



**JNAC v AC & 5 others (Civil Appeal 449 of 2018)
[2023] KECA 1358 (KLR) (10 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1358 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 449 OF 2018
HM OKWENGU, MSA MAKHANDIA & K M'INOTI, JJA
NOVEMBER 10, 2023**

BETWEEN

JNAC APPELLANT

AND

AC 1ST RESPONDENT

DKP 2ND RESPONDENT

PP 3RD RESPONDENT

CP 4TH RESPONDENT

LACHEKA LUBRICANTS LIMITED 5TH RESPONDENT

FAC 6TH RESPONDENT

(Being an appeal from the judgment and decree of the High Court (Kimaru, J) delivered on 9th February 2017 in Civil Case No. 29 of 2005 (OS))

JUDGMENT

1. On 9th February 2017, the High Court (Kimaru, J – as he then was) delivered a judgment in a dispute concerning the distribution of matrimonial property. The judgment elicited two appeals, that is, Civil Appeal No 444 of 2018 which was filed by Lacheke Lubricants Limited and FAC, and Civil Appeal No 449 of 2018, which was filed by JAC (J) and which is the subject of this judgment.
2. The proceedings leading to the judgment of the High Court were commenced through an originating summons that was lodged in the High Court by AC (A) who had been married to J, but the couple was at that time involved in ongoing divorce proceedings in a separate cause. In her originating summons A had originally sued her husband J as the only respondent, but she subsequently amended the summons with leave of the court to include other respondents.



3. The amended originating summons filed on November 14, 2005, brought in DK (D), PP (P), and CP (C) as 2nd, 3rd, and 4th respondents. The three are now 2nd, 3rd, and 4th respondents in this appeal, while A is the 1st respondent. D, P, and C did not participate in the High Court proceedings nor have they participated in this appeal. Lacheke Lubricants Limited and FAC (F) were subsequently joined to the amended originating summons as interested parties. They are the 5th and 6th respondents in this appeal.
4. A's amended originating summons was brought under section 17 of the [Married Women's Property Act](#) of England 1882 (MWP Act).

It sought declarations that she was a beneficial owner of several properties, some held in the name of J and others in the name of D, P, and C. The properties included land, motor vehicles, shares, and monies held in several banks. A claimed that the properties were acquired jointly by J and herself during the subsistence of their marriage, using proceeds from Lacheke Enterprises Limited, a thriving business in which the couple each owned one share.
5. A contended that J holds shares in Lacheke Lubricants Limited through D, a previous employee of Lacheke Enterprises Limited; that J had leased all the assets of Lacheke Enterprises Limited to Lacheke Lubricants Limited in order to defeat her claim to the assets; and that J has also transferred several of the properties to D, P, and C, in a bid to deny her the properties. She maintained that J and the 3 persons were holding the properties in trust for her as she had a beneficial interest in the properties. She sought a declaration and decree that the properties were jointly owned by J and herself in equal shares.
6. J filed a replying affidavit in which he deposed that: A's originating summons was bad in law as the court had no jurisdiction to entertain the same as drawn and filed; A was seeking orders in excess of the jurisdiction of the court's powers under section 17 of the [MWP Act](#); A was seeking orders that were not prayed for in the originating summons; and that D, P, and C were improperly joined in the suit.
7. J accused A of misrepresentation and failure to disclose material facts. He stated that A had not made any financial contribution to the acquisition of the properties she claimed. That A had always been a housewife and the only income she has ever earned was *ex gratia* payment as director of Lacheke Enterprises Limited. J swore that the properties registered as LR. No. xxx/xxxx and LR. No. xxx/xxxx, were solely acquired by him and had been sold between March and April 2005 with the knowledge of A, to pay off debts owed by Lacheke Enterprises Limited and to raise capital for the company.
8. In regard to LR. No. xxx/xxx Kibagare Nairobi, J stated that although the property was their matrimonial home, it was acquired solely by his own efforts with no financial contribution from A. He deposed that through a mutual agreement, he purchased A's interest in LR. No. xxx/xxx Kibagare. J also claimed to have purchased vehicle Nos. xxx xxxK, xxx xxxB, xx xxxF, through his own efforts, while motor vehicle No. xxx xxxQ belonged to Lacheke Lubricants Limited. He stated that A only holds one share in Lacheke Enterprises Limited, while he holds 4,999 shares in the said company. He asserted that the court had no powers under section 17 of the [MWP Act](#) to distribute and adjust shareholding in a limited liability company.
9. In addition, J denied being a beneficiary of bank accounts at Prime Bank Limited, Southern Credit Bank Limited, and Standard Chartered Bank Limited. He admitted holding accounts at Hong Kong and Shanghai Banking Corporations but stated that the accounts had been closed due to lack of funds. He denied ownership of other accounts.
10. F also filed a replying affidavit in which she stated that she was a director of Lacheke Lubricants Limited. She stated that the amended originating summons was bad in law, and supported the objections raised by J. She deposed that A's claim was simplistic, frivolous, and intended to scandalize and vex Lacheke Lubricants Limited.



