrimonial Property Act “does not distinguish between monetary

and non-monetary contribution” and that she failed to acknowledge the appellant’s financial contribution notwithstanding the respondent’s acknowledgment of Kshs.3 million earned by the appellant during the marriage. Citing **Article 45(3)** of the **Constitution**, the appellant submitted that “as long as a spouse is working for the family, their contribution is equal.” Reliance was also placed in a **C.W.M vs. JPM [2017] C.A. 142 of 2016 eKLR** and **OKN vs MPN Civil Appeal No. 332 of 2024.**

Next, the appellant contended that the learned judge erroneously failed to protect and allocate the Karen property to her considering she was living at the matrimonial home there with the children contrary to **section 68 (c) (iii)** of the MPA and the respondent could have ended with the Chester property. The judge was also criticized for failing to consider whether the respondent had rebutted the presumption recognised by **section 14(b)** of the Act that the beneficial interest in matrimonial property acquired during the marriage in the names of spouses jointly shall be equal. **KIVUITU Vs. KIVUITU [1991] LLR 1411** **CAK** and **KAMORE Vs.**

KAMORE (supra) and the judgment of Lady Justice Hale in the

English case of **STACK Vs. DANDEN ALL ER (D) 208** were relied on.

The appellant criticized the learned judge for holding that the appellant had withdrawn a sum of Kshs.42,000,000, which sum was not supported by the bank statements. She asserted that as the account was jointly held, “half the money therein was hers any way” so that she only owed the respondent Kshs.21 million. She submitted that the learned judge was wrong to place the total worth of the matrimonial homes at Kshs.171,100,000 when the proper value should have been Kshs.156,387,000 and divided equally between the parties.

Submissions on behalf of the respondent are dated 7th October 2020, filed by N.A. Owino & Co. Advocates, his learned counsel on record. On the appellant’s first three grounds of appeal, it was submitted that the learned judge did a good analysis of the evidence and considered all the relevant matters based on prevailing legal environment before arriving at her judgment. It was asserted that the evidence of the appellant being a well-qualified woman with a Master’s degree in finance who voluntarily refused to work was never rebutted nor was the

evidence that the respondent

was throughout the marriage the sole breadwinner who also hired and paid two domestic workers for the family throughout. It was also un rebutted that all of the family properties were bought using his earnings deposited in their joint bank accounts while the appellant produced no proof of her alleged contribution to the said purchases. She did admit having withdrawn about Kshs.42million from the joint accounts and that she did benefit from the Treasury bills valued at Kshs.16,500,000 as at inception of the case. It was explained that the sum of Kshs.63 million comprised the sum of Kshs.44,588,950 (factoring in exchange rate variation) and the Treasury bills of Kshs.16.5 million plus interest thereon at 15% pa.

Reliance was placed on **section 63** of the MPA which provides that ownership of matrimonial property vests in the spouses *“according to the contribution of either spouse towards its acquisition,”* and **section 7** of the Act which defines contribution to mean monetary and non-monetary contribution including companionship, management of family business or property and farm work. Also cited was **PNN vs ZWN [2017]eKLR** in which this

Court affirmed monetary and non-monetary contribution.

It was further submitted that whereas the learned judge recognized the appellant's contribution and awarded her 25% to the respondent's 75% share of the matrimonial property, in actual fact the properties she was awarded amounted to Kshs.57,700,000 in value against total of Kshs.179,200,000 meaning she in fact got 32.2.% which is significantly higher than the percentage she was awarded. For her to claim the Karen house valued at Kshs.85 million, as she does, it was argued, would increase her share to Kshs.142,700,00 which would be 79.5% of the total matrimonial estate. The respondent then submitted as follows;

***“Lastly on contribution to the matrimonial property, although the learned Judge considered and allowed the Appellant a percentage on contributing to child care, of family and companionship, the negative companionship by the Appellant to the Respondent and family and the fact that she spent most of her time drinking and smoking making the life of the Respondent uncomfortable should have been considered such that, then her contribution would actually have been negative.*”**

