Nyakeya v Nyamweya (Civil Appeal 234 of 2018)
[2025] KECA 20 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KECA 20 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 234 OF 2018

JM MATIVO, HM OKWENGU & GWN MACHARIA, JJA

JANUARY 17, 2025

BETWEEN

MATATA OYONDI NYAKEYA ..... APPELLANT

AND

JOYCE OYONDI NYAMWEYA ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Milimani) by K.H. Rawal J, dated 11th March, 2011 in Nairobi High Court Civil Suit No. 81 of 2003)

JUDGMENT

1. The appellant and the respondent herein, were married on 9th July, 1978. After several years of marriage, their marriage hit the rocks, and was subsequently dissolved and a decree nisi issued on 11th November, 2005, following divorce proceedings filed by the respondent in Divorce Cause No. 187 of 2003.

2. Before the divorce proceedings were finalised, the respondent; initiated proceedings in the High Court by way of an originating summons, under Section 17 of the Married Women Property Act, 1882 (MWPA), in which she sought distribution of property registered jointly in her name and that of the appellant, or in the name of the appellant. She contended that the property was acquired during the subsistence of the marriage, either directly or indirectly, through joint funds of the couple or her efforts.

3. In her originating summons (which was amended on 9th June 2009), her affidavit in support, and her oral evidence, the respondent identified the properties which she maintained were matrimonial properties, as LR No. 209/8358 House No. 58 Kyuna Crescent Nairobi (Kyuna property); LR No. 209/359 House No. 7 Woodlands Avenue Nairobi (Woodlands property); LR No. 1870/V/228/F5, Apartment No. 5 Waiyaki Way Nairobi (Waiyaki Apartment); and Plot No. Kisii Municipality/Block 1/602 (Gusii County Council) (Kisii property); she conceded that during the subsistence of the marriage she bought a House in Atlanta 3265, USA Catkin Court, Marieta GA 30066 (Atlanta

property); and an apartment at Maverick 485 Atlantic Avenue Ormond Bach Florida 32/76, also in USA (Florida Apartment), but maintained that the appellant did not make any contribution towards the purchase of these two properties, and that she had since disposed of the Atlanta property.

4. The respondent sought orders that the matrimonial properties be each shared on a ratio of one third to the appellant and two thirds to herself, and that the appellant be ordered to render accounts of the proceeds of rent that he has been collecting from the Kyuna property and the Woodlands property, and to pay the respondent two thirds of the rent collected, as her share. In addition, the respondent sought a declaration that all the furniture and household goods in the matrimonial house at Kanyamware in Kisii, and the Waiyaki Apartment, were purchased by her sole efforts and belong to her.

5. The application was opposed by the appellant through his affidavit sworn on 12th July, 2004, in which he maintained, inter alia, that the respondent did not purchase any property during their marriage; that the Kyuna property and Woodlands property, were all purchased by him; that he is merely a tenant in, and does not own the Waiyaki Apartment; and that the Kisii property was allotted to him by the Kisii Municipality, and is undeveloped. The appellant maintained that the Atlanta property and the Florida property were bought through the joint efforts of the couple; that the Kanyamware property is his ancestral home; and that the respondent did not in any way contribute towards his business in Jumla Trade Links Ltd. He objected to the respondent's claim for him to be ordered to account for rent for the Kyuna property, and the Woodland property contending that the claim was barred by the statute of limitation.

6. The learned Judge of the High Court, upon hearing the originating summons and considering the oral evidence, together with the contending submissions that were made by the parties, found that the Kyuna property, and the Woodlands property, were all jointly acquired by the spouses during the subsistence of the marriage, and that they were matrimonial property. The learned Judge declared the Kyuna property to be held in the ratio of 60:40 percent in favour of the respondent and the appellant; and the Woodlands property to be held in the ratio of 55:45 percent in favour of the respondent and the appellant.

7. The learned Judge also found that there was evidence that established that the appellant bought the Wayiaki Apartment, but that the apartment was bought using proceeds of rent collected by the appellant from the Kyuna property and the Woodlands property. She therefore declared that the respondent is holding fifty percent share in the Waiyaki Apartment, and ordered the appellant to disclose the proprietorship of the property; and render accounts in regards to the rents collected from the Kyuna property and the Woodlands property from 1996 to date, and pay the respondent her shares in accordance with her fifty percent ratio.