11. Upon hearing the amended originating summons, the trial Judge considered the question of whether the properties listed by A constituted matrimonial properties. The trial Judge identified the immovable properties in dispute as LR. No. xxxx/xx Kibagare, LR. No. xxxx/xxxx and LR. No. xxx/xxxx. LR. No. xxxx/xx was registered in the joint names of A and J, and both had conceded that it had been the matrimonial home. LR. No. xxx/xxxx and LR. No. xxxx/xxxx, were registered in the name of Lacheke Lubricants Limited, but A claimed they were matrimonial property as they were purchased during the subsistence of the couple's marriage with proceeds from Lacheke Enterprises Limited, a company in which both spouses were shareholders. A claimed that she actively participated in that company's operations.
12. The trial Judge having taken into account the judgment of the Court of Appeal in *Mereka v Mereka*, Civil Appeal No 236 of 2001, and *Mbugua v Mbugua* [2001] 2EA 445, found that LR No xxx/xxxx and LR No. xxx/xxxx, were purchased by J during the subsistence of his marriage to Ax, and that the two properties were transferred to D during the pendency of the court proceedings before an attempt was made to transfer them to F. Noting that the transfer of properties. No. LR xxx/xxxx and LR. xxx/xxxx to D was made after J had been separated from A, and that D did not attend court to defend the alleged ownership of the two parcels of land, the trial Judge found that the intended transfer to F was for her to hold the two properties as a trustee of J in order to defeat any claim that may be lodged by A. The trial Judge, therefore, concluded that LR. No. xxx/xxxx and LR. No. xxx/xxxx were matrimonial property available for distribution by the court, as J is the equitable and actual owner of the two properties.
13. As regards LR. No. xxxx/xxx, the trial Judge found that A did not of her own free will execute the agreement transferring LR. No. xxxx/xxx to J, but an attempt was made by J to forge her signature, with the sole purpose of dispossessing her of her share of this property. Consequently, the trial Judge rejected J's contention that A had transferred the property to him, and found that LR. No. xxxx/xxx was still matrimonial property to which A was entitled to a share.
14. In regard to the distribution of the matrimonial property, the trial Judge considered the contending claims regarding the share of each party, in light of Article 45 (3) of the *Constitution of Kenya* 2010, the *Matrimonial Property Act, 2013*, and a Court of Appeal decision, *Agnes Nanjala William v Jacob Petros Nicholas Vander Goes*, Civil Appeal No 127 of 2011, and found that A had directly contributed towards the growth of the business in Lacheke Enterprises Limited; that this explained why she was getting a monthly salary/allowance from the business; that J did not controvert A's evidence that she contributed towards the improvement of the matrimonial home. The trial Judge therefore concluded and declared that A was entitled to half the values of LR. No. xxx/xxxx, LR. No. xxx/xxxx and LR. No. xxxx/xx, as well as half the value of the shares held by J in Lacheke Enterprises Limited and Lacheke Lubricants Limited.
15. J has faulted that judgment on 10 grounds contending that the trial Judge erred in: exercising jurisdiction over properties owned by a limited company; failing to give due regard to the settled principles that a company is a separate legal entity from directors and shareholders; failing to set out valid grounds for interfering with property held by limited liability companies; finding that the suit properties listed by A constitute matrimonial properties, and that Lacheke Enterprises Limited and Lacheke Lubricants Limited held the properties in trust for J; holding that A is entitled to half the values of the 3 properties without ascertaining her contribution towards the acquisition of the said properties; disregarding A's and J's testimony on the purchase and development of the said property; disregarding the agreement between J and A dated March 19, 2013 and the evidence that was adduced in support thereof; failing to give due weight and consideration to J's evidence on how he acquired the said properties and bought out A; finding and holding that A is entitled to half of the values of the



