



**Lacheke Lubricants Limited & another v Chanandin & 4 others (Civil Appeal
444 of 2018) [2023] KECA 1359 (KLR) (10 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1359 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 444 OF 2018
HM OKWENGU, MSA MAKHANDIA & K M'INOTI, JJA
NOVEMBER 10, 2023**

BETWEEN

LACHEKA LUBRICANTS LIMITED 1ST APPELLANT

FEMIDA ALAUDIN CHANANDIN 2ND APPELLANT

AND

ANJU CHANANDIN 1ST RESPONDENT

JAHANGIR ALAUDIN CHANANDIN 2ND RESPONDENT

DILIP KUMAR PATEL 3RD RESPONDENT

PIYUSH PATEL 4TH RESPONDENT

CHAYABEN PATEL 5TH 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. This is an appeal from the judgment of the High Court delivered on February 9, 2017. The appeal was filed by Lacheke Lubricants Limited and Femida Alaudin Chanandin who were dissatisfied with the judgment. The judgment arose from an amended originating summons dated November 14, 2005, that was lodged by Anju Chanandin (Anju) under section 17 of the [Married Women's Property Act 1882](#).
2. Before the originating summons was heard, Anju filed a chamber summons in which she sought leave to have Dilip Kumar Patel (Dilip) Piyush Patel (Piyush) and Chayaben Patel (Chayaben) joined in the proceedings as respondents on the ground that Jahangir had been transferring and alienating properties and funds which were acquired during the subsistence of the marriage, to the names of the three



persons, with the aim of removing the property from Anju's reach. Thus, it was necessary to join the said parties to the suit in order to effectively determine the matter. In addition, Anju sought leave to have the amended originating summons (which brought in specific pleadings against Dilip, Piyush, and Chayaben) deemed as duly filed. Both prayers were granted by Aluoch, J. (as she then was) on November 10, 2005.

3. As per the amended originating summons the respondents were Anju's husband Jahangir Alaudin Chanandin (Jahangir), Dilip, Piyush, and Chayaben. Lacheke Lubricants Limited and Femida Alaudin Chanandin (Femida) who are now the appellants, were subsequently joined in the suit as interested parties.
4. Among the orders sought by Anju in the amended originating summons, were: a declaration that the properties known as LR No 209/2888 and LRNo 208/4965 which were registered in the name of her husband Jahangir, and which had been transferred to the name of Dilip, is owned jointly by Anju and her husband; that these properties should be sold and proceeds apportioned equally between them; that several motor vehicles which were registered in the names of Jahangir and transferred to the name of Lacheke Lubricants Limited, are jointly owned by Anju and Jahangir; that these motor vehicles should be sold and proceeds shared equally; and that the shares in Lacheke Enterprise Limited registered in Jahangir's name are jointly owned by Jahangir and Anju in equal shares and are held by Jahangir in trust for Anju.
5. In response to the amended originating summons Jahangir filed a lengthy 54-paragraph affidavit in which he denied Anju's claims and challenged the jurisdiction of the High Court. Jahangir also filed a notice of preliminary objection in which he raised a point of law regarding the jurisdiction of the High Court to entertain the chamber summons. He contended that the application is bad in law and incompetent on the grounds that: the High Court has no jurisdiction to entertain the same as drawn and filed; the application seeks orders in excess of the jurisdiction and powers of the court in determining and adjudicating rights under section 17 of the *Married Women's Property Act of 1882*; the amended originating summons seeks orders in excess of the jurisdiction and powers of the High Court in determining alleged rights under section 17 of the *Married Women's Property Act of 1882*; the application seeks orders that have not been prayed for in the amended originating summons; and the 2nd, 3rd, and 4th respondents have been improperly joined in the suit.
6. Upon Lacheke Lubricants Limited being joined as an interested party, Femida in her capacity as director of Lacheke Lubricants, filed a replying affidavit in which she denied that the company was holding any properties on behalf of Jahangir. She swore that Jahangir was neither a director nor a shareholder of Lacheke Lubricants Limited, and that motor vehicle KAT 172Q is registered in the name of Lacheke Lubricants Limited, while KAE 117K was bought from Jahangir by Lacheke Lubricants Limited. Femida deposed that the amended originating summons was bad in law and fatally defective for misjoinder of causes of action.
7. The preliminary objection was heard by the High Court (Rawal J. - as she then was), and dismissed on May 26, 2008. The learned Judge in dismissing the preliminary objection, noted that Jahangir transferred the claimed matrimonial properties to his family members and employees during the pendency of the suit, which action Anju claimed was intended to steal a match on her, but that the issue of jurisdiction had not been brought out with clarity, and the court needed to hear the matter in order to be able to determine the issue concerning jurisdiction.
8. Subsequently, the hearing of the amended originating summons proceeded through oral evidence, both Anju and Jahangir calling witnesses, while Lacheke Enterprises Limited opted to rely on the



affidavit sworn by Femida. Dilip, Piyush and Chayaben did not call any evidence or file any response or submissions.

