**JKO v CKO (Civil Appeal 560 of 2019) [2023] KECA 115 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KECA 115 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL 560 OF 2019**

**DK MUSINGA, F SICHALE & HA OMONDI, JJA**

**FEBRUARY 3, 2023**

**BETWEEN**

**JKO ............................................................................................................ APPELLANT**

**AND**

**CKO ......................................................................................................... RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Nairobi (Muchelule, J.) dated 11th July, 2019 IN HCCC NO. 55 OF 2015 (O.S.))***

**JUDGMENT**

1. In this appeal, this Court has once more been called upon to resolve a dispute touching on division of matrimonial property. At the time the relationship between the parties herein became awry, the duo had lived together in holy matrimony for 35 years. In the appeal, JKO, the appellant (the then applicant) is dissatisfied with the judgment of Muchelule, J. (as he then was), who in the penultimate part of his judgment held that:

   > "Considering all the evidence that was placed at my disposal, 1 estimate that the total contribution by the applicant towards the acquisition and development of the matrimonial property was 30%, and the respondent's contribution was 70%. In reaching this determination I have considered the length of time the couple was married. I have also considered the rent the applicant received from the Kileleshwa apartment for many years and which she did not account.
   >
   > The matrimonial property, I find, is the Karen home worth Kshs. 82,330,000/=; Kileleshwa apartment worth Kshs. 19,500,000/=; [Particulars Withheld] land worth Kshs. 5,000,000/ = and vehicle KAS xxxx worth Kshs. 590,000/=. I estimate the Volkswagen vehicle to be worth Kshs 600,000/=, given its age. Lastly, I determine that the Kshs. 148,157,456/50 in treasury bills at the Central Bank in the name of the applicant is matrimonial property. This is money the applicant got from the deposits made by the respondent into the joint account.

I find that, in respect of the Karen home and the Kileleshwa apartment which are in joint names, the respondent has sufficiently rebutted the presumption that the applicant has an equal beneficial interest in each of them.

The total value of the matrimonial property between the applicant and the respondent is Kshs. 251,177,456/=. 30% of that is Kshs. 75,353,236/80. 70% is Kshs. 175,824,219/=.

I order that the applicant shall have Kileleshwa apartment, the vehicle KAS xxxx and Kshs. 55,263,236/= worth of the treasury bills at the Central Bank in her name. The respondent shall have the Karen home, the Volkswagen vehicle and Kshs. 92,894,200/= of the treasury bills at the Central Bank in the name of the applicant."

2. In a Memorandum of Appeal dated 18th November, 2019, the appellant listed 19 grounds of appeal which we shall advert to in the course of our determination of this appeal. The appellant sought the following orders:

" a) That this Honorable Court be pleased to set aside the Judgment and Decree of Lord Justice A.O. Muchelule made on 11th July, 2019 and redistribute the matrimonial property equally and or equitably.

b. That in the alternative, the Judgment and Decree of Honourable Justice A. Muchelule made on 11th July, 2019 be set aside and that the matter be heard afresh.

c. Such further or other order be made as the Court may deem fit in the interest of justice.

d. That the costs of this Appeal be provided for."

