TMG & another v AP (Civil Appeal 138 of 2019)
[2022] KECA 612 (KLR) (6 May 2022) (Judgment)

Neutral citation: [2022] KECA 612 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 138 OF 2019

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

MAY 6, 2022

BETWEEN

TMG ..... 1ST APPELLANT

QFG MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND TMG ..... 2ND APPELLANT

AND

AP ..... RESPONDENT

(An appeal from the judgement and decree of the High Court at Mombasa delivered by Lady Justice Thande, J on 10th April, 2019 in Matrimonial Property Cause No. 1 of 2016 [Formerly Case No. 207 of 2015])

JUDGMENT

1. The Appellants have in this appeal challenged the judgment of the High Court at Mombasa delivered by Thande, J. dated 10th April 2019. The judgment dismissed the appellants' suit and allowed the defendant's counterclaim. The court declared that no marriage existed between the 1st appellant (TMG) and the respondent (AP); and that the respondent had no obligations to maintain the appellants and ordered the appellant to deliver vacant possession of the suit property within three months and in any event not later than 31st July 2019.

2. The 1st appellant's case before the High Court was that she met the respondent sometime in March 2008 when the couple commenced a lengthy intimate relationship. That shortly thereafter the couple started living together as a family on a property the respondent purchased as their matrimonial home in [Particular Witheld], before he sold it. That they lived together with QFG, the 2nd appellant herein who is the 1st appellant's son. That the respondent instituted Adoption Cause No. 5 of 2013 intending to adopt the 2nd appellant, which cause is still pending before the court. That sometime in 2011 the respondent purchased the suit property upon which they constructed their home and lived thereon

until the time the suit was filed in the High Court. That due to some differences between the 1st appellant and the respondent, the respondent moved out of their matrimonial home, and moved back home to Italy, and has threatened to evict the appellants and sell the suit property.

3. The appellants sought a permanent injunction restraining the respondent from interfering with the appellants' use and enjoyment of all that property known as CR xxxxxx subdivision xxxxx (Original No.xxxx/x of Section I Mainland North) measuring 0.033 hectares (the suit property) situate in Shanzu Serena in Mombasa. The 1st appellant also sought a declaration that she had an equitable interest in the suit property.

4. The respondent's undisputed account of facts are that the property in Mtwapa was sold and the parties divided the proceeds with the 1st appellant getting Kshs. 4,600,000/- and the respondent getting Kshs. 4,000,000/-. The respondent's case, which is not disputed, was that he solely purchased the suit property from Kopex Industries Limited on 26th September 2011, effectively registered it in his name on 31st October 2011, and constructed a home on it. That he allowed the appellants to move in with him on 25th February 2014. However, due to irreconcilable differences, the respondent left the suit property and relocated back to his home in Italy. The respondent subsequently served the appellants with an undated notice requiring the 1st appellant to vacate the suit property on or before 28th September 2015. Consequently, the 1st appellant instituted the suit against the respondent in the High Court Family Division.

5. As regards the adoption proceedings in respect of the 2nd appellant, the respondent admitted he filed them but that he was forced to abandon the same after learning in 2015 that the 1st appellant was legally married to one REP.

6. The High Court identified four issues for determination, that is; whether a marriage could be presumed between the 1st appellant and the respondent; whether the property in dispute is matrimonial property; whether the appellants are entitled to a 50% share in the suit property and in the proceeds of rent or sale thereof; and, whether the respondent has parental responsibility over the 2nd appellant.

7. The learned Judge, found that the 1st appellant and the respondent were not married under any system of law. She also found that due to 1st appellant's marriage to one Pearson which still subsists as the divorce proceedings between them were never concluded, the 1st appellant did not have a legal capacity to enter into another relationship with any other man. That the position could only change if a competent court declared the marriage a nullity, or upon the demise of Pearson. She found that the court could not presume a marriage between the 1st appellant and the respondent for 1st appellant's lack of capacity and thus the suit property could not be regarded as their matrimonial home of parties who were not married to each other.