9. In his judgment, the trial Judge (Kimaru J. - as he then was), upon considering the evidence and the submission before him, identified the issue for determination to be whether the properties listed by Anju constitute matrimonial property. He answered that question in the affirmative and declared that Anju was entitled to half the values of LR No 209/2888, LR No 209/4965 and LR No 7752/65; and further that Anju was entitled to half the value of the shares held by Jahangir in Lacheke Enterprises Limited and Lacheke Lubricants Limited.
10. The appellants filed an amended memorandum of appeal in which they substantially focused on the competence of the amended originating summons and the issue of jurisdiction. The grounds raised in this regard, at paragraph 1B to 1L, 2B, 3B to 3G of the amended memorandum of appeal, are that the learned Judge erred:
 - i. in entertaining an originating summons which was not signed by either the applicant or her counsel;
 - ii. in overlooking the fact that order 1 rule 10 of the *Civil Procedure Rules*, like rule 76 of the *Court of Appeal Rules*, embodied the fundamental right to a fair hearing which required that the court *suo moto* orders that the originating summons be converted into or replaced by a plaint, and enjoins all persons who stood to be affected by its decisions;
 - iii. in entertaining the amended originating summons in which the 2nd to 6th respondents who were not spouses as mandated by section 17 of the repealed *Married Women's Property Act, 1882*, were not made parties to the proceedings before it;
 - iv. in not dismissing or striking out the amended originating summons and requiring the applicant to commence her suit against all the respondents by way of plaint;
 - v. in undertaking proceedings which via the amended originating summons offended the requirement of pleading that they give the other parties notice of the case they have to meet;
 - vi. in not requiring that the 2nd to 6th respondents and one Manish Mehta against whom reliefs were sought be made defendants in a suit commenced by way of a plaint;
 - vii. in not requiring that Lacheke Enterprises Limited on whose behalf the applicant made claims to LR No 209/2888, LR No 209/4965 and the motor vehicles be made a party;
 - viii. in ignoring the summary nature of proceedings under section 17 of the *Married Women's property Act 1882* which are wholly unsuitable to spouses' claims that properties registered in the names of third parties are held upon a resulting/constructive trust for spouses;
 - ix. in assuming jurisdiction over the amended originating summons to which non-spouses were parties;
 - x. in presiding over wholly illegal proceedings;



- xi. in ignoring the separate legal personality of a company from those of shareholders and directors be they spouses or not;
 - xii. in holding that the pleading of the case against the appellants was faulty and illegal;
 - xiii. in granting the 1st respondent reliefs against the 5th respondent which was a mere interested party in the proceedings and a non-party, Lacheke Enterprises Limited;
 - xiv. in overlooking the fact that the 1st respondents claims of interest in LR No 209/2888, LR No 209/4965 and the motor vehicle registered in the names of the appellant and the 5th respondent were based on a rejection of the rule in *Salomon v Salomon* and consequently, the 1st respondent did not have a cause of action against the appellant;
 - xv. in ignoring the fact that, the case of the 1st respondent as pleaded was made on behalf of Lacheke Enterprises Limited which was not a co-applicant in the amended originating summons;
 - xvi. in not following this court's decision in *Kimeria v HFCK* which demand that the 2nd to 6th respondents be struck out from an originating summons taken out under section 17 of the repealed *Married Womens Property Act, 1882*;
 - xvii. in holding that the 2nd to 6th respondents were not obliged to participate in proceedings taken out under section 17 of the repealed Married Womens Property Act, 1882; and
 - xviii. in ignoring the ruling of the Court in Civil Appeal No 277 of 2005 MNK v SNK which was binding on him.
11. In the original memorandum of appeal, the appellants had faulted the learned Judge on several grounds including: holding that Anju was entitled to properties owned by Lacheke Lubricants Limited subject to half the value of shares held by Jahangir, when the evidence on record was clear that Jahangir has never been a shareholder in Lacheke Lubricants Limited; in exercising jurisdiction over properties owned by a limited liability company; in applying the equitable doctrine of trust to property owned by a limited liability company which is a separate company from a husband and a wife; in distributing shares and property belonging to a limited liability company when such shares and property can only be dealt with under the *companies Act*; and in holding that Femida did not attend court to defend her ownership of LR No 209/2888 and LR No 209/4965 when no evidence was led to support such a conclusion.
 12. In support of the appeal, the appellants filed two sets of written submissions prepared by P W Wena & Company advocates. The first set is dated 20th May 2019, and the second set is the supplementary submissions dated 6th May 2022. Jahangir who supported the appeal did not file any submissions in this appeal but relied on the written submissions that had been filed by his advocate Ms Judy Thongori & Co Advocates in Civil Appeal No 449 of 2018, an appeal lodged by Jahangir from the same judgment subject of this appeal. In opposing the appeal Anju also filed written submissions prepared by her advocate W.G. Wambugu on 12th July 2022.
 13. The initial submissions filed by the parties addressed the issues which were raised in the original memorandum of appeal filed in Civil Appeal No 444 of 2018 and Civil Appeal No 449 of 2018,