In the case of PNN VS ZWN (2017) eKLR Supra Hon Justice Kiage while emphasizing that contribution needs to be proved stated at page 20 thereof as follows;

"A spouse may be so uncooperative, wasteful, so

distant, so all over, that he or she hardly provided the warmth of companionship the basis of which might be

said she made non-monetary contribution to matrimonial property. In such instance it may well be that the one spouse achieved all they did and acquired not because, but rather in spite of their lazy, wasteful, wayward, drunken or draining mate. In such circumstances, an assessment of the inauspicious party's non-monetary contribution may well turn out to be negative, the amount in debit"

The above passage fits so appropriately in the circumstances of this case. In essence the Appellant was a wasteful, drunkard and idler who chose not to work. She should not be allowed by the Law to make the Respondent a beast of burden. Marriage should not be an express ticket to 50-50% sharing of matrimonial property as this will encourage laziness, idling and oppression from some spouses. Both parties need to put in their best to care and nurture the family.'"

The respondent asserted that were the appellant to be given the Karen house as she beseeches this Court, it would be a gross injustice as it would have brought her share to "over 80% of the property of the marriage" when her contribution towards acquiring the same was "much less than 25%". He defended the learned judge's apportionment as it took into account the Kshs.42 million the appellant took, the whereabouts of which she refused to disclose and so cannot be trusted to give it back. To him, she was at liberty to use that money to get herself a comfortable

house.

The submissions highlighted the appellant's conduct in depleting the joint accounts in Kenya then travelling all the way to Jakarta, Indonesia in 2013 and withdrawing all of his salary earnings and leaving her with nothing, and her claim that the money from the Central Bank of Kenya was on account of her sick sister yet she had personal accounts into which such money, if true, would have been paid, into and her attempt to introduce issues of maintenance to justify the Kshs.42 million withdrawal yet the respondent was paying Kshs.40,000 per month as maintenance in **Children's Case No. 522 of 2012**. Moreover, the appellant and the one child adopted by the parties "did not need Kshs.42 million for food and school fees because the respondent, has always [paid] and still pays for such expenses." He urged us to dismiss the appeal with costs.

Those submissions were highlighted in terms during the plenary hearing of the appeal by **Ms. Kiarie** and **Mrs. Owino**, respective learned counsel for the appellant and respondent, and we need not rehash them.

I have set out the evidence on record at some length cognizant of our duty as a first appellate court to re-evaluate and

analyse

afresh the entire evidence with a view to making our own inferences of fact and drawing independent conclusions, since we proceed on the basis of re-hearing but without the benefit enjoyed by the trial court of observing and hearing the witnesses in live testimony for which we make due allowance.

See Rule 31(1)(a), of the Court of Appeal Rules; **SELLE & ANOR Vs. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS** [1968] EA 123.

I think that the three issues that we need to determine in this appeal are:

- (i) Whether the learned judge misapprehended current law on division of matrimonial property.
- (ii) Whether the judge erred in distributing the matrimonial property on the basis of 25:75.
- (iii) Whether the appellant is entitled to the Karen house.

The law on division of matrimonial property was stated by the learned judge to be found in the Matrimonial Property Act, 2013.

Section 6(1) of that statute, which she cited, defines matrimonial property to mean:

- “(a) the matrimonial home or homes;
- (b) household goods and effects in the matrimonial home or homes; or

(c) any other immovable or movable property jointly owned and acquired during the subsistence of the marriage.”