3. The respondent, CKO, was equally dissatisfied with the said outcome and proffered a Cross-Appeal dated 19th December, 2019 and an amended Notice of Cross-Appeal dated 11th November, 2020, listing 16 grounds of appeal, again which we shall advert to in the course of this judgment. The respondent's prayers were that the proportions of 70% and 30% be varied to 84% in his favour and 16% in favour of the appellant; that LR No. xxxx/xx, (the Karen Home), Apartment Bx in [Particulars Withheld] Park on LR No. xxxx/xxxx, (the Kileleshwa Apartment), land parcel Number I/ L/xxxx (the L land), land known as S/M/B/xxxx, in Majengo, Vihiga (the Majengo land) and Motor-vehicle registration Number KAS xxxx make Civic Honda (the Honda) were bought with his funds and hence are solely his; that rent for the period March 2006 to December, 2013 collected by the appellant in respect of the Kileleshwa apartment should be shared in the ratio of 84:16; that interest of Kshs 1,260,000 earned on monies the appellant deposited in Account No. xxxx at Commercial Bank of Africa, Upper Hill Brach, Nairobi, was matrimonial property and that he was entitled to a share in proportion to his contribution; that the company known as [Particulara Withheld] Development Enterprise Ltd (the company) and land parcel No. E/B/I/xxxx (the Bunyore property) were not matrimonial property and finally, that the respondent's pension monies in the joint US Dollar Account No. xxxx, Commercial Bank of Africa Ltd, Upper Hill Branch is not matrimonial property and that the sum of USD 5200 in that account which the respondent invested in Treasury Bonds was his sole money and that he is entitled to a refund of the principal and interest earned in that investment, a sum of Kshs 148,157,456.50.

4. On 29th June, 2022, the appeal came up before us for plenary hearing. Ms Thongori, learned counsel for the appellant, highlighted the appellant's submissions dated 4th August, 2020 and relied on a list and case digest of the same date and a further list and digest of authorities dated 23rd June, 2022. The

17 grounds of appeal were condensed and urged in a composite of 7 thematic areas. Firstly, on ground 1, we were urged to find that the appellant filed the proceedings, which form the subject of this appeal in 2015 after the promulgation of the 2010 *Constitution* as well as the enactment of the Matrimonial Property Act (MPA) yet, the trial judge failed to take into account the advancements in law in the area of division of matrimonial property inspite of the said promulgation and enactment of the law on matrimonial property.

5. Secondly, on grounds 2, 3, 4, 14 & 15, the learned judge was faulted for not acknowledging the appellant's monetary and non-monetary contribution; in elevating monetary contribution over non-monetary contribution; in considering non-monetary contribution as an indirect contribution, and in giving the appellant a smaller percentage of the matrimonial property, this being the 30% thereof as opposed to the respondent's 70%.

6. On grounds 5, 6, 7 and 8, the judge was faulted for failing to find that under Section 14(b) of the MPA, the beneficial interest in matrimonial property registered in joint names is taken to be equal, unless there is evidence to rebut that presumption; that this presumption ought to have applied to the Karen home and the Kileleshwa apartment. Further, that the onus lay on the respondent to prove that the beneficial interest was different from their legal interests.

7. In respect of ground 9, the judge was faulted for failing to find that the appellant had acquired a beneficial interest to the extent of her contribution in respect of the L land as this was acquired during coverture; that she is the one who identified the property, paid the seller Kshs 250,000 using a bankers cheque from her salary account and that she put up a pigsty, water tanks and one or two rooms on the property.

8. On grounds 10 & 11, the judge was faulted for finding that non-existent Treasury Bills (T.B) in the sum of Kshs 148,157,456.50 was matrimonial property. On grounds 12 & 13, the judge was faulted for not acknowledging the appellant's interests in the Bunyore property which, although was land inherited by the respondent from his father, the appellant had been involved in its improvement, hence was entitled to a share. Reliance was placed on the decision in *JWG v GGW* [2019) eKLR for the proposition that once a party proves that he/she has made contribution on inherited property, he/she acquires an interest on the property.