and these will be addressed in the judgment in Civil Appeal No 449 of 2018. The supplementary submissions filed by the parties addressed the issues which were raised in the amended memorandum of appeal filed in this appeal, and also a memorandum of appeal in Civil Appeal No 449 of 2018. We highlight these submissions as they pertain to this particular appeal.

14. In their supplementary submissions the appellants identified the issues for determination in the appeal as follows:
 - a. Whether the proceedings before the superior court contravened the rights of the appellants and 3rd to 5th respondents to a fair hearing under article 50 of the Constitution?
 - b. Whether the entire proceedings of the superior court are illegal for offending the rule in *Housing Finance Company Limited v Faith W Kimeria & Another* [1998] eKLR?
 - c. Whether the 1st respondent's (in essence) derivative suit against Lacheke Enterprises Limited which was not a party, could be prosecuted by way of an originating summons?
 - d. Whether movable and immovable assets of companies named in the decree of the superior court namely Lacheke Enterprises Limited and Lacheke Lubricants Limited are matrimonial assets which can be distributed under section 17 of the repealed Married Women's property Act, 1882 and its equivalent under the new Matrimonial Property Act, 2013?
 - e. Whether the superior court declined to follow decisions of this honourable court?
 - f. Whether the superior court had jurisdiction to grant the reliefs which appear in its decree?
15. The appellants submitted that Civil Appeal No 444 of 2018 is competent as it was filed in Court in accordance with the timelines provided in the Court of Appeal Rules 2010. It was submitted that the appellants had applied for certified copies of the proceedings and ruling in accordance with rule 82 (1) and (2) of the Court of Appeal Rules, and therefore they had the benefit of exclusion from computation of 60 days certified in the certificate of delay as necessary for the preparation of the proceedings and ruling.
16. The appellants argued that the learned Judge had no jurisdiction to make any finding or declaration in regard to any property or funds held in the name of Lacheke Enterprises Limited and Lacheke Lubricants Limited, who are separate legal entities and whose properties do not constitute matrimonial properties capable of distribution between spouses. In this regard, it was asserted that *Salomon vs Salomon* [1987] AC 22 had settled the law that a company is a separate legal personality from its shareholders, and that what a company owns is separate and distinct from what its shareholders or directors own. Thus the Family Court dealing with matrimonial property has no jurisdiction to deal with property invested in a company.
17. The appellants further relied on *S.N.K. vs M.S.K. & 5 others* [2015] eKLR, in arguing that the learned judge had no jurisdiction to hold that Anju was entitled to any properties held by the two companies subject to half the value of shares held by Jahangir; that Anju did not prove or even allege that Jahangir owned any shares in Lacheke Lubricants Limited; and that the evidence on record clearly demonstrated that Jahangir has never owned any shares in Lacheke Lubricants Limited since its incorporation.