8. With regard to the issue whether the 1st appellant had any equitable interest and whether a constructive trust existed over the suit property in her favour, the High Court found that the appellants failed to demonstrate that the respondent represented to them that they were to obtain proprietary rights in the suit property. Secondly, that since the 1st appellant's claim was founded on an immoral and illegal act, the court could not lend its aid to the appellant.

9. With regard to the parental responsibility and the best interest of the 2nd appellant, the High Court held that for a party to be saddled with parental responsibility, it must be demonstrated that such party has had a relationship with a child akin to that of a parent. In the circumstances, the High Court was not persuaded that the instant case placed the respondent loco parentis to the 2nd appellant, and it was not in the best interest of the child to have him regard the respondent as his father when the 1st appellant and the respondent are not married. The result was that the High Court in a judgement

delivered on 10th April 2019 found that the appellants' suit lacked merit and the same was dismissed in favour of the respondent's counterclaim as mentioned above.

10. Although the appellants have challenged that decision on fourteen grounds of appeal as set out in the memorandum of appeal, there are in our view, three main issues for determination. The first issue is whether the judge was correct to hold that for a court to presume a marriage, it was necessary that the parties had capacity to marry. The second issue is whether the judge erred in finding that there was no constructive or resulting trust over the suit property in favour of the 1st appellant. The third issue is whether the judge was right to hold that the respondent had no parental responsibility over the 2nd appellant.

11. The appeal was called out for virtual hearing on 16th February 2022, whereby Mr. Gikandi learned counsel appeared for the appellants, while Ms. Mkoya learned counsel held brief for Mr. Mulei learned counsel for the respondent. In support of the appeal, Mr. Gikandi relied on his written submissions, which he highlighted before us, and the filed list of authorities. Ms. Mkoya opposed the appeal and relied entirely on the submissions filed by Mr. Mulei on 1st April, 2021, We have duly considered the appeal, the submissions and the authorities cited.

12. This being the first appeal, rule 29 of the *Court of Appeal Rules* requires this Court to re-appraise the evidence and draw inferences from the facts. This principle was emphasized in the oft-cited case of *Selle & Another vs Associated Motor Boat Co. Ltd. & others* (1968) EA 123 where it was stated that;

> " ..... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally"

13. This Court shall therefore proceed to consider this appeal by re-evaluating and re-analyzing the evidence adduced in the High Court, and draw our own conclusions of fact and law, and will only depart from the findings by the High Court if we find that they are not based on the evidence on record, or where the said court is shown to have acted on wrong principles of law, as held in *Jabane vs Olenja* [1986] KLR 661.

14. On the issue whether capacity to marry was necessary before there can be presumption of marriage, Mr. Gikandi submitted that the relationship between the 1st appellant and the respondent was intimate, demonstrated by expensive gifts the respondent and his immediate family gave the 1st appellant. He urged that the many phone calls exchanged between them, and the numerous visits by both to Italy and Thika, the latter being the appellants rural home, all demonstrated their intimacy. Counsel placed reliance on *POM V MNK* [2019] eKLR a case he urged was similar to the instant case in that the High Court declined to divide the suit plot between the two parties, declaring that MNK was not the wife of POM, for being married to another man. He urged us to find, as did the Court of Appeal in the cited case, that the 'long association or relationship between the appellant and the respondent led to the inescapable conclusion that the two were married as husband and wife.

15. Counsel also relied on the decision in *CKC & Another (suing through their mother and next of friend JWN) v ANC* (2019) eKLR which in the case of *Rose Mueni Musau v Brek Awadh Mbarak* CA No. 267 of 2011 where the Court delivered itself thus:

> "We think on our part, that the trial court, faced with such complexity, should have opted for the law that best accords with *the Constitution* and was protective of the interests of both parties. There was no paucity of such laws and the *Kadhis' Courts Act*, Cap 11 was not an impediment as it did not oust the jurisdiction of the High Court." (Emphasis added).

16. Counsel urged that the learned trial Judge demonstrated open bias against the 1st appellant for the sin of getting a child out of wedlock and the same time having managed to get a father figure for her said child. Counsel urged that the court was not too strict with the respondent, but 'turned a blind eye' to his admitted shortcoming in regard to his personal life, those of having intimacy with the 1st appellant though married, and his sexual relations with other women.