9. In response to the Cross-Appeal, the appellant refuted all the respondent's contentions thereon.

10. In urging grounds 1 and 2 of the cross-appeal, Mr. Karani, learned counsel for the respondent, relied on his submissions dated 31st May, 2022 and his list of authorities and a case digest of the same date. It was his submission that the judge having found that the appellant's contribution was non-monetary, erred in arriving at a formula of 70% to 30% without providing a basis for the said distribution; that the respondent identified the matrimonial properties, negotiated for their purchase and financed their acquisitions; that the appellant's contribution was non-monetary, whilst the respondent's contribution was monetary. He submitted that section 7 of the MPA vests property according to the contributions made by each spouse. Reliance was placed on this Court's decision in *MEK v GLM* [2018] eKLR where it was stated that: "Equality in a marriage is not a principle to be applied blindly nor is it intended to encourage dependency on one spouse. It is a situation where each party makes a contribution. In other words, it is not shifting the burden, but the sharing of responsibilities and benefits and taking into account the gender limitations"; that the respondent, in view of his contributions was entitled to 84% and the appellant 16%; that in line with the decision of the Singaporean Court of Appeal in *ANY v ANK* [2015], the Court ought to first ascribe a ratio to the direct contributions and thereafter give credit to parties' indirect contribution, this being the second ratio. On grounds 3 & 4, the judge was faulted for failing to find that the L Land was wholly

owned by the respondent despite having determined that it is the respondent's contribution that led to its acquisition, having obtained funds for its purchase from the United Nations Sacco loan; that in any event, the L land had been transferred to a 3rd party. In respect to grounds 5, 6 and 7, the judge was faulted for failing to find that the Kileleshwa apartment was wholly owned by the respondent as he solely purchased and maintained it. Further, that the respondent was entitled to 84% of the rent collected by the appellant for the period March, 2006 to December, 2013, a sum of Kshs 6.5m. It was the respondent's position that the purchase price for the Kileleshwa apartment was from the Kenya Shillings joint account at CBA and that although the property is jointly registered, he had rebutted the presumption of law as set out under Section 14 of the MPA.

11. In respect of grounds 8 & 9, counsel was of the view that the Majengo land having been fully funded by the respondent, the proceeds of sale thereof, (a sum of Kshs 225,000.00) was used to offset the loan owed to Housing Finance Company Kenya (HFCK) in respect of the matrimonial property in Karen and that the judge failed to declare that the appellant was not entitled to it. In ground 10, it was contended that the judge erred in awarding the Honda Motor vehicle (registered in the appellant's name) to the appellant inspite of finding that it was purchased using the respondent's funds deposited in a joint account at CBA, Upper Hill Branch. He urged that the purchase price of the Honda, a sum of Kshs 1.6m as well as its interest from the date of withdrawal, be made to the respondent as the money therein "… was earmarked for family developments"; that the monies deposited in the joint account at CBA and each of the spouse's shares was to the extent of the contribution to the deposits made into the joint accounts by each one of them; that his deposits to the joint account were large deposits vis-à-vis the appellant's deposits; that it is from these deposits in this account that a sum of Kshs 6,500,000.00 was used to purchase the Kileleshwa apartment.

12. On grounds 11, 12 & 13, it was submitted that the return on investment, a sum of Kshs 1,260,000.00, was made up of funds held in the joint account at CBA Bank, Upper Hill Branch, again where his deposits were larger than those of the appellant.

13. In respect of ground 14, the judge was faulted for not finding that the [Particulars Withheld] Development Enterprise Ltd was a legal entity nor, was the appellant a director and /or a shareholder, and this ought to have been excluded from the list of matrimonial property. In addition, that the shares owned by the respondent in the company were not matrimonial property.

14. In respect of ground 15, the judge was faulted for treating the respondent's pension monies in the sum of USD 52,000 in the joint USD account No. xxxx at CBA in which the appellant invested in Treasury Bills, at Central Bank of Kenya, and which the respondent worked out to be Kshs 148,157,456.50 (principal & interest) matrimonial property (Section 6 of MPA); and that although these monies were to be used for the educational expenses of the children, the appellant did not use it for the intended purpose.

15. Finally, that the Bunyore property was inherited in 1965 by the respondent and was not matrimonial property and contrary to the appellant's assertion, it was not "improved" at all by the appellant.