18. The appellants posited that neither Anju nor Jahangir has ever owned shares in Lacheke Lubricants Limited; that the memorandum of association of Lacheke Lubricants Limited names the shareholders as Dilip Kumar Patel, Jane Wanjiku Wanyoike and Moses Munderu Maina; that letters from the Registrar of Companies confirmed that as at the date of the hearing of the amended originating summons, the shareholders were the same except for Femida Alaudin Chanandin who had taken the place of Dilip Kumar Patel; and that there was no evidence that any of the shareholders in the company were holding shares in trust for Anju.
19. The appellants noted that Femida was joined in the proceedings as an interested party on account of her purchaser's interest over LR No 209/2888 and LR No 209/4965 and not in respect of ownership of shares in Lacheke Lubricants Limited; that since Jahangir has never been a shareholder in Lacheke Lubricants Limited the learned Judge erred in declaring that Anju was entitled to half the value of the shares owned by Jahangir in the said company.
20. The appellants faulted the learned Judge, arguing that the High Court dealing with matrimonial property in a matrimonial cause only has jurisdiction to deal with shares in a limited company if those shares are registered in the name of one of the spouses. In this regard, the appellants cited *S.N.K. vs M.S.K. & 5 others* (*supra*), where the Court of Appeal cited *Muthembwa vs Muthembwa*, [2002] 1 EA 186 (Civil No 74 of 2001) which relied on *Mereka vs Mereka* Civil Appeal No 236 of 2001. The appellants argued that the High Court had no jurisdiction to make a declaration on the company properties as the shares were not directly owned by one of the spouses.
21. The appellants stated that LR No 209/2888 and LR No 209/4965 were transferred from Jahangir to Dilip on August 2, 2005 which was before the originating summons was filed, and thus Jahangir has no beneficial interest in the properties, as the properties ceased to be matrimonial properties; that the two properties were sold to Femida although the transfer was not registered due to a court order stopping the registration; that Femida has a purchaser's interest in the two properties and the evidence on record does not show that she is under the influence of Jahangir; and that the trial Judge found that the nature of the relationship between Femida and Jahangir was not clear. Therefore, the trial Judge had no basis to assert that Femida was acting under the control of Jahangir.
22. In addition, the appellants faulted the trial Judge in holding that Femida did not give evidence in court but had only filed an affidavit and drawing an adverse inference on Femida's failure to give evidence in court, as this did not prove that she was holding the two properties in trust for Jahangir. The appellants argued that Femida was wrongly joined in the suit as she was not the registered proprietor of the two properties and the court's finding was therefore not founded on any evidence.
23. Finally, the appellants submitted that Lacheke Enterprises Limited was not a party to the suit nor was it ever served with the pleadings, and therefore the learned Judge erred in making declarations and orders concerning properties owned by Lacheke Enterprises Limited. Besides, the learned Judge did not restrict himself to shares held by Jahangir in Lacheke Enterprises Limited, but also purported to deal with properties held by Lacheke Lubricants Limited including motor vehicles, and funds held by the two companies in banks.
24. Jahangir supported the appeal arguing that the High Court had no jurisdiction to make a finding with regard to properties, motor vehicles, funds and shares held in Lacheke Lubricants Limited or any property held by Lacheke Enterprises Limited. This is because a company is a separate legal entity from its shareholders and directors and property registered in a company cannot be subjected to matrimonial proceedings. As concerns shares held by Jahangir in Lacheke Enterprises Limited and Lacheke Lubricants Limited, Jahangir submitted that Lacheke Enterprises Limited was not a party to the proceedings and any matter touching on the formation and shareholding of Lacheke Enterprises