8. The appellant is aggrieved by the judgment of the High Court and has lodged this appeal in which he has raised twelve grounds as follows:

    i. The Superior Court's finding and conclusion that the property known as LR No. 1870/V/228/75 was/had been purchased by the appellant using the proceeds of the rents from the matrimonial properties (LR No. 209/8358 house 58 Kyuna Crescent and LR No. 209/359 house no.7 Woodlands Avenue) was not supported by any evidence at all.

    ii. The Superior Court's Order that "the respondent is ordered to disclose forthwith the proprietorship of the above property being Apartment No. 5 along Waiyaki Way Nairobi" is confirmation that the Court had not established ownership of the property on a balance of probability or at all and the same could not constitute matrimonial property as known in Law.

iii. The learned trial Judge erred in fact and in law in making an Order for the rendering of accounts for the rent from December 1996 when the rents will not fall into category of matrimonial property and when indeed the shares were undetermined.

iv. The Superior Court erred in making a finding that the property known as LR No. 1870/V/228/75 had been purchased by rental income form the other matrimonial properties and in the same vein made an order for the appellant to render accounts and the income thereof be shared in the ratio proposed by the court.

v. The learned trial Judge failed to appreciate that the first mortgage for the property known as LR No. 2344 SECT VI MN, Portreitz was being serviced by the appellant through salary check off system and the appellant did not have to bring any evidence, the facts having been admitted by the respondent.

vi. The learned Judge failed to appreciate that the Woodlands property (LR No. 209/359/7) had been exclusively purchased by the Appellant and as this point was admitted did not need any further evidence by way of documents.

vii. The learned trial Judge failed to appreciate that the purchase of the Kyuna property was a reinvestment of proceeds from the Nyali property which was jointly owned and then top ups for which the evidence was in the affidavits which were before the judge.

viii. The learned trial Judge failed to appreciate that by evidence of the parties the marriage had broken down in 1997 and the respondent had filed for divorce and any property acquired subsequent to the filing of the said divorce proceedings will not have been property acquired with the joint efforts of the parties, and will not have formed matrimonial property.

ix. The trial Court ignored the evidence before it that the rental income "formed joint earnings" of the parties and that the rent account and mortgage account were at all material times in the joint names of the appellant and respondent and as such no account was necessary as all parties had access to the funds.

x. The learned trial Judge erred in not making an order for the distribution of the funds obtained from the sale of the Atlanta property being a property that was acquired during the continuance of the marriage or covertures and which the appellant had stated to have contributed to its acquisition.

xi. The learned trial judge failed to appreciate the principle that where the property is registered in the joint name of the couple the Court must take it that such property being a family asset it is owned in equal shares and clearly it was unnecessary to disturb such position.

xii. The trial Court failed to appreciate the fact that realistically the appellant cannot be asked to account for his day to day expenditure some dating back to 1996 and Courts have taken judicial notice that couples do not record their affairs in legally binding agreements or at all and they do not keep records of their spending during and the course of the marriage.

9. The appellant filed written submissions duly prepared by his advocate, Omangi & Associates. The sum total of the submissions was, that there were no material facts to support the findings that were made by the trial Judge, or the conclusion that the Waiyaki Apartment had been purchased by the appellant using proceeds of rent from the Kyuna property and the Woodlands property, or the consequent order made by the learned Judge that the respondent holds fifty percent share in the apartment. The appellant argued that he was unable to produce appropriate documents, as his house was broken into and the documents were stolen; that there was no evidence adduced to show when the Wayiaki

apartment was allegedly bought, as no sale agreement or any form of title document was availed; and that in the absence of evidence regarding the proprietorship of the said property, the High Court should not have apportioned the property as matrimonial property.

10. On the issue of rendering accounts, the appellant submitted that the learned Judge misdirected herself as the parties were husband and wife, who had enjoyed their life for a reasonably long period, during which period, they shared a lot, including the respondent's salary being deposited into the appellant's account; that in the ordinary order of things in a family, it was not expected that there would be accounts given, as most of the money was used for family issues without documentation; that there was no issue regarding the rents collected from the Kyuna property or the Woodlands property; nor was there evidence that the appellant used the rental income for his exclusive use; and that the order backdating the rendering of accounts to December, 1996 was without basis as the Woodlands property was purchased in May 1997. In addition, the High Court did not take into account the periods when there were no tenants in the premises.

11. The appellant maintained that the order conferring the respondent fifty percent interest on the Waiyaki Apartment, amounted to unjust enrichment, as the apartment was allegedly bought through proceeds from rental income from the Kyuna property and the Woodlands property which the High Court had ordered the respondent to be given fifty percent share. Moreover, the respondent admitted that the property was jointly purchased through funds saved by the couple in the United Kingdom and that the appellant paid the balance of the purchase price, therefore it was evident that the appellant contributed more than the respondent.