Section 14 of the same Act goes on to provide that “where matrimonial property is acquired during the marriage -

- (a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
- (b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

The learned judge made reference to **NJOROGE Vs. NGARI** [1985] KLR 480 which decision, though predating the MPA, nonetheless held that if a matrimonial property is held or registered in the name one of one person, but the other spouse made contribution towards its acquisition, then each spouse has proprietary interest in that property, which is in line with the presumption of trust in section 14(a). That presumption is a rebuttable one, meaning that a court, while starting from the position that such property is held in trust for the other spouse may, nonetheless, hold to the contrary on the basis of such evidence from writing, conduct and all the surrounding and relevant circumstances, that the property is held in the name of

the

registered spouse absolutely to the exclusion of the other. The presumption relates to matrimonial property as defined in the Act, and not to all properties registered in the sole names of married persons. So long as it is matrimonial property, however, the spouse not on the register starts with the benefit of the presumption that the same is held in trust for him or her. If the registered spouse contends otherwise, the onus is on such spouse to tender evidence on a balance of probabilities to dislodge the presumption.

I think, with respect, there is no substance in the appellant's generalised complaint that the learned judge was not alive to the changed legal and jurisprudential landscape in division of matrimonial property. It seems clear to me, from a reading of the judgment, that the learned judge was fully cognizant of and keen to expressly apply the statutory principles entertained in the MPA, the most significant of which was the recognition of non-monetary contribution to the acquisition of material property. This marked a clear departure from the prior position that focussed on monetary contribution only be it direct or indirect, as famously, if reluctantly, declared by this Court in **ECHARIA Vs. ECHARIA** (supra) and affirmed in many other cases including **NJOROGE**

Vs. NJOROGÉ

(supra). That epochal shift was recognized by this Court in **PNN Vs. ZWN** (supra) with which the learned judge's approach is in consonance. The complaint of nonappreciation of current law is, therefore, without foundation as are the related grouses that the learned judge elevated monetary contribution over non-monetary, or that she considered the latter to be indirect contribution, and discriminatorily so. The text of the judgment does not disclose these claims and I would reject them.

The next issue is whether the learned judge was wrong to distribute the matrimonial property between the appellant and the respondent on 25:75 basis. In contending that this was erroneous, the appellant complains that her contribution to the matrimonial property was either ignored or improperly minimized by the learned judge. Basing her arguments in the spousal equality provision in **Article 54(3)** of the **Constitution**, she boldly asserts that "as long as a spouse is working for the family; their contribution is equal." She also cites dictum from **C.W.M Vs. J.P.M. [2017]eKLR** to the effect that:

"Parties are of equal worth and human dignity,

whatever their station in life. To the issue before us, it is obvious the appellant having been married for 18 years made some contribution to the family of the

respondent at the time of such coverture. In our view, that contribution, be it domestic work and management of the matrimonial home, child care; or companionship falls within the definition of contribution under the Act.”

The appellant also charges that in arriving at the proportions for division, the learned judge failed to give effect to the presumption of equal entitlement to the joint matrimonial properties. To her, the respondent failed to rebut that presumption submitting that:

“The burden of proving that the parties intended their beneficial interests to be different from their legal interests, and in what way is not an easy task in family disputes where it is inevitable that strong feelings are aroused when marriage fails which often lead the parties to reinterpret the past in self- exculpatory or vengeful terms. The Court should look into the circumstances in each case in determining what the intention was. In a case where Parties held their money in a joint account, registered their properties jointly, it should be very unusual for the Court to hold that their beneficial interests should be different from their legal interests.”

She cited **KIVUITU Vs. KIVUITU** (supra) and **KAMORE Vs. KAMORE** to press the case that for the properties that were acquired during coverture and registered in the joint names of

both

spouses, the property being family assets, should have been held to have been acquired in equal shares.

I take the respectful view that the presumption of equality of beneficial interests of the spouses in matrimonial property acquired during coverture and registered in their joint names is a logical, rational and commonsensical legal consequence of such registration. It derives its power not from the fact of marriage, but from the general law that if persons get registered as joint owners of property with nothing to show the proportions in which they hold their beneficial interests they are taken to hold equally. Courts of law, therefore simply recognize the legal incidences of such joint registration.

The presumption is, however, not irrefutable. The parties may have been so registered but if evidence is led by the party contesting equality that, in fact the beneficial interests therein are anything but equal, then the court must recognize and give effect to that reality and will not be hamstrung by any fanciful insistence on equality in the face of clear proof, on a balance of probabilities, to the contrary.