- shares held by Lacheke Lubricants Limited without any legal basis as there was clear evidence that J was not a shareholder; and declaring that A is entitled to half of the values of shares held by J in Lacheke Enterprises Limited, which company was not a party to the suit.
16. By an order dated December 4, 2020, made by this Court (Kantai JA), J was granted leave to amend his memorandum of appeal. The amended memorandum of appeal introduced grounds 1B to 1L which challenged the competence of A's originating summons and the amended originating summons contending that the originating summons was not signed by A or her counsel; that the amended originating summons joined 2nd to 6th respondents who were not spouses contrary to section 17 of the *MWP Act* that is intended for spouses; failing to require the proceedings to proceed by way of a plaint; failing to include Lacheke Enterprises Limited as a party to the suit; and paragraphs 2B, 2C, 2D, 2E, 2F, and 2G which faulted the learned judge for granting relief against persons who were not party to the proceedings; going against the ruling in *Salomon v Salomon & Co Ltd* [1897] AC 22; failing to follow *Housing Finance Company Limited v Faith W Kimeria & another* [1998] eKLR, failing to strike out incompetent proceedings; and ignoring *MNK v SNK* Civil Appeal No 277 of 2005, a judgment of this Court that was binding upon the trial court.
 17. Also included in the new grounds are paragraphs 4B 4C, 4D, 4E, and 4G in which the learned Judge was faulted for failing to require A to discharge the burden of proof regarding her contribution to the acquisition of the alleged matrimonial properties; not holding that A sold her interest in LR. No. xxxx/xx and her one share in Lacheke Enterprises Limited to J; and overlooking the evidence on record which showed that A lacked capacity during coverture to make any financial contribution to the acquisition of the properties she claims.
 18. Finally, ground 9B faulted the trial Judge for ignoring evidence that J is not a shareholder in Lacheke Lubricants Limited; and 10B which faulted the trial Judge for failing to apply the rule in *Bull v Bull* [1955] 1 QB 234.
 19. In support of his appeal, J submitted that for the court to consider a claim for beneficial interest in the properties alleged to constitute matrimonial properties, the intent of the parties at the time of the acquisition of the properties must be clear; and in this case, there was no evidence upon which the court could impute that J holds the title subject to a trust in favour of A. J asserted that A only made unsubstantiated assertions, as she did not adduce any evidence of her alleged contribution to the acquisition of the disputed properties even though she had indicated in her affidavit that she would tender such evidence during the hearing.
 20. J relied on *Peter Mburu Echaria v Priscilla Njeri Echaria* [2007] eKLR, and *Muthembwa v Muthembwa* [2002] EA 186, on the principles that govern the acquisition of property rights of husbands and wives. This includes evidence that either the spouse paid part of the purchase price, or contributed regularly to the mortgage installments, or paid part of the mortgage, or made a substantial financial contribution to the family expenses so as to enable the mortgage installments to be paid.
 21. J argued that he adduced clear evidence that he acquired LR. No. xxx/xxxx and LR. No. xxx/xxxx in 1995 from one Nanji, and that he transferred the properties to D on August 2, 2005 before A's suit was filed. He maintained that the trial Judge erred in finding that A was entitled to half the value of LR. No. xxx/xxxx and LR. No. xxx/xxxx. Citing *Pettitt v Pettitt* [1969] 2 All ER 385, J reiterated that these properties cannot be subject of an application under section 17 of the *MWP Act 1882*, as the properties were not registered in his name.
 22. As regards LR. No. xxxx/xx Kibagare, J conceded that the property was acquired on February 3, 1997, and is registered in the joint names of A and himself as joint tenants, but maintained that the purchase proceeds were provided by himself. J explained that he raised part of the purchase price from a loan



- of US\$ 150,000 which he obtained from a business associate, one Tam Fook Yen, and that he raised the balance from his own resources. He contended that A did not make any direct, financial, or any other contribution. He dismissed A's contention that her contribution was sourced from the sale of her property in Hurlingham, pointing out that A could not have used the proceeds from the sale of the Hurlingham property as the sale of that property was concluded in 1999, two years after LR. No. xxxx/xx was purchased and registered. J added that even the purchase price for the said Hurlingham property was provided by himself and that this was admitted by A in her evidence.
23. J further submitted that A sold her share in LR. No. xxxx/xx to him at a consideration of US\$ 70,000 through a sale agreement which was produced in evidence, and that A's witness, a document examiner, confirmed that the signature on the document was A's. J therefore argued that applying the principle of resulting trust, A is holding her share in LR. No. xxxx/xx in trust for him.
 24. As regards the motor vehicles, J submitted that motor vehicle xxx xxxQ Prado, belonged to Lacheke Enterprises Limited and was sold to Lacheke Lubricants Limited through a higher purchase agreement with Prime Capital and Credit Limited, while motor vehicle xxx xxxK was sold to Lacheke Lubricants Limited and motor vehicle xxx xxxB Land Rover, was acquired by J without any assistance from A. The other vehicle, Daewoo Salon which had also been acquired by J with no contribution from A, was sold to Munish Mehta. J maintained that A did not provide any evidence of her financial contribution towards the acquisition of the motor vehicles.
 25. Regarding shares held by J in Lacheke Enterprises Limited and Lacheke Lubricants Limited, J maintained that the matters were not for determination before the trial Judge as Lacheke Enterprises Limited was not a party to the suit, and that the issue regarding shareholding could only be determined in a suit in the commercial court division.
 26. On the monies alleged to be in bank accounts, J submitted that neither the bank accounts at Prime Bank, Southern Bank and Chartered Bank in the name of Lacheke Lubricants Limited and D nor the alleged bank account at Prime Bank in the name of P, belong to him (that is J). As for monies alleged to be in the Hong Kong Shanghai Banking Corporation Limited, there was no money as the two accounts had been closed.
 27. In support of his submissions, J relied on a *dictum* by Kiage JA in *PNN v ZWN* [2017] eKLR that:

“First, while I take cognizance of the marital equality ethos captured in article 45(3) of the Constitution, I am unpersuaded that the provision commands a 50:50 partitioning of matrimonial property upon the dissolution of a marriage. The text is plain enough; ‘45(3) 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’. To my mind, all that the constitution declares is that marriage is a partnership of equals. No spouse is superior to the other. In those few words, all forms of gender superiority -whether taking the form of open or subtle chauvinism, misogyny, violence, exploitation or the like have no place.”
 28. J submitted that he had explained his role as an enterprising person in the acquisition of each property. He urged that division of matrimonial properties should be precise as to the contribution of each party, and therefore his appeal should be allowed as A did not make any contribution to the acquisition of the properties.
 29. J also filed supplementary submissions dated May 7, 2022 and second supplementary submissions dated June 18, 2022 through his advocates Judy Thongori & Co advocates. The two sets of submissions mainly address the new grounds introduced in the amended memorandum of appeal. These submissions have been addressed at length in Civil Appeal No 444 of 2018, and therefore we



shall not rehash them, but only refer to them as may be pertinent to this appeal. During the hearing, Dr. Kamau Kuria SC appeared for J and highlighted the submissions.