12. The appellant faulted the learned Judge for seeking further evidence for the purchase of the Kyuna property, when it was not disputed that the first mortgage that the couple enjoyed in regard to a house at Port Reitz, was serviced by the appellant through monthly deductions from his salary, while the respondent bore the rest of the expenses, and that it was not disputed that the appellant exclusively paid for the Woodlands property. The appellant reiterated that the Kyuna property was purchased by proceeds from sale of a property that the couple jointly owned in Nyali after selling the Port Reitz property, and with top up being made by the parties, the appellant contributing substantially. The appellant argued that the contention by the respondent that she substantially or solely contributed towards the purchase of the Kyuna property was unsubstantiated, lacked candour, was exaggerated and contradictory. The appellant noted that although the trial Judge appreciated that determining the exact contribution in respect of matrimonial property is an arduous and complex exercise, she did not show the basis upon which she apportioned the properties, between the appellant and the respondent, nor did she take into account, that the appellant was disadvantaged by the theft of documents from his house while the case was ongoing;

13. The appellant maintained that the High Court misdirected itself in making an order for reimbursement of rent for the Woodlands property from December, 1996, when the property had a dispute in court, and as at 1997, possession had not been granted, nor had the dispute been finalised. The appellant argued that the court was bound to determine the monetary contribution made by each party towards the acquisition of the properties, but did not do so, and ignored the fact that the appellant was the substantial contributor in the purchase of the properties. The appellant relied on TMW -vs- FMK [2018] eKLR, and Section 7 of the *Matrimonial Property Act*, 2013, in which it was stated that subject to Section 6(3), ownership of matrimonial property vests in the spouses according to their contribution.

14. He pointed out that the High Court did not make any orders in regard to the Atlanta property or the Florida Apartment. Yet the two properties were bought during coverture; that the Atlanta property was purchased through contributions by both parties; and the mortgage was paid from the joint account

of the parties. In addition, the property was rented out and the respondent is the one who collected the rents to the exclusion of the appellant. He argued that the learned Judge misdirected herself in failing to distribute the two properties. He submitted that the respondent concealed information concerning the Florida Apartment, which apartment she sold at the expense of the appellant.

15. The respondent who was dissatisfied with part of the judgment, also filed a cross appeal in which she faulted the learned Judge for not allowing prayers 1 and 2 of the Amended Originating Summons. She urged that the decision of the High Court, be varied, and the following orders be substituted in place of the orders that were made by the learned Judge as (i) to (iii):

    i. That LR No. 209/8358 house No. 58 Kyuna Crescent be and is hereby declared to be held in the ratio of 66.67%:33.3% or 2:1 in favour of the respondent and the appellant respectively.

    ii. That LR No. 209/359 house No. 7 Woodlands Avenue (Nairobi) be and is hereby declared to be held in the ratio of 66.7%:33.7% or 2:1 in favour of the respondent and the appellant respectively.

    iii. That the respondent to hold 66.7% or 2:1 share in LR No 1870/V/2328 F5 Apartment 5 Waiyaki Way (Nairobi).

16. The respondent also filed grounds for affirming the decision of the High Court other than those that had been relied upon by the High Court. These were:

    i. That by not cross examining the respondent on the averments contained in her 63 paragraphed affidavit sworn on 4th November, 2009 and supported by the documents at pages 99 to 386 of the record of appeal, the appellant admitted the respondent's entire case as pleaded; he offered no documentary evidence to support his case or claims.

    ii. The learned Judge erred in not finding as a fact that from the time the appellant was dismissed from his employment in 1987 he never was involved in any gainful employment and that his company namely Jumla Trade Links Ltd did not make any money that would enable him to make a contribution in acquisition of the suit properties thereafter.

    iii. Throughout the marriage which lasted between 1978 and 2005, the respondent had the higher salary of the two and therefore deserves a much higher award than the one granted by the Superior Court; the respondent's career progressed from the post of Senior Personnel Manager to Human Resource Manager, UN Performance Officer, Permanent Secretary Office of the President and Regional Adviser Governance and Administration United Nations Economic Commission for Africa in Addis Ababa.

    iv. Out of the Six properties acquired during marriage, including the three suit properties, the respondent was the initiator or go getter who commenced and drove the purchases to their conclusions, these are (a) Portreitz Mombasa property 1981, (b) the Nyali property 1983, (c) the Kyuna property Nairobi 1992, (d) the Woodlands property Nairobi 1992, (e) the Atlanta Georgia property in USA 1993.

    v. The appellant was not a witness of truth whereas the respondent told the truth.

    vi. The respondent had business acumen whereas the appellant did not.

    vii. Through the appeal and Superior Court hearing, the appellant sought to benefit from the constructions by the respondent of a three bedroomed house in his parents' land in Kisii County using her money including pension in the sum of Kenya Shillings 229, 000/ upon

resigning her job so that she might not be the boss of the appellant after the merger of the Kenya Ports Authority with East African Cargo Handling Services Ltd in 1986.