17. Mr. Mulei in his written submissions relied on Section 9 of the *Marriage Act* and urged that the 1st appellant having admitted that she was married to another in a monogamous marriage which has not been dissolved, she could not purport to have capacity to enter into any other form of legal marriage.

18. From the evidence before the learned trial Judge, there was no dispute that the 1st appellant and the respondent met in 2008, and that soon thereafter started living together until 2015, when the respondent returned to his home country of Italy, due to irreconcilable differences between them. During the period they were together, the two did not enter into any formal marriage or ceremony.

19. Mr. Gikandi asked us to be guided by the sentiments by this Court in the case of *CKC & Another (suing through their mother and next of friend JWN) V ANC* (2019) eKLR in which the case of *Rose Mueni Musau V Brek Awadh* Mbarak CA No. 267 of 2011 was cited with approval. With respect, that case is easily distinguishable from the instant appeal and does not apply as it involved the application of Islamic Law to parties, some who professed Muslim faith and others who did not. To demonstrate this, we quote what the Court held:

> "A reading of Article 24(4) together with Article 170(5) of *the Constitution* shows strict conditions that must be satisfied before a person can invoke Islamic law to derogate from or limit the right to equality and freedom from discrimination. First, the derogation must be "only to the extent strictly necessary". Second, the derogation must relate to matters of personal status, marriage, divorce and inheritance. Third, the persons involved must be persons who profess the Muslim faith. Fourth, as regards jurisdiction of the Kadhi's court, all the parties to the dispute must profess the Muslim faith and submit to the jurisdiction of the Kadhi's court."

20. Mr. Gikandi relied on *POM V MNK* [2019] eKLR and urged us to find as did this Court in the cited case "that the long association or relationship between the appellant and the respondent led to the inescapable conclusion that the two were married as husband and wife." We have considered the cited case and in particular what the Court said about the relationship between the appellant and the respondent thus:

> "The question we have to decide is whether, given those correct observations regarding the elements that constitute a presumption of marriage which were in the present case established, the learned Judge was correct to negate all on the basis of MNPs' claim that she had in fact been somebody else's wife during the quarter century of cohabitation with

POM. We think that it sounds ill, and is not particularly edifying, for MNP herself to have been the one to claim that she was all along somebody else's wife. It is contradictory and puzzling that she should say so only when the issue of division of property arose while all along she had lived, acted and let the world believe that she was POM's wife. The immediate question that would arise is whether, on the origin and significance of the name of K, she was telling the truth. Now, regarding her credibility or her relationship to the truth..."

21. It is clear to us that it is not the length of time the parties had lived together per se that was the reason for the conclusion that there existed a marriage between them. Rather, it was the fact the Court disbelieved the respondent's claim that she was ever K's wife, given the quarter century she lived with the appellant without raising such an allegation; and secondly, for reason the issue of marriage to K arose only when the issue of division of property between the respondent and the appellant arose. The respondent's truthfulness was found doubtful and in the end, her evidence discredited.

22. In this case, there is a marriage certificate between the appellant and one Pearson. In addition, there are Divorce Proceedings filed by the 1st appellant as against Pearson, in which the appellant pleaded that she was married to the respondent in the Cause, and was asking the Court to declare the marriage invalid. Those proceedings had not been concluded by the time the 1st appellant filed this suit in Court. To date, the case is still pending. So, unlike in the cited case where there was no evidence of a marriage between the respondent and K, there is evidence of a ceremonized marriage between the 1st appellant and one Pearson.

23. Mr. Mulei relies on Section 9 of the *Marriage Act* 2014. This Act came into effect on 20th May 2014 and applies to this case. Under Section 2 of the *Marriage Act*, the following words are defined as follows:

> " cohabit" means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage; "spouse" means a husband or a wife;

24. Section 9 of the *Marriage Act* provides:

> 9. Subsisting marriages
>
> Subject to section 8, a married person shall not, while—
>
> (a) in a monogamous marriage, contract another marriage; or..."