30. Lacheke Lubricants Limited and F did not file any submissions in this particular appeal. During the hearing of the appeal, learned counsel Mr. Wena who appeared for the duo, supported J's appeal and adopted the submissions that were made on behalf of J.
31. In opposing the appeal, A filed written submissions dated July 12, 2022, which were intended to address the amended grounds of appeal but were in reality quite similar to the written submissions filed in Civil Appeal No. 444 of 2018. In the submissions, A pointed out that she sought and obtained leave to amend her originating summons to bring in other respondents apart from J. She asserted that Lacheke Enterprises Limited had a thriving business through which J and herself managed to purchase LR. No. xxx/xxxx and LR. No. xxx/xxxx and the two properties were both registered in the name of J.
32. A referred to her evidence before the trial court and stated that she was able to prove that the properties were acquired through their joint efforts, and that J fraudulently altered the shareholding in Lacheke Enterprises Limited in a bid to steal a match on her. She maintained that the transfer of the two properties to D was undertaken during the pendency of the suit, and at an undervalue; that J incorporated Lacheke Lubricants Limited as a vehicle to assist him fraudulently transfer properties from Lacheke Enterprises Limited to third parties; and that this was in a bid to defeat A from claiming shares in the company.
33. She relied on SNK v MSK & 5 others [2015] eKLR in support of her contention that she had made indirect financial contributions. She also cited Mereka vs Mereka, Civil Appeal No. 236 of 2001 for the proposition that the court's jurisdiction under section 17 of the MWP Act extends to shares in limited liability companies owned by spouses with a caveat that the trial court in such proceedings has no jurisdiction to distribute properties registered in the name of the company in which the spouses are shareholders. She maintained that the trial court set out valid grounds for interfering with the property held in the name of J; that the court considered the evidence adduced regarding the conduct of J in fraudulently transferring the two properties to D, and the attempt to transfer the two properties to F during the pendency of the trial; and that the trial court came to the right conclusion that LR. No. xxx/xxxx and LR. No. xxx/xxxx were still matrimonial property and that A was entitled to half their values.
34. A argued that the court rightfully held that J is the equitable and actual owner of LR. No. xxx/xxxx and LR. No. xxx/xxxx, and that he holds the same in trust for A and therefore the findings of the court cannot be faulted. A cited in support Mereka vs Mereka (*supra*) where the court stated:

“If there are disputes between husband and wife as to their respective rights to the shares in a company registered in the name of one spouse, then the court like in the case of any other property in dispute between husband and wife has power to ascertain the respective beneficial rights of husband and wife to the disputed shares. It can declare like the learned CA did in this case that one spouse holds a certain number of shares in trust for the other. What the court cannot do under section 17 of the 1882 Act, like in respect of all other properties, is to order the transfer of the legal titles to property or in other words, to pass proprietary interest from one spouse to the other.”
35. A further argued that her claim under the Matrimonial Properties Act was proper as the properties she claims were acquired during coverture, and even if the properties were sold and or transferred, the court could apply the doctrine of tracing to recover the same.
36. During the hearing of the appeal learned counsel Ms. Wambugu who appeared for A highlighted the submissions reiterating that LR. No. xxx/xxxx which is registered in the joint names of A and J, and



LR. No. xxx/xxxx and LR. No. xxx/xxxx which are registered in the name of J were all matrimonial properties acquired during the subsistence of the marriage. She added that LR. No. xxx/xxxx and LR. No. xxx/xxx were transferred to D during the pendency of the suit before the court, and this necessitated the joinder of D as well as P and C in whose name it was discovered monies were held in some accounts. That Lacheke Lubricants and Femida were joined in the suit by consent of the parties, when it transpired that D had prepared a transfer document which was lodged at the lands office in a bid to transfer the two properties to the name of F.