16. In response to the appellant's submissions, it was contended that the appellant and the respondent both being employed, hired domestic workers, hence none of them should lay claim on non-monetary contribution; that the respondent deposited large amounts of money and the appellant withdrew large amounts of money which she did not account for; that although the appellant was a lecturer at the University of Nairobi since 1980, she had not provided evidence of what she did with her salary and fees earned from consultancies for the 35 years of marriage; that from December, 2011 to January, 2015, there were no children in the matrimonial home; that the appellant made a one-off hospital bill for S (their daughter) and it is the respondent who paid the hospital bills for the children; that the

respondent took care of the children when they were young, paid for their upkeep, paid for the house assistant and the gardener as opposed to the appellant who was a joy rider in the marriage.

17. On grounds 5, 6, 7 & 8, it was the respondent's contention that the judge was right in coming to the conclusion that the respondent sufficiently rebutted the presumption of equal beneficial interest in the Karen home & Kileleshwa apartment which were registered jointly in their names; that there was no proof that the appellant paid Kshs 1 million towards the Karen home. In answer to ground 9, the respondent maintained that where property is registered in the name of one spouse, the other has to show contribution, either direct or indirect towards the acquisition or improvement of the property and of which the appellant had failed to do.

18. In respect of grounds 10 & 11, it was contended that the sum of Kshs 148,157,456.50 was based on a principal sum of USD 52,000.00 applying a compound interest rate of 29.50%, the applicable interest on TB at the time; that the respondent deposited huge sums of money into this joint account, including his pension, which the appellant withdrew and concealed their destination; that the pension money did not go to pay fees as when the appellant withdrew the pension money on 22nd March, 2006, the children were off to university to undertake university education, which presumably did not require fees.

19. As for the Bunyore property, the respondent claimed that this was his inheritance and was therefore not matrimonial property. The appellant had laid claim to this property on the basis that its registration was effected during coverture and that she had made improvements on it.

20. In respect of the L land, the respondent maintained that he had developed it when the appellant was in the USA; that he acquired and developed the Karen home from 1999 whilst in the employment of [Particulars Withheld] and he took care of the family, paid the house assistant and gardener and paid for the upkeep of the children and finally, that the respondent had rebutted the presumption of equal beneficial interest in the Karen home and Kileleshwa apartment.

21. We have considered the record of appeal in its entirety, the submissions, both written and oral, of the rival parties and the decisions relied upon by the parties as well as the law. The division of matrimonial property is never an easy task. As rightly pointed out by the respondent's counsel, there is no formula for division of matrimonial property. However, when called upon to do so, a court must painstakingly take the contribution of each of the spouses into consideration so as to arrive at a just position. In the decision of *ANJ v ANK* [2015](*Supra*), a decision relied on by the respondent's counsel, it was held:

> "The ultimate objective of any approach towards the division of matrimonial assets is to accord due and sufficient recognition to each party's contribution towards the marriage without overcompensating or undercompensating a spouse's indirect contributions - so that the outcome would, in the circumstances of each case, lead to a just and equitable division. Using the structured approach, the court could first ascribe a ratio that represents each party's direct contributions relative to that of the other party, having regard to the amount of financial contribution each party has made towards the acquisition or improvement of the matrimonial assets. Next, to give credit to both parties' indirect contribution throughout the marriage, instead of giving the party who has contributed more significantly than the other an "uplift" to his or her direct contribution percentage, the court should proceed to ascribe a second ratio to represent each party's indirect contribution to the well-being of the family relative to that of the other. Using each party's respective direct and indirect percentage contributions, the court then derives each party's average percentage contribution to the family which would form the basis to divide the matrimonial assets."

22. We agree. It behooves us to determine firstly, the direct contribution and thereafter proceed to ascribe the second ratio of indirect contributions. Section 2 of MPA defines contribution as follows:

> “
>
> “ 2. Interpretation
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> In this Act, unless the context otherwise requires-
>
> “ "contribution" means monetary and non-monetary contribution and includes:
>
> a. domestic work and management the matrimonial home;
>
> b. child care;
>
> c. companionship;
>
> d. management of family business or property; and
>
> e. farm work;
>
> “ "family business" means any business which –
>
> a. is run for benefit of the family by both spouses or either spouse; and
>
> b. generates income or other resources wholly or part of which are for the benefit of the family.”