The Karen house, being **No. I.R. 12159/21** located at Marula Lane, was registered in the joint names of the parties. The presumption did operate that the beneficial interest of the parties was equal and it was the appellant's case and plea that it, alongside the Shimoni property registered in her sole name, the Chester property, the two cars and funds held in various accounts be shared equally. She prayed that an order issue declaring that 50%, or curiously, "*higher proportion of the properties aforesaid*" is held in trust and for her beneficial interest. Her further prayer was that the properties be "shared equally between [her] and the respondent or in such a manner as the court may deem fit."

There was, therefore, no question that all of the aforesaid properties did, on the appellant's own showing, constitute matrimonial property. The learned judge accepted that to be the case but went further to find that the appellant had not been candid and had, in fact, concealed and failed to disclose when ordered, the whereabouts of large sums of money withdrawn from joint bank accounts held in the names of both parties jointly. She also did not include, nor did she disclose the Treasury bills purchased using funds from the same accounts, and she was

also

silent on furniture, furnishings, art, appliances, electronics and kitchenware imported from Indonesia at the approximate cost of 50,000 USD, and which did form part of matrimonial property.

From the record it is clear to see that the respondent provided the funds that went to the purchase of the matrimonial property almost exclusively. The replying affidavit he filed in answer to the originating summons set out in great detail his salary income which went into various bank accounts. He produced bank statements that told a story of a man who had dedicated all of his earnings towards the care of his family and making investments for their betterment. What emerges is a rare case of a man who was open and transparent about his earnings. He put it all at the disposal of his wife with whom he held the joint accounts into which went all of his earnings and she had equal access to the same as he did, and could withdraw, transfer and deal as she wished without requiring his joint mandate, such was the extent of his trust. The learned judge accepted, as was clear from the **evidentiary evidence** tendered, and especially the bank statements, that the respondent provided about 95% of the finances of the family. This was paid into joint accounts and was

used to purchase not only the Karen and

Chester properties that were registered in the joint names of the parties, but also the entirety of the purchase price for the Shimoni property which was registered in the sole name of the appellant and the Treasury bills which, as well, were in the appellant's sole name. Thus, were distribution of the matrimonial property to be based solely on direct financial contribution, as in former days the appellant would have been entitled to 5% or so of the same, and no more.

In assessing the appellant's monetary contribution, the learned judge took into account the uncontested fact that she did engage in gainful employment for a cumulative period of 13 or so months of the decade plus that the marriage between the parties lasted. I would not find fault with that calculation of the appellant's monetary contribution. The learned judge did not stop there, however consistent with the MPA's recognition of non-monetary contribution, the learned judge took into consideration that the appellant did accompany the respondent on his work related sojourns out for the country where she kept him company. She also took care of the home and child even though uncontroverted evidence was led to the effect that there were always two servants, a

maid and a gardener, who did the actual work and were paid by the respondent. Significantly, she did oversee the construction and decoration of the Karen home, and for all of these the learned judge made an assessment that her non-monetary contribution (which she referred to as 'indirect contribution' to the appellant's ire amounted to 20%, a proportion which is, in the full circumstances of this case quite generous in favour of the appellant, and bringing her total entitlement to 25%. I do not see that the learned judge's use of the "indirect contribution" nomenclature in any way diluted from her correct understanding, recognition and application of what MPA refers to as 'non-monetary contribution.' It is a matter of semantics that did not derogate from the substance and I would not consider it to be an error inviting reversal, or even criticism.

I have already opined that the learned judge's attribution of 20% to the appellant's non-monetary contribution was in the circumstances of this case quite generous as I would think that a consideration of her not taking up formal employment, notwithstanding her being highly qualified, the fact that servants were employed and paid by the respondent, and it was claimed

without serious contestation from her that she spent most of
her

days drinking, makes it rather surreal that her non-monetary contribution would be so high. I would say no more on the point, however, as there was no cross-appeal filed to contest the award.