- Limited and Lacheke Lubricants Limited is an issue for determination before the commercial courts. Moreover, according to the memorandum of association which was produced in evidence, Jahangir is not a shareholder of Lacheke Lubricants Limited.
25. Jahangir submitted that the supplementary record of appeal demonstrated that an illegal procedure was adopted to adjudicate on the dispute concerning properties allegedly acquired by Anju during her marriage; that the High Court failed to follow *Kimeria vs Kimeria* [1988] eKLR, which held that any suit filed by a wife under section 17 of the *Married Women's property Act of 1882* of England is for speedy resolution of the distribution of what share if any the wife is entitled to.
 26. Jahangir urged that the decree of the High Court should be set aside as the procedure used was illegal; that section 17 of the *Married Women's property Act 1882* envisages an evaluation and examination of how a husband and a wife manage their affairs and the contribution of each in the acquisition of property, and that outsiders have no role in that evaluation, unlike in Anju's position in which Lacheke Enterprises Limited was alleged to have acquired the immovable properties claimed; that although the application dated November 9, 2005 was allowed by consent on November 10, 2005, as was held by this Court in *Ibrahim Okoyana vs Ziporah Musi & another* [1987] eKLR, the consent was illegal as parties to a suit cannot agree to achieve an unlawful purpose. Therefore, the proceedings were null and void as the object of the consent was to fundamentally change the character of the proceedings under section 17 of the *Married Women's property Act*.
 27. The appellants argued that the rights of Lacheke Enterprises Limited and Lacheke Lubricants Limited were contravened as they were not heard before adverse orders were made against them; that the proper procedure provided in order 1 rule 10 & order 53 rule 3(2) of the *Civil Procedure Rules*, and rule 76 of the *Court of Appeal Rules*, require that persons who are likely to be affected by decisions of courts or tribunals be made parties to the proceedings or appeal. It follows that where a judgment affects the property rights of a person who is not a party to the proceedings, the judgment should be set aside. In support of this proposition, Jahangir cited this Court's decision in *James Ndungu Wawambu vs Republic & 7 others* [1995] eKLR in which the Court set aside such a judgment. Also cited was *Mradula Suresh Kantaria vs Suresh Nanalal* [2010] eKLR, in which this court struck out a notice of appeal that had not been served on persons affected by the appeal.
 28. Jahangir faulted the learned Judge for ignoring the separate legal personality of Lacheke Enterprises Limited and Lacheke Lubricants Limited, and making adverse orders against them without their being heard. In addition, for granting Anju relief that she had not claimed in her amended originating summons, thereby exceeding his jurisdiction. *Nadwa vs Provincial Insurance Company of East Africa* [1995-1988] EACA 288, was cited for the proposition that those who wish to have prayers must make the necessary amendments to their pleadings and seek them, and that the court lacks jurisdiction to grant reliefs which have not been sought.
 29. In her submissions, Anju submitted that during the subsistence of her marriage to Jahangir, they incorporated a company - Lacheke Enterprises Limited in 1998. Both Jahangir and herself were directors and shareholders of the company each having one share. This was confirmed by a letter dated August 8, 2005 from the registrar of companies which Anju produced in evidence during the hearing. Anju also submitted that she proved during the hearing, that Jahangir fraudulently altered the shareholding in Lacheke Enterprises Limited by forging her signature on the alleged agreement for the sale of her share in the company. In addition, Jahangir fraudulently allotted himself a further 4998 shares in the company. Anju maintained that the report and evidence of Mr. Mackenzie Mweu a forensic document examiner who examined the signatures on the agreement, confirmed that there were inconsistencies in the signatures.



30. Further, Anju submitted that although LR No 209/2888 and LR No 209/4965 were purchased through proceeds from the business in Lacheke Enterprises Limited through the joint efforts of Anju and Jahangir; that the properties were registered in the name of Jahangir who in a bid to steal a match and to keep the properties out of Anju's reach and from the court's jurisdiction, fraudulently transferred the said properties to Dilip in the year 2005; and that in a further attempt to obscure the transaction, Dilip attempted *vide* transfer documents dated December 30, 2005, to transfer LR No 209/2888 and 209/4965 to Femida.
31. Anju asserted that Jahangir incorporated Lacheke Enterprises Limited as a vehicle to assist him in fraudulently transferring properties from Lacheke Lubricants Limited to third parties in a bid to steal a match on her and to defeat her from claiming shares in the company. Therefore, the court was right in making a finding that LR No 209/2888 and LR No 209/4965 is still matrimonial property and that Anju was entitled to half their values.
32. Anju relied on *S.N.K. vs M.S.K. & 5 others* (*supra*) and *Mereka vs Mereka* (*supra*) for the proposition that the jurisdiction of the court under section 17 of the *Married Women's Property 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. Anju maintained that the lower court in its judgment clearly set out valid grounds for interfering with the property held in the name of the appellants and took into account the evidence adduced in court especially the conduct of Femida and Jahangir in fraudulently transferring LR No 209/2888 and LR No 209/4965, in a bid to steal a match on her.
33. It was argued that the court rightfully held that Jahangir is the equitable and actual owner of LR No 209/2888 and LR No 209/4965, and that he holds the same in trust for Anju and therefore the findings of the court cannot be faulted. Anju 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.”
34. In regard to the orders issued that were alleged not to have been sought, Anju relied on *Anne Chepkemoi Ngeny vs Joseph Tireito & anor* [2021] eKLR, in which this Court held:
- “The appellant in her memorandum of appeal had put forth a ground that the learned Judge erred in granting reliefs that were not specifically pleaded or proved. The appellant was referring to the orders issued by the superior court to have the new titles canceled and the suit property reverting back to the 1st respondent. The appellant having gone against the *lis pendens* doctrine, the court had to ensure justice is served by issuing those orders. The appellant and the 2nd respondent were trying to steal a match on the 1st respondent by disobeying court orders and hoping the court would turn a blind eye. The learned Judge properly exercised his discretion in the manner that he did. Under the circumstances, the learned Judge cannot be faulted for cancelling the title deed and ordering the re-transfer of the properties to the 1st respondent.”