23. In our view and as postulated in other decisions of this Court, the 2010 Constitutional provision on equality of parties did not envisage the division of matrimonial property on a 50-50 basis. Kiage, JA. in *PNN v ZWN* Civil Appeal No. 128 of 2014 underscored that fact when he stated:

> “ I do not think that getting married gives a spouse a free to cash cheque bearing the words "50 per cent." Thus it is that *the Constitution*, thankfully, does not say equal rights "including half of the property." And it is no accident that when Parliament enacted the *Matrimonial Property Act*, 2013, it knew better than to simply declare that property shall be shared on a 50:50 basis. Rather, it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition."

24. Having come to the conclusion that marriage does not confer one a carte blanche equality in division of matrimonial property, but that this is based on one’s contribution, both direct and indirect, the herculean task for us is to ascertain the contributions of each spouse, both monetary and non-monetary. The situation is not made any easier where spouses have lived together for over 35 years, have held joint Kenya shillings and USD dollar accounts, operated the accounts for payment of fees, investment and general upkeep of the home. In *PNN v ZWN* [2017], eKLR, Kiage, JA. surmised:

> “ "The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts. I would repeat what we said in *Francis Njoroge v Virginia Wanjiku Njoroge*, Nairobi Civil Appeal No. 179 of 2009;

a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the Court of Appeal of Singapore in *Lock Yeng Fun v Chua Hock Chye* [2007] SGCA 33; It is axiomatic that the division of matrimonial property under Section 112 of the Act is not and by its very nature cannot be a precise mathematical - exercise. "[emphasis ours]

25. For a start, there is no gainsaying in finding that the appellant and the respondent are accomplished professionals in their respective fields. The respondent is a holder of a Master of Philosophy degree in Demography from the United Nations Demographic Centre, Cairo, Egypt, besides being a holder of a Bachelor of Arts Degree from the [Particulars Withheld]. He is an accomplished Demographer, having started his career as a Programme Officer, a position he held at the time of solemnization of the marriage when he was then 28 years old. On the other hand, the appellant is a holder of Ph.D. in Anthropology from the University of [Particulars Withheld], and M.Phil in Anthropology from the same University and B.Ed from [Particulars Withheld]. She was 26 years old at the time she married the respondent. At the time, she was a Junior Research fellow at the [Particulars Withheld]. She subsequently scaled the heights to the extent that at the time of filing the proceedings, the subject of this appeal, she was a Professor, School of Public Health. Their children too, seem to have followed in their parents' footsteps as all the three children have post graduate degrees. The children are:

    1. LAK born on 25th October, 1982,

    2. AJK born on 18th November, 1985 and

    3. SAK born on 22nd March, 1989.

26. It is evident that at the time the two solemnized their marriage on 6th September, 1980, they had no property worthy of mention. However, from the time of the marriage, the properties either in their joint names and /or registered in the name of one spouse, that are the subject of this cause are as follows:

    a. Matrimonial home situate in Karen in Nairobi on LR No.xxxx/xx (the Karen home),

    b. Apartment Bx in [Particulara Withheld] Park situate on LR No. xxxx/xxxx in Kileleshwa (the Kileleshwa apartment),

    c. I/L/xxxx measuring 2.05Ha (the L land)

    d. Vehicle Volkswagen Polo Classic registration number -xxxx(the Volkswagen polo),

    e. Vehicle Honda CRV registration number xxxx (the Honda),

    f. [Particulars Withheld] Enterprises Limited (registration number xxxx) (the company),

    g. A parcel of land at Majengo in Vihiga (the Majengo land) and

    h. Monies in the joint account number xxxx at Commercial Bank of Africa, Upper Hill Branch (the Dollar account).