37. Mrs. Wambugu maintained that the additional respondents were joined in the proceedings for purposes of enabling the court to identify the matrimonial properties and preserve them. Mrs. Wambugu maintained that J has not suffered any prejudice through the procedure adopted. She added that there was evidence that A sold her house at a consideration of Kes 25 million which money was applied towards the improvement of the matrimonial home which was in the joint names of J and A. She urged the Court to dismiss the suit.
38. This being a first appeal, we are under a responsibility to subject the evidence that was adduced in the trial court to a fresh analysis in order to arrive at our own conclusion, being alive to the fact that we have not had the advantage of hearing the witnesses and assessing their demeanor, and therefore we must give due deference to the findings of the trial court. (See *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR.
39. Before we consider the evidence, the submissions of the respective parties, and the law, we wish to state that the issues raised in the amended memorandum of appeal which are mainly the competence of the originating summons and amended originating summons; jurisdiction of the court over properties owned by a limited company; and the competence of the proceedings under section 17 of the *MWP Act* in light of the joining of other parties, in addition to the spouses, are issues that we have addressed in Civil Appeal No. 444 of 2018, which concerns the same parties as the parties in this appeal and raise the same issues. We do not, therefore, find it necessary to address these issues again, save to reiterate that, for reasons that we have given in Civil Appeal No. 444 of 2018, the respondents were properly joined to the proceedings, the trial court had jurisdiction to entertain the proceedings under Section 17 of MWP Act, and the amended originating summons was competent.
40. It was common ground that A and J were married on December 4, 1979; that as at September 6, 2005 when A initiated proceedings in the High court under section 17 of the *MWP Act*, there were ongoing divorce proceedings in the High Court; that during the subsistence of the marriage, A and J lived on LR. No. xxx/xx Kibagare which was registered in their joint names; and that this was their matrimonial home. It is also common ground that the couple had shares in Lacheke Enterprises Limited which was incorporated in 1988.
41. The dispute relates to the distribution of matrimonial property.
A identified moveable and immovable properties which she claimed were matrimonial property. The first issue that we must address is whether the properties that A claim, are matrimonial property that can be distributed under section 17 of the *MWP Act*.
42. A commenced the proceedings in September 2005 under the *MWP Act* which was then in force. The proceedings were subsequently heard and finally determined in February 2017. This was after the promulgation of the *Constitution of Kenya*, 2010, and the enactment in Kenya of the *Matrimonial Property Act* No. 49 of 2013. However, although the *MWP Act* is no longer in force in Kenya having been superseded by the *Matrimonial Property Act* No. 49 of 2013, the issues raised in the appeal before us have to be determined in accordance with the *MWP Act* which was the law in force at the time the proceedings subject of the appeal were initiated.



43. The *MWP Act* is an English law that was applied in Kenya as a statute of general application through section 3 of the *Judicature Act*. In *Mereka v Mereka* (*supra*) this court in addressing the application of section 17 of the *MWP Act*, referred to several authorities of the House of Lords that are instructive.

“In *Pettitt v Pettitt* [1969] 2 All ER 385, Lord Upjohn, said at page 405 paragraphs F, G, H, thus:

“In my view, s.17 is a purely procedural section which confers on the Judges in relation to questions of title no greater discretion than he would have in proceedings begun in any Division of the High Court or in the county court in relation to the property in dispute, for it must be remembered that apart altogether from s.17, a husband and wife could sue one another even before the Act of 1882 over questions of property; so that, in my opinion s.17 now disappears from the scene and the rights of the parties must be judged on the general principles applicable in any court of law when considering questions of title to property and although the parties are husband and wife these questions of title to property must be decided by the principles of law applicable to the settlement of claims between those not so related, while making full allowances for that relationship”.

Later at page 407 paragraph H, his Lordship continued:

“But where both spouses contribute to the acquisition of a property, then my own view (of course in the absence of evidence) is that they intended to be joint beneficial owners and this is so whether the purchase be in the joint names or in the name of one. This is the result of the application of the presumption of resulting trust. Even if the property be put in the sole name of the wife, I would not myself treat that as a circumstance of the evidence enabling the wife to claim an advancement to her; for it is against all the probabilities of the case unless the husband’s contribution is very small. Whether the spouse contributing to the purchase should be considered to be equal owner or in some other proportion must depend on the circumstances of each case”.

In the subsequent case of *Gissing v Gissing* [1970] 2 All ER 780 the House of Lords made it clear that where both spouses contribute towards the purchase of a matrimonial home and there was no agreement as to the sharing of the beneficial interest, and the spouse in whose name the matrimonial home was purchased evinced no intention that the contributing spouse should have a beneficial interest therein, then the question

whether the contributing spouse is entitled to a beneficial interest in the matrimonial home is a matter dependent on the law of trusts. Further, the House of Lords recognized that there was no distinction to be drawn in law between direct contributions towards the purchase of a matrimonial house and where the contributing spouse makes indirect contributions. In that case, Lord Pearson, at page 788 C cautioned against excessive use of the maxim “Equality is Equity” in determining the proportional share of a contributing spouse. The cases of *Falconer v Falconer* [1970] 3 All ER 449 and *Hazell v Hazell* [1972] 1 All ER 925 which followed *Gissing v Gissing* (*supra*) have exhaustively considered the principles applicable in these kind of cases



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In *Falconer v Falconer* (supra) Lord Denning MR in expounding the principles of law enunciated in *Gissing v Gissing* (supra) said in part at page 452 e

“The law imputes to the husband and wife an intention to create a trust, the one for the other. It does so by way of inference from their conduct and surrounding circumstances, even though the parties themselves made no agreement on it. This inference of trust the one for the other, is readily drawn when each has made a financial contribution to the purchase price or to the mortgage instalments. The financial contributions may be direct, as where it is actually stated to be a contribution towards the price of instalments. It may be indirect, as where both go out to work, and one pays the house-keeping and the other the mortgage instalment. It does not matter which way round it is. It does not matter who pays what. So long as there is a substantial financial contribution to the family expenses, it raises the inference of trust. But where it is insubstantial no such inference can be drawn.”