1. In response to the appeal and in support of the cross appeal, the respondent filed written submissions through her advocates, Kamau Kuria & Company Advocates. In a nutshell, she submitted that in her 63 paragraphed affidavit and oral evidence, she established that during coverture, the couple acquired various properties. These included: a property in Port Reitz Mombasa, and a property in Nyali Mombasa, both of which were disposed of by the couple. Other properties were: the Woodlands property, the Kyuna property, the Waiyaki Apartment and the Atlanta property which the respondent contributed directly and indirectly to the purchase of, and availed appropriate documentation.

2. In regard to the Atlanta Apartment, the respondent adduced evidence to show that she purchased the property alone, and when it failed to fetch good rent, she sold it at a loss; that it is only the Waiyaki property that was sourced by the appellant, who had control of the rent that was being yielded by the Woodlands property and the Kyuna property from 1993; that throughout the subsistence of her marriage, the respondent was employed in high positions in various institutions, including the UN, institutions in the USA, and as a Permanent Secretary in the Kenya Government; that from these employments, she received good salary through which she was able to maintain the family and also save for family investments; that the Waiyaki property was paid from monies from Jumla Trade Links Ltd a family enterprise, in which the respondent invested, to prop the appellant in business; that the appellant also received rent from the Kyuna property and the Woodlands property; that unlike the respondent who availed all necessary documents concerning her income, the appellant did not tender any evidence regarding his income, nor did he attach any bank statements for his company Jumla Trade Links Ltd, or documents pertaining to the acquisition of the matrimonial properties. The respondent submitted that the appellant was terminated from his employment in 1987 and thereafter did not secure any paid employment.

19. The respondent cited Kenya Akiba Micro Financing Ltd – vs – Ezekiel Chebi and 14 others [2012] eKLR, Kimotho -vs- KCB [2003] 1EA 108 and Stanley Mombo Amuti -vs- Kenya Anti- Corruption Commission [2019] eKLR, for the proposition that where a party is in control of evidence, including documents that impacts on the dispute, but fails or refuses to tender the evidence or documents, or refuses to call a material witness, the court can make an adverse inference that such evidence if produced would have been adverse to the party who fails or refuses to tender the evidence.

20. The respondent argued that although the legal burden remains upon the party who invokes the aid of the law, the evidential burden is cast upon any party who has the burden of proving any particular fact which he desires the court to believe in its existence. She therefore urged the Court to find that the appellant did not have any other source of income, apart from the rental income from the matrimonial properties, whose rental income was deposited in his personal bank account.

21. The respondent added that the appellant did not establish his allegation that he was only a tenant in the Waiyaki Apartment, and that to the contrary, the evidence she had adduced established that the appellant had purchased the apartment in 2000, during the pendency of the marriage. The respondent maintained that the appellant had been collecting rent from the Woodlands property and Kyuna property, as the same was being paid directly to his Barclays account; that he has collected rent over the years without accounting for the rent collected or the expenses; and that therefore, the court was right to issue an order for the appellant to account for the rental income.

22. The respondent relied on RMM -vs- TSM [2015] eKLR; Echaria -vs- Echaria; and Francis Njoroge -vs- Virginia Wanjiku Njoroge [2013] eKLR, in support of her submission that the distribution made by the High Court was proper. The following principles espoused by the Court of Appeal in M -vs- M (2008) 1 KLR (G & F) 247, in regard to applications under Section 17 of the MWPA, were also relied upon:

    i. In assessing the contribution of the spouses in acquisition of matrimonial property each case must be dealt with on the basis of peculiar facts and circumstances but bearing in mind the principle of fairness.

    ii. That the Court approach has been that only those properties acquired during subsistence of marriage through joint contributions, direct or otherwise of the spouses, would be subject to an order under the said section.

    iii. In the case of inherited property, the same should not be claimed unless there is proof of contribution or improvements to the same. It remains the property of the spouse who inherited the same.

    iv. The wife's contribution or in the case of an application by the husband, his contribution to the development and improvement of such property has to be taken into account and the value of such developments or improvements ascertained.

    v. Properties acquired after cohabitation ceased cannot be taken into account.

    vi. A property acquired with the assistance of a loan, what is to be shared is the interest fee of the loan.