27. There was also the Bunyore property as well as monies in the Kenya shillings account held at CBA, upper Hill Branch. Two properties namely, the Karen home and the Kileleshwa apartment are in joint names. The L land comprising of 2.05 Ha was purchased in 1996 for a sum of Kshs 270,000.00 and registered in the respondent's name and subsequently transferred to BO, the respondent's son (who was then a minor) born out of another relationship. The Majengo land was purchased in 1986 and sold by the respondent in the year 2000 for a sum of Kshs 225,000 to his sister. Then there is a trading company (Particulars Withheld Development Enterprises Ltd) which although the respondent and the children of the marriage are shareholders, is a dormant company and of no value. Admittedly, the

Bunyore property was inheritance land given to the respondent by his father in 1965. The appellant's claim to this land was on the basis that it was registered in the respondent's name during coverture and that she had "improved it". She stated that she built a home on it and the household goods therein are hers. The joint USD A/C at CBA, No. xxxx, as at 13th January, 2015 had USD 767.05. As for the two vehicles, the Polo Classic is registered in the respondent's name while the Honda is registered in the appellant's name.

28. It is common ground that the Karen home and the Kileleshwa apartment are registered in the joint names. The purchase price for the plot where the Karen home was built was Kshs 3.05 m. The respondent told the court that he obtained the funds for the purchase of this property from his savings and credit society. The appellant on the other hand told the court that she gave Kshs 1m to the respondent for him to clear his Sacco loan and to shore up his shares so as to get a loan of Kshs 3m. The appellant further stated that apart from the purchase of the plot, she expended huge sums of money in 1999 for purposes of fencing, interior finishings, construction of a garage, water tanks and a guest wing. There was also the payment of land rent and rates, electricity bills, water bills and security. As for the Kileleshwa apartment, this was purchased at a cost of Kshs 6.5m. The down payment of Kshs 1.5m was from the Kenya shillings joint account at CBA. Admittedly, the full purchase price as well as legal fees, stamp duty was from this joint account. However, the respondent contended that this property was wholly his. As for the rent for this apartment for the period March, 2006 to December, 2013, a total sum of Kshs 6.5m, the respondent told the trial court that he was entitled to 84% of this sum. However, he also stated that he had instructed the appellant that ½ of the rent of the Kileleshwa apartment would go towards the upkeep of S (one of their daughters) who was then still in School.

29. It is noteworthy to mention that the respondent was dismissed from his employment in 2002, after having been suspended in 1999. It was not until 2005 that the respondent got a job in Botswana where he worked from 2005 till 2011. During the period he was unemployed, the appellant involved the respondent in the consultancies by inviting him to carry out the consultancies she had secured. Subsequently, the respondent retired from active employment in December, 2011 and thereafter remained a Consultant and did consultancies although according to him, these were few and sporadic.

30. The appellant, on the other hand, pursued her career with zeal. She pursued her Doctoral Degree at Cambridge University, graduating in 1981. She also graduated from Harvard University in 1997. Apart from her formal employment, she also undertook consultancies and the monies deposited in the joint USD and Kenya Shillings Accounts at CBA. At no time for the 35 years that she was married was she ever out of employment. Indeed, even upto the time she was ejected from the matrimonial home on 11th January, 2015, she was still in full time employment. Would anyone want us to believe that all the years of her hard work amounted to 16% more so, when it was never ever suggested that she had acquired properties in her name? We find that the appellant and the respondent being professionals in their respective fields worked very hard to raise their family and to acquire property. The appellant's career was always on an upward trajectory and never was she out of employment, unlike the respondent. Again, unlike the respondent who retired from formal employment in December, 2011, the appellant was still in employment up to the date she filed these proceedings. Indeed, this was the situation obtaining when she was ejected from the matrimonial home, one fine evening when she together with one of their daughters (S) came home from the gym at about 8 pm. This was on 11th January, 2015. Her blood pressure medication and everything else was in the house she had hitherto called home. She had lived in the Karen home from 2004 till then. After some plea, S was allowed into the house but the appellant had to move into a hotel and subsequently hired a place to stay until the Court intervened on 22nd January, 2016, directing that she moves into the Kileleshwa apartment. She paid rent from the date of ejection from the matrimonial home on 11th January, 2015 upto 22nd January, 2016, when the court intervened. It is clear that the appellant maintained the home when the respondent was away