44. From these authorities, it follows that the crucial issues that must be addressed in determining a dispute under section 17 of the *MWP Act*, is first, whether the property claimed is matrimonial property, secondly whether the party claiming the matrimonial property contributed to its acquisition, and what share, if any, the party is entitled to.

45. This Court in *Muthembwa v Muthembwa* [2002] 1EA 186, dealing with the issue of distribution of matrimonial properties had this to say.

“The issue of whether the respondent made a contribution to the acquisition of the suit properties was a question of fact. As it was impracticable to take accounts for the purposes of determining the respective contribution of a couple to the management of a home, there arose a rebuttable presumption of an equal contribution”

46. The holding in *Muthembwa v Muthembwa* (supra) has been reiterated by this Court in subsequent decisions, such as *PBW v JWC* [2017] eKLR. It behooves us, therefore, to consider the circumstances of this case in order to determine whether the properties being claimed by A are actually matrimonial properties that can be subject of distribution under section 17 of the *MWP Act*.

47. We start with LR. No. xxxx/xx Kibagare, which J and A agree was acquired during the subsistence of the marriage and was used as their matrimonial home. Therefore, it is apparent that LR. No. xxxx/xx Kibagare was matrimonial property. The main issue in regard to this property is how it was acquired, whether A contributed to its acquisition, and what share, if any, she is entitled to.

48. We have considered the evidence that was adduced in the trial court in regard to LR No xxxx/xx Kibagare. First, it is not disputed that it was acquired during coverture and was registered in the joint names of the two spouses. In *Kamore v Kamore* [2000] 1EA 80, this Court dealing with the issue of distribution of property under section 17 of the *MWP Act*, held as follows:

“Where 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 it that such property being a family asset is acquired in equal shares.”



49. J claimed that he solely paid for the property; that A did not contribute to the acquisition of the property; and that in any case, she had agreed to relinquish her interest if any, to him. J's evidence was that he bought LR. No. xxxx/xx Kibagare through monies that he obtained from one "Tam Fook Yin" as a loan. This person was not called as a witness nor did J produce any documents in proof of the alleged loan or repayment of the same. On her part, A stated that Tam Fook Yin was their business associate in Hong Kong but maintained that Lacheke Enterprises Limited at that time, had a thriving business and they had no need for a loan to buy LR. No. xxxx/xx Kibagare.
50. In accordance with *Kamore v Kamore (supra)* LR xxxx/xx Kibagare having been acquired during coverture and being registered in the spouses' joint names, there was a presumption arising from the joint registration, that LR. No. xxxx/xx Kibagare was a family asset acquired in equal share, and the burden was upon J who was disputing A's share in the property, to dislodge the presumption. We find that in light of the evidence that was before the trial Judge, J failed to dislodge that presumption.
51. On her part, A claimed that she was entitled to 75% of LR No xxxx/xx Kibagare, as she contributed indirectly to the acquisition of this property. This was because it was acquired with proceeds from Lacheke Enterprises Limited, where she held shares together with J and also worked from 1988 to 2001. In addition, A testified that LR No xxxx/xx Kibagare was renovated from the 2- bedroomed house that it was at purchase, to a 6-bedroomed house, which renovations she contributed to, using monies from the sale of a property she owned in Hurlingham, which property she had sold at Kes 25 million.
52. A produced documents confirming that she sold her Hurlingham property for Kshs. 25 million. While not disputing that A sold her house, J denied that A contributed to the purchase or renovation of LR. No. xxxx/xx Kibagare using the proceeds from the sale, as the house was allegedly sold two years after LR. No. xxxx/xx Kibagare was purchased. Whereas A may have spoken the truth regarding having used money from the sale of her house in the renovation of LR. No. xxxx/xx Kibagare, A did not adduce evidence to show exactly what renovations she did and how much she spent, so as to justify the 75% contribution that she claimed. In the absence of such evidence, we have no reason to find that her contribution in the acquisition of LR. No. xxxx/xx Kibagare was more than the 50% contribution based on the presumption arising from the joint registration.
53. Moreover, J was no doubt alive to A's rights to LR. No. xxxx/xx Kibagare, hence his attempts to establish that she had relinquished her rights to the property through an agreement of sale. The learned Judge properly addressed his mind to the issue of the sale of LR. No. xxxx/xx Kibagare, and was clear that this was not proved.
54. Our examination of the purported agreement of sale shows that A had agreed to sell all her shares, rights, and interests in the said property for a consideration which has not been disclosed. Peter Mwendwa Malonza, the advocate who drew the agreement was called by J as a witness. He testified that the agreement was signed in his presence and insisted that he witnessed the payment of consideration of US\$70,000 which A was paid in cash. However, there was no evidence of receipt for that money, nor did A acknowledge receipt of this money in the sale agreement. The advocate could not explain why the amount paid was not stated in the agreement. Consideration is a critical part of an agreement and without the consideration given being stated in the agreement, the agreement is invalid.
55. On his part, J admitted that although he offered to buy out A's half-share in LR. No. xxxx/xx Kibagare, A reneged on the agreement. If J had paid an amount of US\$ 70,000, one would have expected a demand to be made for a refund of the money. However, there is no evidence that J made any demand for refund of US\$ 70,000 from A.