The foregoing observation does gain a measure of significance, however, when considering the appellant's complaint that 25% share of the matrimonial property was unfairly low. I do not find the complaint to be supported by the evidence. In the instant case, arriving at the respective contribution of the parties was no difficult task owing to the respondent's meticulous recollection backed by bank statements. He knew where and when he worked and had all of his income channelled into specified bank accounts. Compared to the applicant's generalized testimony in which she had difficulty recalling even the names of the companies she worked for, and did not indicate what her earnings from sundry consultancies were, it would be a distortion of the judicial function to ignore solid, documentary evidence in favour of unsubstantiated claims. I say this while fully mindful and respectful of judicial sentiment that has recognized that when matters are rosy and cosy in coverture and marriage floats along on halcyon mode, spouses

may not be keen on keeping record of their contribution as this would “negate

the very essence of trust which is the cornerstone of marriage unions. See **J.O.O. Vs. MBO [2023] KESC**. Indeed, J. Ngugi, JA has in his recent dissent in **RESMA COMMERCIAL AGENCIES Vs. JOEL KARUMBA NGATTAH** (Suing as the representative of the estate of **LEAH WANGUI NGATIA & FRANCIS NGATA KINGORI**,

Civil Appeal No. 16 of 2019, strongly opined that not all contributions in a matrimonial context are documented and:

“to require documentary proof of every shilling would impose on impossible burden and privilege on male- coded documentary economy over the reality of women’s labour [and that] such heightened documentary threshold would systematically harm women, whose domestic and informal contribution have historically been undervalued do or invisibilized.”

My respectful view is that in the country we have imagined and legislated for ourselves through statutes such as the MPA, it is essential, for fair outcomes to be realized in this vexed area of division of matrimonial property, that parties to marriage be more intentional in guarding and documenting their interests and affairs. I would hold that there is no rational basis upon which proof of non-monetary contribution should be at a lower level

than monetary contribution. It is not enough for a party to say they have

contributed when they have nothing to show for such contribution be it monetary or non-monetary, beyond their say so. True, it may be that love is blind but in the eyes of the law parties are required to walk into marriage with their hearts full of the tender sentiment (perhaps), but their eyes open to their interests as well. To keep their bank accounts and wallets open unguarded in the name of love may be quaint and touchingly romantic in fair weather but, when they drag each other to the Law for its aid in partition of property, the courts would require proof.

As I have pronounced on a previous occasion in my concurring opinion in **PNN Vs. ZWN** (supra), the fact of marriage *per se* is not productive of property and it is a fatal misconception for a man or a woman to think that being married is a passport to 50% of the matrimonial wealth. I would think that a requirement of proof of contribution, be it monetary or non-monetary, it is consonance with the constitutional pronouncement that both 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. See **Article 45(3)**. That must mean that each shall get his or her due share and neither shall get more or less than they contributed by

reason only

of their sex. It would be unconstitutional and impermissible for courts to divide property on any basis beyond what the statute decrees. The necessity to ascertain and give effect to the respective parties' rights in matrimonial property based on their actual contribution, has been given authoritative and binding force by the Supreme Court in **J.O.O. Vs. MBO; FEDERATION OF KENYA LAWYERS (FIDA KENYA) & ANOR (AMICUS CURIAE) [2023] KESC**

4 (KLR). See also **EGM Vs. BMM [2020] eKLR** a decision, affirmed

by the Supreme Court in the foregoing case, to the effect that equality of spouses does not mean the redistribution of property rights at the dissolution of marriage,

Thus, it is not a diminution or betrayal of love to keep records, but a demonstration of a wiser love, feet grounded on the hard rock of reality. It is indeed in appreciation of these realities that the MPA itself, even provides for pre-nuptial agreements: intending parties to a marriage should be alive to the possibility of parting and partition. To confront these possibilities beforehand is evidence, not of less love, but pragmatism.