working in Botswana. The two lived together for 35 years and emails exchanged when the respondent was in Botswana show that she provided sound advice, even on the type of the motor-vehicle to be purchased by the respondent. There is no denying that both the appellant and the respondent made monetary and non-monetary contribution towards the properties acquired during coverture and as stated above, the funds for the purchase of the Kileleshwa apartment were wholly from the joint Kenya shillings account at CBA.

31. If it is true that the appellant upon request by the respondent refused to contribute towards the purchase of the Kileleshwa apartment, why did the agreement bear her name as a purchaser and a transfer registered in her name as well? The same argument can be made of the Karen home.

Section 14 of the *MPA* provides:

> " 14. Presumptions as to property acquired during marriage Where matrimonial property is acquired during 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."

And

In *Kamore v Kamore* EALR [2001], IEA 75, the court held:

> " When a property is acquired during the course of coverture and is registered in the joint names of both the spouses the court in normal circumstances must take that such property, being a family asset, is acquired in equal shares."

32. Similarly, in *Kivuitu v Kivuitu* [1991], LLR 1411 CAK, Omollo, Ag, JA. stated:

> " So that while the original deposit of Ksh. 17,000/= was paid by the husband and he subsequently paid all the mortgage instalments from his salary, the wife also made contribution to the family income. Her contribution might have been intermittent and not as much as that of the husband but nevertheless contribution it was and upon the property being acquired, it was registered in their joint names with no specification as to who owned what proportion. It was clearly intended to be family property jointly owned by the husband and wife in equal shares and, with respect to the learned judge, the evidence on record did not warrant his conclusion that the wife had owned one-quarter while the husband owned the rest."

33. In our view, the Karen home and the Kileleshwa apartment, being properties registered in the joint names and with both parties having made direct and indirect contributions towards the acquisition as they were both gainfully employed, are owned in equal shares, although it would appear that the appellant maintained her employment for a much longer period than the respondent. It is equally true that both held responsible positions and we can only infer that their incomes were equally good. It would also appear that the appellant had a larger share of consultancies vis-a-vis the respondent as she is the one who shared in her consultancies with the respondent. In our view, as the two made both direct and indirect contributions towards the purchase and development of the two properties (the

Karen and the Kileleshwa apartment), we have no hesitation in coming to the conclusion that these two properties are owned in equal shares by the duo.

34. As for the monies in the two joint accounts, one being a USD account and the other being a Kenya Shillings Account, the respondent told the court that he deposited his pension in the USD account, a sum of Kshs USD 52,000. This may be true. It is also true that pension monies are not matrimonial property (Section 6 of the *MPA*). However, there is no dispute that the two were joint accounts. It is on record that monies from the two accounts and particularly from the USD account was used for the education of the children and on the instructions of the respondent. Indeed, in paragraph 43 of the Respondent's submissions, it was submitted "The joint account was established initially for the education of the children outside Kenya". At the time, two of the children were in South Africa pursuing university education and the 3rd child was in [particulars Withheld] and later [particulars Withheld], all high cost schools.

35. It is also not lost to us that the dollar account was initially operated as a personal account by the appellant (from 1998 to 2004) when she invited the respondent to join in. And as stated above, she also invited the respondent into consultancy projects, a fact acknowledged by the respondent.

36. As for the company, (Particulara Withheld Development Enterprises Ltd), the court was told that this was a dormant company and whose shareholders were the respondent and their children. It has no tangible assets. In our view, nothing turns on this.