56. The above factors coupled with the evidence of Mackenzie Mweu, a document examiner who testified on behalf of A, whose evidence was that the signature on the sale agreement that was purported to be A's signature, was different from A's known signatures, leaves us in doubt as to whether A entered into any such sale agreement. We are alive to the fact that J's advocate had in his possession a report dated March 24, 2009 from a document examiner one Hezron W. Wamalwa, who purported to have examined known signatures of A which he compared with the signatures on the sale agreement, and concluded that the signatures were in the same normal hand. J having opted not to call this crucial witness, we believe and accept the evidence of the expert witness Mackenzie Mweu who testified before the trial court. We therefore uphold the finding of the trial court that J and A were each entitled to 50% share in LR. No. xxxx/xx Kibagare based on the acquisition of the property during coverture and the joint registration.
57. As regards LR. No. xxx/xxxx and LR. No. xxx/xxxx, A maintained that these properties were bought through proceeds from Lacheke Enterprises Limited but registered in the name of J. On his part, J denied that the purchase of the property was financed by proceeds from Lacheke Enterprises Limited. He maintained that he bought the two properties from his own resources and that he subsequently sold the two properties to D.
58. It was apparent from the documents that were produced in evidence that LR. No. xxx/xxxx and LR. No. xxx/xxxx were bought and registered in the name of J on July 4, 1995. This was during the subsistence of the marriage while the spouses were in cohabitation. The two properties were also bought during the time when Lacheke Enterprises Limited was in operation, and during which time J and A were the only directors and shareholders in the company, each owning one share. Although J maintained that he bought the two properties from his own resources, he did not adduce any evidence to support this allegation, and we are not surprised that the trial Judge did not believe him.
59. On the other hand, the trial Judge believed A's evidence that Lacheke Enterprises Limited was doing well, and that A worked and contributed to the company's progress from 1988 to 2001. This was supported by documents and the fact that A was getting a salary/stipend from the company. We find that although the company was a separate legal personality, it was in actual fact a family enterprise as there was no other directors or shareholders of the company apart from the two spouses who both worked in the company. Thus, the legal personality of the company was blurred and this explains why the two properties that were bought with proceeds from the company were registered in the name of J. The circumstances herein show that the company being a family venture to which A was actively participating, and the two properties having been purchased during coverture, the registration of the two properties in the name of J imputed that by virtue of its acquisition through proceeds from the joint family venture, and their acquisition during coverture, the two properties were matrimonial property held by J partly for his own benefit and also in trust for A.
60. As regards the sale of LR. No. xxx/xxxx and LR. No. xxx/xxxx by J to D, the title indicates that the transfer was registered on August 2, 2005. As at that date the marriage had broken down, J had moved out of the matrimonial home and A had filed a divorce cause for dissolution of the marriage. Obviously, the relationship between the spouses had become very acrimonious. We agree with A that the purported sale of the two properties to D was nothing more than an attempt to put the properties beyond her reach in a bid to defeat her rights to the properties. This is buttressed by the fact that the two properties had been transferred to J at a consideration of Kshs 20 million about 10 years earlier, and the consideration of Kshs 5 million allegedly paid by D for each of the properties, was a gross undervalue, which puts the genuineness of the transfer transaction in question. The fact that D made no efforts to challenge A's claim nor assert his rights to the two properties, is further evidence that he had no genuine claim to the properties.