35. Anju 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. In this regard, Anju relied on *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014] eKLR, for the proposition that tracing is an equitable remedy and equity shall trace the suit property for ends of justice to be served. Anju urged the Court to dismiss the appeal with costs.
36. This being a first appeal, this Court is under an obligation to reconsider and evaluate all the evidence that was adduced before the trial court as per the record of appeal, the submissions made before us, the authorities cited, and the law. In doing so, we bear in mind that the trial court had the advantage of seeing the demeanour of the witnesses and therefore we must pay due homage to the findings of the trial Judge on issues of fact unless it's plainly clear that the learned Judge was wrong.
37. The issues before us as we discern them can be compressed as follows:
- i. Whether the amended originating summons entertained by the trial court under section 17 of the *Married Women's Property Act* of 1882 was competent and whether the trial court had jurisdiction to grant the reliefs sought;
 - ii. Whether the proceedings of the trial Court contravened the rights of Lacheka Enterprises Limited and Lacheka Lubricants Limited to a fair hearing under article 50 of the *Constitution* and whether the reliefs granted against Lacheka Enterprise Limited who was not a party to the suit was proper;
 - iii. Whether the trial court could distribute movable and immovable assets of companies namely Lacheka Enterprises Limited and Lacheka Lubricants Limited as matrimonial assets under section 17 of the repealed *Married Women's property Act, 1882* and its equivalent under the new *Matrimonial Property Act* 2013; and
 - iv. Whether the moveable and immovable property registered in the name of an individual can be matrimonial property held in trust.
38. The propriety of the amended originating summons has been attacked on two fronts: competence and jurisdiction. In regard to jurisdiction, it was argued that section 17 of the *Married Women's Property Act*, was intended for summary proceedings between spouses involving properties that are matrimonial, and that this does not extend to properties registered under the *Companies Act* because of the rule in *Salomon vs Salomon (supra)*. *Muthembwa vs Muthembwa (supra)* and *Mereka vs Mereka (supra)* have been cited for the proposition that jurisdiction of a court under section 17 of Married Women's Property Act extends to shares in Limited Liability companies owned by spouses but does not extend to distribution of properties registered in the name of the company in which the spouses are shareholders.
39. In order to appreciate the position in *Muthembwa vs Muthembwa (supra)* on whether in an application under section 17 of *Married Women's Property Act*, a Judge has jurisdiction to deal with shares in a company in which one or both spouses are shareholders, the following extract from the judgment is important:
- “....the wording of section 17 aforesaid is clear. The jurisdiction of the court is to determine a question or questions between husband and wife principally, as to title to or possession of property. Where each spouse has a definite number of shares in a company as in the Mungai case (*supra*), no question could arise as to titles to the shares in issue. But in certain cases



particularly in companies in which only one spouse is a shareholder or where properties of the company have been mixed with matrimonial property problems do arise. In such a case more particularly where the said property as here, cannot be split without dealing with the respective shareholding of the parties, a court may in an application under section 17 above, deal with the parties' respective interest in the company. Section 17 does allow it. The section reads in pertinent part as follow (emphasis added)

‘in any question between husband and wife as to the title to, or possession of property, either party or any such bank, corporation, company, public body, or society aforesaid in whose books any stocks, funds, or shares of either party are standing may apply and the judge of the high court of justice may make as he thinks fit.’ (Emphasis supplied)

.....

Under section 17 the Court has power to make such order with respect to the property in dispute, and as to the cost and consequence of the application as he thinks fit. The wording of that section clearly shows that the court is clothed with wide and unfettered discretion to make such order or orders as the justice of case might demand once it has determined the question of title or possession of the subject property.”

40. In *PWK vs JKG* (*supra*) this Court (Waki, Nambuye & Kiage JJ.A), departed from the previous interpretation of *Muthembwa vs Muthembwa* (*supra*) and the holding of the court in *SNK vs MNK* (*supra*) that a trial court has no jurisdiction under section 17 of the *MWPA Act* to distribute properties registered in the name of the company in which the spouses are the shareholders, due to the company’s separate legal personality. This is how the court reasoned:

“With respect, we are not ourselves persuaded that *Muthembwa v Muthembwa* was to exactly that effect. Quite the opposite. The court there held, and we respectfully agree, that where the property of the company had been mixed with the matrimonial property, Section 17 allowed the court to deal with the parties’ respective interests in the company as injustice might otherwise result, which, to our way of thinking, is a repudiation, in appropriate cases, of the sometimes unhelpful distinction between the parties as spouses as opposed to shareholders for purposes of section 17 proceedings.