37. Then there are the two vehicles. The Polo Classic is in the possession of the respondent, and it is registered in his name. The funds for the purchase of this vehicle were from the joint USD, account which money was wired to the respondent by the appellant while he was in Botswana. The other vehicle, the Honda, is in the name of the appellant. The appellant told the court that she obtained a loan from her University Sacco plus money obtained from her consultancies to buy this motor-vehicle. There was no evidence that the money for the purchase of the Honda, unlike the money for the purchase of the Polo Classic came from the joint account. However, the appellant is reasonable enough to state that since these two vehicles were purchased using her facility as a University don, the respondent should retain the polo as any change thereof would attract tax payment.

38. As for the joint accounts, we think it is asking the impossible to task this Court to ascertain who banked what sum, whether it was pension money or not,how much went for family expenses, towards school fees for the children, etc. Suffice to state that the money was in joint accounts for the running of the affairs of the family, for investment purposes such as the purchase of the Kileleshwa apartment as well as the purchase of the Polo Volkswagen registered in the respondent's name. We decline the invitation to comb through the joint accounts to determine the deposits made by each of the spouses as this is a mission impossible.

39. The appellant laid claim to the Bunyore property on the basis that it was registered in the respondent's name during coverture and that she had "improved" it. She said she built the house on the property and she has her household goods therein.

Section 6 of the *MPA* defines Matrimonial Property as:

(a) The matrimonial home or homes

b. Household goods and effects in the matrimonial home or homes, or

b. Any other immovable property jointly owned and acquired during the subsistence of the marriage".

40. In our view, the Bunyore property, although registered on 16th September, 1996 was property acquired through inheritance before the solemnization of the marriage. It was not acquired during the subsistence of the marriage. In our view, it does not matter that its registration was effected during coverture. It is therefore not matrimonial property to be shared equally. It belongs to the respondent.

41. For the L land, the appellant told the court that she identified the land during her sojourn to that part of the country in her consultancy work; that she paid for it and the sale agreement was witnessed by her brother, Alfred Kayere. It is not in dispute that indeed, the sale agreement was witnessed by her brother. This land was transferred to BOK, a minor, on 5th August, 2015, during the pendency of this suit. We find that the appellant contributed to its purchase and she is entitled to a 50% share. However, this land having been transferred to a 3rd party by the respondent, we direct that the appellant is entitled to 50% share of its current value.

42. As for the Majengo property, the respondent acknowledged that it was jointly bought. It was sold for Kshs 225,000.00 to the respondent's sister. The appellant is entitled to 50% of its current market value.

43. It is not lost on us that the respondent in a bid to permanently deprive the appellant of these two properties (the L land and the Majengo property) transferred one to his son inspite of the said son being a minor and sold the second to his sister. As these two properties were acquired during coverture and for the reasons stated above, each of the parties herein is entitled to equal shares of the current value of the two properties, the same having been sold/transferred and removed from the reach of the appellant.

44. In respect of the sum of Kshs 148,157,456.50, this was based on the respondent's calculation based on a principal of USD 52000 applying a compound interest rate of 29.5% per annum, what he said was the applicable interest rate on Treasury Bills then. The sum of Kshs 148,157,456.50 was a hypothetical figure worked out by the respondent. There was nothing to show that this money was actually in the account. The account had USD 767.05 as at 13th January, 2015, the time the respondent made the last withdrawal. As a court, we cannot act on hypothetical figures as this would be acting in vain.

45. In view of our findings above, it is our considered view that the matrimonial properties excluding the Bunyore land, the two cars and the company should be shared on 50:50 basis. To that extent, we allow the appeal and dismiss the cross appeal.

46. In view of the fact that this is a dispute pitting a husband and wife, we direct that each party bears his/her own costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.**

**D.K. MUSINGA (P)**

**……………………**

**JUDGE OF APPEAL**

**F. SICHALE**

**……………………**

**JUDGE OF APPEAL**

**H. OMONDI**

**……………………**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**