        1. The respondent submitted that she has consistently been in paid employment since 1979, and took care of the two issues of the marriage when the appellant was unemployed. She cited Strong -vs- Strong [2000] KLR 631 for the proposition that under section 17 of the MWPA the court has to consider the personal earnings of the spouses, and how they apply to the family, and that indirect contribution must be translatable to money, ultimately bearing in mind that in general, spouses do not keep a record of all their transactions. SMK – vs- NWM [2021] KECA 146 (KLR); ENK -vs- MNNN [2021] KECA 219 (KLR); and NJB -vs- KB [2009] eKLR, were also cited.

        2. The respondent argued that although she had filed and withdrawn several divorce matters, before she finally pursued a divorce cause to conclusion, without a decree nisi or decree absolute, the court could not distribute the matrimonial properties; that a decree absolute having been issued in the divorce proceedings, the Court could distribute the matrimonial properties, and therefore, she was entitled to her share of the rental income which to date was only being enjoyed by the appellant.

        3. In regard to the Atlanta property, the respondent submitted that she explained that the loan repayments on this property were difficult to meet as she had inconsistent tenants. She was therefore constrained, to sell the property at a loss, to pay off the mortgage and be able to keep paying her own living expenses, as the appellant was not in employment and had not been supporting her financially from 1987. The respondent argued that the property could not be considered as matrimonial property, as she is the one who bought it, and had already disposed it. The respondent therefore urged the Court to dismiss the appeal with costs.

26. We have carefully considered the record of appeal, the submissions made by the parties, and the law, bearing in mind our duty to reconsider and re-evaluate the evidence which was before the trial Judge, in order to come to our own conclusion in this first appeal. In doing so, we bear in mind that unlike the learned Judge, we have not had the advantage of seeing and assessing the demeanour of the witnesses (See Selle vs. Associated Motor Boat Co. Limited (1968) EA 123).

27. The respondent's originating summons was anchored on section 17 of the MWPA. This was clearly stated on the heading of the originating summons, the amended originating summons, as well as the affidavit that was sworn by the respondent in support of the originating summons.

28. Before the enactment of the *Matrimonial Property Act*, 2013, which came into effect on 16th January, 2014, the MWPA, an English legislation, was applicable under Section 3(1) of the *Judicature Act*, to disputes concerning distribution of matrimonial properties. Thus, the appellant's originating summons having been filed in the High Court on 18th December, 2003, and judgment delivered on 11th March, 2011, before our indigenous statute was enacted, the dispute between the appellant and the respondent was governed by the MWPA. The Supreme Court in JOO -vs-MBO; Federation of Women Lawyers (FIDA Kenya) & Another (Amicus Curiae) [2023] KESC 4 KLR, was emphatic that the *Matrimonial Property Act* 2013 has no retrospective application, and the applicable law to claims filed before the commencement of that Act, is the repealed MWPA.

29. It is not disputed that the appellant and the respondent were married for several years and that their marriage was dissolved on 11th November, 2005. During the subsistence of the marriage, the couple cohabited in various places including Mombasa, Nairobi, London and United States of America. They had two issues of the marriage who are both now adults. The appellant and the respondent were both initially employed, but at some stage, the appellant was either unemployed or in business. During the course of the marriage, several properties were acquired, and some of these properties were the subject of the originating summons before the High Court.

30. The issues for determination in this appeal are first, whether the learned Judge of the High Court properly identified the properties which were matrimonial properties; secondly, whether the learned Judge properly assessed or identified the contribution of each party in the acquisition of the specific property; and thirdly, whether the distribution made by the learned Judge in regard to each property identified as matrimonial property was proper.

31. Section 17 of the MWPA, empowered the court to make any orders in regard to questions concerning title to, or possession of, property between husband and wife. The issue of distribution of matrimonial property under Section 17 of the MWPA has been addressed by this Court in several decisions, and principles laid for distribution of the property.

32. In Strong -vs- Strong [2002] 2KLR 631, this Court held that:

    i. The court cannot decline to apportion the family property merely on the ground that neither party is able to show the extent of their contribution towards the acquisition of matrimonial property.

    ii. The court must do its best by considering not only the personal earnings of each spouse and how the same was applied in the family, but also each spouse's indirect contribution to the welfare of the family and estimate how such contribution would translate monetarily to the family's wellbeing. What would be considered as a spouse's indirect contribution varies from race to another, one community to another and even one generation to another.

iii. A court should, from the evidence tendered, be able to ascertain to what extent the indirect contribution of a spouse was towards the welfare of the family and such indirect contribution must be of a nature translatable into money.

iv. The Court of Appeal will not interfere with the assessment and apportionment, unless it is shown that the learned judge either erred in principle, was plainly wrong in the assessment and apportionment, or that the apportionment is manifestly disproportionate to the parties' respective contribution.

v. The decision of the High Court was in the exercise of a discretionary power, which the appellate court cannot interfere with unless grounds for doing so are shown to the court.

vi. The respondent was clearly entitled to a 50% share of the matrimonial property.