The Court in *Muthembwa v Muthembwa* found that section 17 of the *MWPA* did, in fact, allow a court to deal with the parties’ respective interests in a company in which they are shareholders. We agree with that court’s conclusion in this aspect as follows;

“...a certain landed property is registered in the name of the appellant but on it stands premises allegedly owned by a limited liability company with the parties herein as the only shareholders, in such a case there will arise problems in tracing what would peculiarly be matrimonial property, And where, as in the instant case, matrimonial property is intertwined with company property we think that injustices might result if the court declines jurisdiction, under section 17 to deal with, the whole property. In the event the wife would normally be the loser as invariably she would be the party out of possession of the property in issue” (at p.191)

That practical approach to matrimonial property that is so closely linked to or mixed inextricably with property in the name of a company under the sole shareholding of a couple without outsiders in it, appears to us to be more conducive to the doing of real and substantive justice untrammelled and un-frustrated by the technicalities and esoteric



niceties of company law that would defeat what ordinary citizens would see as rather straight-forward issues of division of matrimonial property. *Muthembwa v Muthembwa* has been followed in other cases including *RFS v JDCS* [2010] eKLR, where the Court appreciated that when the matrimonial home is built on land belonging to a company where the husband is the major shareholder with his consent, the property becomes altered and he cannot be heard to raise the distinctions of company law in the hope of defeating the spouse's interest in it as matrimonial property.”

41. We are totally in agreement with the reasoning of the Court in *PWK vs JKG* (*supra*). It would be totally unjust and unfair to deny the court jurisdiction to deal with a dispute involving distribution of matrimonial property, where the ownership of the claimed property is obfuscated through transfer of the property to a company which is either wholly controlled by the husband and wife as sole directors and shareholders, or by the husband as the main shareholder. In such situations, the corporate legal personality of the company is either obscured or deliberately ignored by the couple during coverture, and this requires the court to go behind the corporate veil to determine the actual beneficial ownership of the property. As stated in *Muthembwa vs Muthembwa* (*supra*), section 17 of the *Married Women's Property Act* gives the court wide powers to inquire into the company and the issue of ownership of the property and to make orders as the justice of the case may demand.

42. That position was re-emphasized by this Court in *HWM v WNM* [2015] eKLR, where the court relied on a dictum by Danckwerts LJ in *Merchandise Transport Limited v British Transport Commission* [1961] 3 All ER 495 at page 518 on whether to lift a corporate veil of a company that:

“Where the character of a company, or the nature of the persons who controls it, is a relevant feature that court will go behind the mere status of the company as a legal entity, and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance.”

43. Applying that dictum to the facts where the respondent transferred the alleged matrimonial home to a company, the Court in *HWM vs WNM* (*supra*) noted:

“...the *bona fides* of the transfer of the matrimonial home, which was done far below the market price and the rationale of the respondent allegedly transferring shares to himself and his brothers when in his evidence he maintained that he had total control of the sub division of the land left the Judge wondering what kind of a corporate body [particulars withheld] Company Limited was. Having made these conclusions which are also supported by the evidence, 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)

44. In *PWK vs JKG* (*supra*) the court considering a similar situation where the husband had transferred properties to friends and relatives noted:

“What is more, the properties were transferred to persons very closely associated or related to the respondent. They are [particulars withheld], a friend; [particulars withheld], his lawyer; [particulars withheld], his brother and [particulars withheld], his married sister. Contrary to the respondent's assertions that the transfers were for stated sums of money, the documents show that some at least of the properties were so transferred as gifts. At any rate, the closeness



of the persons to whom the transfers were made and the timing thereof are enough reason to doubt that good and effective value was obtained for those transfers, even assuming they were bona fide. Their destination is also suggestive of their being within the reach or control of the respondent.”