In the instant case the record shows that the appellant made huge, unexplained withdrawals of money deposited by the

respondent in the joint accounts. In one of the sudden withdrawals as the marriage faced imminent collapse, she travelled to Jakarta, Indonesia, and literally cleaned the account, leaving the respondent at the mercy of colleagues who lent him money to live on. The money she withdrew in various denominations amounted to some Kshs.42 million. She did not notify the respondent and did not explain to the trial court where she took the money, leading to the inference that she held it in a personal account. This, together with the Treasury bills originally bought at Ksh.7.200,000 plus interest thereon translated to some Kshs.63 million which the applicant appropriated for herself in a stark example of ***“what is mine is mine, but what is yours is ours.”***

I am persuaded the learned judge was correct to consider these sums as being part of the matrimonial property and to subject them to the division formula of 25:75.

This brings me to the last issue which touches on the Karen house. There being no dispute that the same was paid for wholly by the respondent, and give its value *vis-a-vis* the total matrimonial estate, inclusive the monies withdrawn and kept by

the appellant, I do not see that the learned judge made any error
in granting it to

the respondent solely. He had demonstrated by cogent proof that the money that went into its purchase by deposit and mortgage payments came solely from his salary income. He thus rebutted the presumption of equality of beneficial interest and the learned judge was correct to grant it to him during division of the total properties as she did, given the relative values of the same.

The respondent has submitted before us, and I did not see any serious controvert thereto, that whereas the learned judge adjudged the parties' respective contributions to be 25:75, upon working out the values of the various properties divided between them the appellant actually got 32% to the respondent's 68%. To the respondent's credit, he did not file a cross appeal or otherwise seek adjustment of the partition to accord with the percentages decreed by the learned judge.

The respondent has also submitted and placed before us arithmetical workings that show that were the appellant to be awarded, as she urges us, the Karen property valued at Kshs.85,000,000, her portion of the matrimonial property would rise from a total of Kshs.57,700,000 to Kshs.142,700,000 representing 79.6% of the total matrimonial property while

reducing the value of the respondent's share to Kshs.36,500,000 which would be only 20.4%.

I think, with great respect, that such an outcome would be a total inversion of the reality of contribution in this case and would be an untenable injustice against the respondent and I would not in conscience countenance it.

In sum, I am of the opinion that the appellant has not made out a case for our interference with the findings and disposition of the learned judge and I would accordingly dismiss the appeal in entirety but with each party bearing own cost as this is a family matter.

As Muchelule and Korir, JJ.A agree, it is so ordered.

Dated and delivered at Nairobi this 13th day of March, 2026.

P. O. KIAGE

.....
..... **JUDGE OF
APPEAL**

**IN THE COURT OF
APPEAL AT NAIROBI**

(CORAM: KIAGE, MUCHELULE & KORIR,

JJ.A.) CIVIL APPEAL NO. 547 OF 2019

BETWEEN

NJERI WA MUTHONI.....APPELLANT

AND

JOHN ANDREW VIRTUE.....RESPONDENT

*(An appeal from the judgment and decree of the High Court of Kenya at
Nairobi*

(Ougo, J.) dated 28th November 2018

in

HCCC No. 6 of 2013 (OS)

CONCURRING JUDGMENT OF MUCHELULE,

JA

I have had the benefit of reading in draft the judgment of
Kiage,

JA. I entirely agree with it and have nothing useful to add.

Dated and delivered at Nairobi this 13th day of March, 2026.

A.O. MUCHELULE

.....
JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR

**IN THE COURT OF
APPEAL AT NAIROBI**

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Kenya at Nairobi (Ougo, J.) dated 28th November 2018*

in

HCCC No. 6 of 2013 (OS)

CONCURRING JUDGMENT OF KORIR,

JA

I have had the benefit of reading the judgment of Kiage, JA in draft. I am in full agreement with the judgment and I have nothing useful to add.

**Dated and delivered at Nairobi this 13th day of March,
2026.**

W. KORIR

**.....
JUDGE OF APPEAL**

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

Signed
DEPUTY REGISTRAR