33. In Essa -vs Essa (Civil Appeal No. 101 of 1995) Omollo, JA., rendered himself as follows:

> " Since the decision of this Court in Kivuitu -vs- Kivuitu .... the law with regard to the disposal of matrimonial property upon the dissolution of a marriage is fairly well settled. Where a property acquired during the subsistence of the marriage is registered in the joint names of the spouses, the law assumes that such property is held by the
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> parties in equal shares. There is of course no presumption and there could not have been any that any or all property acquired during subsistence of the marriage must be treated as being jointly owned by the parties."

34. In Peter Mburu Echaria -vs- Pricila Njeri Echaria [2007] eKLR, the Court explained the Kivuitu decision as follows:

> " It is clear that in Kivuitu's case, the Court was dealing with a narrow dispute involving the beneficial interest of spouses who are already registered as owners of a property as joint tenants without the registration declaring the beneficial interest of each spouse. There are well defined equitable rights which accrue to each joint tenant from such a registration. Equal contribution results in a joint tenancy unless there is contrary evidence to show that irrespective of the registration there was no equal contribution. In Kivuitu's case, parole evidence was received which justified the finding that the contributions were equal. That case did not lay any general principle of equality applicable to all property disputes between husband and wife as later confirmed in Essa -vs- Essa (supra). Where the disputed property is not so registered in the joint names of the spouses, but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertained contribution, it may be equitable to apply the maxim equality is equity while hiding the caution by Lord Pearson in Gissing -vs- Gissing (supra) at page 788 Para. C that:
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> > 'No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the portion bone by the contributions to the total purchase price or costs is difficult to fix. But if it is plain, that the contributing spouse has contributed about one quarter, I do

not think it is helpful, alright for the court to feel obliged to award either one half or nothing.'

In all the cases involving disputes between husbands and wife over beneficial interests in the property acquired during marriage which have come to this Court, the Court had 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- Muthebwa 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"

35. In JOO -vs- MBO (supra) the Supreme Court reviewed the law concerning distribution of matrimonial properties under Section 17 of MWPA and notable decisions on the application of that section and concluded as follows:

"78. To our minds, the finding in Echaria, was essentially that a spouse does not acquire any beneficial interest in matrimonial property by fact of being married only and that specific contribution has to be ascertained to entitle such a spouse to a specific share of the property. Furthermore, the position taken by our courts following Echaria is that as much as section 17 of the Married Women Property Act gave courts discretion to do what is just and fair and the varying circumstances before them, it did not entitle a court to make an order which is contrary to any well establish principle of law or proprietary interest of ownership of property....

79. The court in Echaria also noted that for one to be entitled to a share of the property, the court should consider that circumstances of each arising case independently in accessing contribution further noting what amounts to contribution may either be direct and monetary and indirect and none monetary.

79. Having considered the law as above, we have no hesitation in finding that Echaria is still good law for all claims under the Married Women's Property Act 1882...

81. ...

82. While therefore reiterating the finding in Echaria, we also find that Article 45(3) acts as a means of providing for equality as at the time of dissolution of marriage, but such equality can only mean that each party is entitled to their fair share of matrimonial property and no more. Nowhere in *the Constitution* do we find any suggestion that a marriage between parties automatically results in common ownership or co-ownership of property (hence vesting of property rights) and Article 45(3) was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only.

82. 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...."

36. The trajectory in the afore cited decisions, is that in order 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.

37. It is not disputed that the Woodlands property and the Kyuna property were both acquired during the subsistence of the marriage of the spouses. Both properties were registered in the joint names of the couple, and therefore in accordance with Kivuitu vs Kivuitu (supra) and Echaria vs Echaria (supra), a rebuttable presumption arose that the parties contributed jointly to the acquisition of these properties. In an effort to dislodge this rebuttable presumption, the respondent swore a detailed affidavit with appropriate documents attached, in support of her claim that she had either solely or substantially contributed to the purchase of the matrimonial properties.