45. The above-cited cases confirm that where the property claimed by the wife was acquired during coverture, but is intertwined with company property registered in the name of the company or registered in the name of some other person, the court has jurisdiction under section 17 to hear the matter and determine whether it is actually matrimonial property subject to distribution.
46. This was the case with the LR No 209/2888 and 209/4965 claimed by Anju. The two properties were acquired during coverture, registered in Jahangir’s name but transferred to Dilip when the marriage relationship turned sour. As Anju claimed the two properties were acquired through proceeds from Lacheke Enterprises Limited a family business venture, the shareholding in Lacheke Enterprises Limited, the control and interest of the company in the property claimed, all needed to be addressed. Only then could the court effectually determine whether the property claimed is matrimonial property, that could be subject of distribution under section 17 of the *Married Women’s Property Act*. Similarly, the ownership and control of motor vehicles that moved from Lacheke Enterprises Limited to Jahangir or the other respondents were issues for consideration. For these reasons we find that the Court had jurisdiction to entertain the amended originating summons under section 17 of the *Married Women’s Property Act*.
47. As regards the competence of the amended originating summons, first, we need to dispose of an issue that was raised but which we believe was not raised in the trial court. This is the issue regarding the incompetence of the amended originating summons due to failure by the advocates/applicant to sign the summons. As we do not have the opinion of the trial court on this issue, it is not open to us for consideration. The substantive challenge to the amended originating summons was the joining of respondents other than the respective spouses to the marriage. The reliefs that were sought and the reliefs granted were also questioned. For reasons that are apparent in our analysis, we address the issue of competence from these angles together.
48. The reliefs sought by Anju in her amended originating summons included inter alia, declarations involving property registered in the name of Dilip, which she claimed is registered in Dilip’s name for the benefit of Jahangir and herself; several motor vehicles registered in the name of Jahangir and others registered in the name of Lacheke Lubricants. Anju also sought an order/decreed that shares registered in Jahangir’s name in Lacheke Enterprises Limited are jointly owned by Jahangir and her in equal shares, and that the shares are held by Jahangir in trust for Anju; that shares registered in Jahangir’s name in Lacheke Lubricants Limited are held by Jahangir in trust for Anju in equal shares; and that the court order and decree that the said shares are properly owned by Jahangir and Anju jointly and in equal shares. Anju also sought similar orders regarding motor vehicles and monies held in different banks in the name of Dilip, and others held in the name of Jahangir as well as another account in the name of Piyush.
49. From the evidence before the trial court, it was evident that property acquired through funds from Lacheke Enterprises in which Anju and Jahangir were the only shareholders and directors, had changed hands not just from Lacheke Enterprises to Jahangir, but even to Dilip, Piyush, Chayaben, Lacheke Lubricants and Femida. Order 1 rule 10(2) of the *Civil Procedure Rules* states that:

“The court may at any stage of the proceedings, either upon, or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant be struck out,



and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon or settle all questions involved in the suit, be added.”(Emphasis added)

50. In the circumstances that were before the trial court the issue of ownership and distribution of the property could not be effectually and completely adjudicated without joining parties who seemingly had an interest in the properties claimed by Anju. The joinder was necessary in order to determine whether the property subject of the application was actually matrimonial property that could be distributed under section 17 of the *Married Women’s Property Act*. Although the dispute was principally between Jahangir and Anju, the amendment of the originating summons was necessary to bring in the other parties named, not only in order to give them an opportunity to be heard on the issue of the property, but also for the Court to inquire into the actual ownership and control of the properties. The ground of appeal in this regard therefore fails.
51. In his judgment the trial Judge made orders that Anju was entitled to half the values of the three properties, that is, LR No 209/2888 and 209/4965, and LR No 7752/65 Kibagare; that from the shares held by Jahangir in Lacheke Enterprises Limited and Lacheke Lubricants Limited, Anju is entitled to half the value of the shares held by Jahangir in the two companies; that Anju is entitled to any properties held by the two companies subject to half the value of the shares held by Jahangir including the motor vehicles and any funds held in the name of the two companies. The question is whether the court had jurisdiction to grant such reliefs, and whether the reliefs granted were compatible with the orders sought.
52. We have already addressed the claim regarding LR No 209/2888 and 209/4965, and LR No 7752/65 Kibagare. We believe we have said enough to show that the relief regarding these properties was sought by Anju, and that it was within the purview of the court to address and grant such relief under section 17 of the *MWP Act*.
53. As regards the shares in Lacheke Enterprises and Lacheke Lubricants Limited, Anju’s prayers were for orders that shares held by Jahangir in these companies were held by him for himself and in trust for Anju in equal shares. In accordance with the holding in *Muthembwa vs Muthembwa (supra)* both companies having been incorporated during Anju’s cohabitation with Jahangir, the court had jurisdiction to inquire into the ownership of the shares in the companies and distribute them accordingly. Equally, the court had jurisdiction to go behind the veil of incorporation and grant relief concerning property found to be in the name of the company, but which it was satisfied was matrimonial property. In the circumstances, the orders sought and the relief granted by the court were competent.
54. For the above reasons, we come to the conclusion that this appeal has no merit as the amended originating summons was competent and the learned Judge had jurisdiction to hear the proceedings and to grant the relief sought. The appeal is accordingly dismissed with costs to the 1st respondent as against the appellants.

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

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE MAKHANDIA



.....
JUDGE OF APPEAL

J. M'INOTI

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