61. The attempt by D to transfer LR. No. xxx/xxxx and LR. No. xxx/xxxx to F at the same consideration of Kshs 5 million for each property, just a few months after the purported sale to him by J, further erodes the authenticity of the transactions. In her affidavits dated July 2, 2007 and July 9, 2010, A challenged F's alleged interest in the properties contending that F was a younger sister to J. A indicated that she intended to have her cross-examined during the trial. F never filed any replying affidavit denying A's allegation that she was J's sister. Moreover, it was telling that she skillfully avoided the cross-examination on her affidavit, by choosing not to testify during the trial. We come to the same conclusion as the trial court did, that the alleged sale to Femida was no more than a further attempt to obfuscate the ownership of the two properties, while in actual fact the beneficial ownership remained in J for his benefit and in trust for A. A was therefore entitled to a share in the two properties.
62. As regards the distribution of the two properties, the learned Judge held that A was entitled to half the values of LR. No. xxx/xxxx and LR. No. xxx/xxxx due to the fact that she worked for the company and contributed towards the growth of the business, and therefore any profit and investment that the business made was due to the joint efforts of the spouses. While A's contribution in regard to LR. No. xxx /xx Kibagare was buttressed by the registration of the property in the joint names of the two spouses, A's contribution in regard to the acquisition of LR. No. xxx/xxxx and LR. No. xxx/xxxx was mainly indirect as a result of the fact that she owned shares in the company and at some stage worked in the company. In actual fact, Lacheke Enterprises Limited as a business was actively being run by J. In the circumstances, we find that the trial judge erred in failing to take into account J's substantial contribution in developing Lacheke Enterprises Limited and generating the income that was used to buy the two properties. In our view, LR. No. xxx/xxxx and LR. No. xxx/xxxx should have been distributed in the ratio of 60%:40%.
63. As regards the shares held in Lacheke Enterprises Limited, it is not disputed that from the time of its incorporation in 1988 up to August 11, 2004, each of the two spouses held one (1) share of the 5000 shares in the company. However, J claimed that he acquired the un-allotted shares of 4998 which resulted in him having a total of 4999 shares as against A's one share, and that this was confirmed at a board meeting of directors held on August 11, 2004. But again the authenticity of A's signature to this sale was challenged by the evidence of the document examiner Mackenzie Mweu. Again, we are doubtful whether A would have conceded to J taking all the un-allotted shares at this time given that the marriage was already on the rocks and the relationship was very acrimonious. We find that A and J each owned one share, and the 4998 remained unallocated. Therefore, the shareholding of A and J in the company was equal.
64. The learned Judge declared that A was entitled to half the value of the shares held by J in Lacheke Enterprises Limited and Lacheke Lubricants Limited, and that A was therefore entitled to any properties held by the two companies subject to the value of the shares held by J which include the motor vehicles and funds held in the names of the two companies.
65. As we have stated in Civil Appeal No. 444 of 2018, in hearing an application under section 17 of the [MWP Act](#), a court has jurisdiction to go behind the veil of incorporation and grant relief concerning property owned by a company if it was satisfied that the property was actually matrimonial property.
66. We have already addressed the issue of ownership of the property held by Lacheke Enterprises Limited. In our view, this company was a family venture whose corporate personality was ignored by the spouses, resulting in property acquired through financing from the company, being treated as matrimonial property. Consequently, the property of the company was intertwined with matrimonial property. As for Lacheke Lubricants Limited, the same was incorporated on February 7, 2005, after cohabitation between J and A had ceased. It is apparent from the memorandum and articles of association that



neither J nor A owned any shares in this company. However, D was one of the shareholders and according to A the other shareholders, Jane Wanjiku Wanyoike and Moses Muderu Maina were employees of Lacheke Enterprises Limited.

67. In *HWM v WNM* [2015] eKLR, this court dealing with a situation where the trial judge had found that the husband had transferred the matrimonial home to a company in a bid to deny the wife's claim stated as follows:

“...in our view, [particulars withheld] company's corporate existence should have been disregarded and declared a mere sham, that was incorporated merely to mask the respondent as he attempted to alter and confuse the ownership of the matrimonial home and thereby make it impossible for the appellant to make any claim over it.” (Emphasis added).

68. A was also able to produce documents that showed that Lacheke Lubricants Limited was operating in the same premises where Lacheke Enterprises Limited had been operating from, and that the plant and equipment of Lacheke Enterprises Limited were leased to Lacheke Lubricants Limited. It was A's contention that Lacheke Lubricants Limited actually carried out the same business as Lacheke Enterprises Limited, and that it was incorporated with a view to transfer the assets of Lacheke Enterprises Limited to it, in order to hide the ownership of the property.
69. A stated that although she was a shareholder and director in Lacheke Enterprises Limited, J signed the lease agreement with an option to purchase the plant and equipment belonging to Lacheke Enterprises Limited without her knowledge. She also produced some documents that indicated that J was actually working in Lacheke Lubricants Limited. J did not adduce any evidence to dispel the contention by A that F was his sister or that P was the wife to C. Given the finding already discussed regarding the participation of Dilip and Femida in the transfer of LR. No. xxx/xxxx and LR. No. xxx/xxxx in a bid to put them beyond the reach of A, we have no doubt that the incorporation of Lacheke Lubricants Limited and the transfer of properties from Lacheke Enterprises Limited to Lacheke Lubricants Limited, was intended to achieve the same purpose. Although neither J nor A were shareholders in Lacheke Lubricants Limited, it is apparent that just like Lacheke Enterprises Limited, this company was actually a family enterprise. Though the apparent shareholders were D, Jane Wanjiku Wanyoike and Moses Muderu Maina, these were actually people who were under the control of J who was the beneficial ownership of the shares. Accordingly, we are satisfied that the shareholders were holding the shares in the company in trust for J and A who was entitled to 50% of the shares given that the origin of the company was Lacheke Enterprises Limited.
70. We find that the properties belonging to Lacheke Enterprises Limited and Lacheke Lubricants Limited were so intertwined with the matrimonial property as to justify the legal personality of the two companies being disregarded. Consequently, the learned Judge was right in declaring that A was entitled to half the value of the shares held by J in the two companies, and that A was entitled to any properties held by the two companies anchored on her 50% share in each of the companies.
71. We come to the conclusion that apart from the limited issue of distribution in regard to LR. No. xxx/xxxx and LR. No. xxx/xxxx in which we allow the appeal to the extent of reducing A's shares in the two properties to 40% and increasing J's share to 60%, we dismiss the appeal in regard to all the other grounds of appeal. As J's success in this appeal is minimal, he shall pay 50% of A's costs of the appeal. Those shall be the orders of the Court.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY NOVEMBER, 2023.

HANNAH OKWENGU



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**JUDGE OF APPEAL
ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL
K. M'INOTI**

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