38. As per paragraph 31 and 32 of the respondent's affidavit, sworn on 4th June, 2009, the Woodlands property was bought in 1988, at a consideration of Kshs.600,000/-. The initial deposit of Kshs. 300,000/- was paid by the appellant from joint savings made by both spouses, when they were both undertaking their studies in the UK. The finalization of the sale transaction for this property was delayed due to litigation involving the property, but the balance of the purchase price was finally paid by the appellant in 1997 from rent earnings received by the appellant from the same property, which was rented out after the family moved to the Kyuna property and thereafter to the USA where the respondent was employed by Care International.

39. On his part, the appellant maintained that he is the one who paid the purchase price of Kshs. 600,000/- for the Woodlands property, and that the respondent did not make any payments. While it is true that the appellant is the one who made the payment, the payments were not from his own resources but were from joint savings contributed to by both parties, and from rent received from the Woodlands property. The sources of the funds belonged to both spouses. Therefore, it is not correct that the appellant is the one who solely bought the property or substantially contributed to it. Nor is it correct that the respondent contributed more towards the purchase of the property. The evidence regarding the payment for the Woodlands property is consistent with the property having been registered in the joint names of the parties as joint tenants. There was therefore no justification for the learned Judge distributing the property in the ratio of 55:45 percent in favour of the respondent. The contribution made by the parties having been equal, the distribution of the Woodlands property between the spouses ought to have been 50:50 percent.

40. Regarding the Kyuna property, the respondent's evidence was that the property was purchased in 1992. The couple raised part of the purchase price after selling a house which they owned in Nyali in Mombasa, and obtained a mortgage from HFCK for the balance of Ksh.1.5 million. The mortgage was in the joint names of the parties, but the respondent explained that she is the one who initially made the mortgage repayments, as the appellant was not employed. A year later, the respondent got a job in the US and moved with the entire family. The Kyuna property was thereafter rented out, and the mortgage repayments were made from the rent received from the same property.

41. The appellant's position was that the respondent made no contribution towards the purchase of the Kyuna property; that he is the one who made the initial payment of Kshs1.6 million and thereafter paid the balance of the purchase price through a loan from HFCK. The appellant did not produce any evidence in support of this assertion. Moreover, his contention was negated by documents, which were attached to the respondent's affidavit, and which confirmed that the initial payment for the Kyuna property paid by the appellant was from sale of the Nyali property that had been owned by the couple, and the balance was raised through a mortgage from HFCK in the joint names of the spouses. The respondent also demonstrated that she is the one who made the mortgage repayments for the Kyuna property between 1992 and 1993, after which the Kyuna property was rented out and the mortgage repayments were made from the rents received from that property until the mortgage was discharged in September, 1997.

42. There was therefore no substance in the appellant's contention that he is the one who solely bought the Kyuna property or substantially paid for it. The correspondences attached to the respondent's affidavit, showed that she was the one who was basically concerned with the mortgage arrangements for the Nyali property and even for the Kyuna property. She swore that the appellant was sacked from his employment with Kenya Ports Authority in October, 1987, which fact was not controverted by the appellant. Nor did the appellant give any evidence regarding his alternative sources of income. The respondent's averment that her husband's unemployment put a lot of strain on her until she got a well-paying job with Alico as a Human Resource Officer, is supported by correspondences attached to her affidavit which showed her efforts to have the mortgage repayments rescheduled. The fact that the respondent's employment in the US enabled the family to accompany her to the US making it possible for the Kyuna property to be rented out, also elevated her contributions to the acquisition of that property. Notwithstanding the registration of the property in the names of the spouses as joint proprietors, the appellant's direct contribution to the acquisition of the Kyuna property was limited to the spouses' joint investments in the Nyali property, through which the initial deposit for the Kyuna property was made. In our view, given the evidence before her, the learned Judge did not err in apportioning the respective shares of the spouses in this property at 60 percent in favour of the respondent and 40 percent in favour of the appellant, as it was evident that the appellant was not in employment when the property was acquired and the family's welfare basically rested on the respondent's shoulders, her employment in the USA, providing an opportunity for rental income from the Kyuna property. The distribution of 60:40 in favour of respondent, was therefore, fair, just and equitable.

43. It is telling that during the hearing of the originating summons, the appellant's advocate opted not to cross examine the respondent on her lengthy 64 paragraph affidavit that she had sworn in support of her claim. This left the evidence deposed to by the respondent on oath, and the documents attached, unchallenged. Even though the appellant alleged that his documents were stolen by the respondent from the Waiyaki Apartment where he was then staying, he did not lay any evidence before the trial court in support of this allegation. While the respondent admitted having gained access into the Waiyaki apartment, she denied having taken documents belonging to the appellant. Moreover, the payments for the matrimonial properties, if made by the appellant, could easily have been established through documents from his bank confirming payment to the vendor, or documents from HFCK, but no attempt was made to procure copies or originals of such documents, nor did the appellant apply for discovery or production of the documents from the respondent.