25. Section 11 of the *Marriage Act* provides:

> " 11. Void marriages
>
> (1) A union is not a marriage if at the time of the making of the union —
>
> (a) either party is below the minimum age for marriage;
>
> (b) the parties are within the prohibited marriage relationship;
>
> (c) either party is incompetent to marry by reason of a subsisting marriage;
>
> (d) ....."

26. All these Sections do not support the 1st appellant's position.Section 11 declares that by virtue of having had a subsisting marriage to another, the 1st appellant was incompetent to marry the respondent, and if that happened the marriage would be void. Secondly, the 1st appellant and the respondent are not a spouse to each other, or a couple. At best, the law recognizes their living together as cohabitation in an arrangement of an unmarried couple that resembles a marriage.

27. In *Mary Wanjiku Githatu v Esther Wanjiru Kiarie* [2010] eKLR, Bosire JA., summarized the position on presumption of marriage thus:

> " The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife."

28. We adopt the holding by the learned Judge in the above case. The finding of the learned trial Judge that the 1st appellant and the respondent were not a married couple, and that a presumption of marriage could not be made in their case, was well founded as one of them had no capacity to enter into a marriage. For that reason, we do not agree by reason only, of arriving at that conclusion, that the Court was biased against the1st appellant. The learned Judge arrived at the correct position of law, on the facts presented before her, which position we agree with.

29. On the issue whether a constructive or resulting trust existed over the suit property in favour of the 1st appellant Mr. Gikandi, in his submissions urged that the suit property was the matrimonial home of the 1st appellant and the respondent, and that the appellant had a right to live in it as a common law wife. He urged that since the respondent moved back to Italy in 2015, his threats to sell the suit property had traumatized the 2nd appellant who is now 10 years old, and that the said threat to sell was against the best interest of the child, both under *the Constitution* and the *Children Act*.

30. Mr. Gikandi urged that the manner in which the suit property was acquired, the home constructed and completed, showed that the appellants did not move in as mere tenants, but as ones moving into a matrimonial home. Counsel urged that the appellants were involved in the acquisition of the suit property, and supervised the construction thereon as shown in the video evidence produced before the trial Judge. That the same was proof that the respondent had represented to the appellants that the house under construction on the suit property was for their permanent residence and that therefore the respondent crated a constructive trust in favour of the appellants. Counsel urged that the High Court, having concluded that the 1st appellant lacked capacity to enter into marriage with the respondent, failed to consider the question of whether there existed a trust over the suit property in the 1st appellant's favour. Counsel urged that from the parties' conduct a trust was established; that the learned trial Judge failed to take into account the concluding remarks in the evidence of the respondent where he said that he was ready to share the suit property equally with the appellants.

31. He placed reliance on the case of *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014] eKLR; *Lloyds Bank PLC v Rosset* [1991] 1 AC 107; and *Steadman v Steadman* [1976] AC 536 for the proposition that having put the appellants on the suit property, proprietary estoppel and constructive trust applied and the respondent cannot renege.

32. Mr. Mulei in his written submissions urged that no trust had arisen in this case. The respondent relied on the case of *Twalib Hatayan & another v. Said Saggar Ahmed Al-Heidy & 5 Others* (2015) eKLR.

In the cited case, the Court held that in absence of an express trust, trusts created by operation of law fell within two categories namely, constructive trust and resulting trusts. That the Court held that constructive trusts are equitable remedy imposed by the court against one who acquires property by wrong doing, meant as a safeguard against unjust enrichment.

33. Counsel urged that, as the respondent had submitted before the High Court, despite having solely purchased the Mtwapa property, and which he had registered jointly in his name and that of the 1st appellant, the respondent shared the proceeds of the sale, giving the 1st appellant 4,600,000/- and him retaining 4,000,000/-. That the said amount shared to 1st appellant was to enable her develop a home for herself and the 2nd appellant, but that instead she utilized the amount for her other endeavours, and that she was underserving of equitable relief as her hands are not clean. Counsel urged that the respondent utilized his share of the proceeds of the sale to purchase the suit property and construct on it. That the 1st appellant invested nothing in the acquisition or construction of the suit property and is not entitled to claim any share.