44. As for the Waiyaki Apartment, the appellant maintained that he was merely a tenant in the premises and has never acquired this property. But the respondent maintained that the property was bought through proceeds from rent received from the Kyuna property and the Woodlands property. She produced

cheques issued by the appellant as well as a cheque drawn on his company Jumla Trade Links Ltd. Much as the respondent maintained that the appellant was a registered owner of the apartment, she did not produce any evidence in this regard, other than a copy of a water bill showing that the account was in the appellant's name. Needless to state that this was not sufficient proof of ownership. Therefore, the respondent failed to prove her allegation that the Wayiaki Apartment was bought by the appellant. Without proof of ownership, the finding made by the learned Judge that the Waiyaki Apartment was matrimonial property, was not anchored on any firm ground.

45. The declaration regarding the respondent owning 50 percent share in the Waiyaki Apartment was misconceived as the learned Judge had no basis upon which to apportion the shares in the Waiyaki property. In addition, the respondent was entitled to rent only from the Woodlands property and the Kyuna property in the ratio of her shares as apportioned, and therefore, the order for accounts should have been limited to these two properties.

46. As regards the appellant's contention that the claim for accounts for rent received from the matrimonial properties, was barred by the statute of limitation, it is evident that the respondent's claim for accounts, was not a claim under contract, but a claim arising under the MWPA. Under that Act, the cause of action in regard to distribution of matrimonial property, only matures after the marriage is dissolved and the court's intervention is called upon in distribution of the matrimonial property. That is when the limitation period would begin to run. The respondent's claim having been initiated before the divorce proceedings were finalized, her claim was not statute barred. As for the rendering of accounts being back dated to 1996, nothing turns on this, since it is apparent that both the Woodlands property and the Kyuna property were rented out as at that date. Even though the finalization of the conveyance in regard to the Woodlands property delayed until 1997, the spouses were in possession before they moved to the Kyuna property in 1992 and rented out the property. Moreover, the rendering of accounts is to the appellant's advantage as it gives the appellant the opportunity to include any period when there was no rent and provide appropriate explanation.

47. There is also an issue concerning the Atlanta property and the Florida Apartment, both of which the respondent claim she purchased on her own, when she was working in the US. It was not denied that the respondent had a good job in the US from which she was getting a good salary and attractive benefits. The appellant claimed that the two properties were matrimonial proprieties, and that he contributed towards the purchase of the Atlanta property by paying approximately US $18,000, and that the loan balance was paid through a mortgage from a joint account in Georgia. The appellant has not produced any evidence in support of the alleged payments. Nor has the appellant produced any evidence in regard to the Florida Apartment, for which he alleged he paid deposit though his credit card. The respondent has explained how she purchased the two properties, in addition to paying tuition for her children when she was working in the US. She also explained why she had to sell the Atlanta property. In our view, these two properties though acquired during the subsistence of the marriage, were not matrimonial properties, but were properties solely bought and owned by the respondent. The fact that they were procured while the marriage was still in subsistence, did not confer any ownership rights on the appellant. Indeed, in her originating summons, the respondent did not seek distribution of these two properties because in her view they were her sole property. The appellant did not file any cross claim, for distribution of these two properties, nor has he proved that he contributed to the purchase of these properties. Thus, the learned Judge did not err in failing to distribute the two properties as they were not matrimonial property.

48. As regards the furniture and households in the Kanyamware property and Waiyaki Apartment, we agree with the learned Judge of the High Court that there was no evidence before the learned Judge upon which such an order could be made.

49. The upshot of the above is that we allow this appeal partly and make orders as follows:

i. The distribution in regard to the Woodlands property made by the High Court of 60:40 percent is reduced to 50:50 percent.

ii. The distribution in regard to the Kyuna property made by the High Court of 60:40 percent in favour of the respondent is affirmed.

iii. The declaration that was made by the High Court that the appellant is holding 50 percent share in the Waiyaki Apartment, is set aside.

iv. The order that the respondent should render accounts for rent received for the Woodlands property and the Kyuna property from December, 1996 to date, and pay the appellant her share is affirmed subject to the distribution made herein.

v. This being a family dispute, each party shall bear its own costs in the appeal and the cross appeal.

vi. The cross appeal is allowed only to the extent that the judgment of the High Court is affirmed as herein stated.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

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

Signed

Deputy Registrar