34. Mr. Mulei relied on the definition of matrimonial property under Section 2 of the *Matrimonial Property Act*, 2013 and urged that since the two parties were not married, they were not spouses and thus the suit property did not fit the description 'matrimonial property'.

35. Under Section 2 of the *Matrimonial Properties Act*, we find the following definitions:

> " matrimonial home" means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;
>
> "matrimonial property" has the meaning assigned to it in section 6;
>
> "spouse" means a husband or a wife."

36. We need not say much about the defined terms, as they are in tandem with those under the *Marriage Act* that we have referred to above. What is clear here is that neither the respondent nor the 1st appellant are a spouse, in that they are not a husband and wife. The definition of matrimonial home under the definition Section makes it clear that matrimonial property must be owned or leased by one or both spouses, and utilized or occupied by them as their family home. Section 6 describes what constitutes matrimonial property thus:

> " 6. Meaning of matrimonial property
>
> (1) For the purposes of this Act, matrimonial property means—
>
> (a) the matrimonial home or homes;
>
> (b) household goods and effects in the matrimonial home or homes; or
>
> (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage."

37. The learned Judge of the High Court found that the appellants' submission that they moved into the suit property as their matrimonial home could not be true for lack of capacity between the parties to marry. Further that the 1st appellant had no interest in the suit property for reason the respondent had given her a share of the sale price of the Mtwapa property in order for her to construct her own home, and that he allowed her into the suit property in the meanwhile, as she completed it. That the

respondent discovered one and a half years later that she was not constructing any house. The judge found that the circumstances in which the 1st respondent moved into the suit property did not amount to a constructive trust as the 1st appellant did not demonstrate that the respondent represented to them that they were to obtain proprietary interest in the suit land. The learned Judge found the case cited by the appellants counsel of *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014] eKLR did not apply for reason the respondent in the case had put the appellants in possession after receiving the purchase price from them before reneging on the agreement and declining to transfer the property to them. The learned Judge found the case distinguishable as it related to a sale of property between the parties. The learned Judge was right in her conclusion that the cited case did not apply to the circumstances of this case.

38. Did a constructive or resulting exist over the suit property in the 1st appellant's favour. *Halsbury's Laws of England 4th Edition* Vol. 48 at paragraph 597 defines a resulting trust thus;

> " A resulting trust is a trust arising by operation of law:
>
> i. Where an intention to put property into trust is sufficiently expressed or indicated, but the actual trust either is not declared in whole or in part or fails in whole or part; or
>
> ii. Where property is purchased in the name or placed in the possession of a person ostensibly for his own use, but really in order to effect a particular purpose which fails; or
>
> ii. Where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended."

39. The case of *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others* [2015] eKLR, outlined the basic tenets of a resulting trust thus;

> " According to the Black's Law Dictionary, 9th Edition; a trust is defined as
>
> "1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."
>
> Under the *Trustee Act*, "... the expressions "trust" and "trustee" extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property..."
>
> In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para1453). As earlier stated, with

constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ..."

40. In the case of *Peter Ndungu Njenga vs. Sophia Watiri Ndungu* [2000] eKLR the Court succinctly observed

> " The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But, such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied." Emphasis added.

41. We have evaluated and analyzed the evidence adduced by the parties. We also read the Plaint filed by the appellants. It is significant that the claim of a resulting trust was neither, pleaded, specifically particularized or proved. The appellants having failed to specify the particulars of the resulting trust raises doubt as to whether a trust existed or indeed, whether the respondent intended to create a trust.

42. It was not disputed that the respondent had, before the suit property, acquired another property in Mtwapa, which he registered in the joint names of the 1st appellant and himself. It is also not disputed that he sold that property, shared the proceeds of sale with the 1st appellant, giving her a larger share than he retained, even though she had contributed nothing towards the acquisition. The respondent made it clear in his evidence that his intention of giving the 1st appellant a share of the sale of the property, even though she had not contributed anything, was so that the 1st appellant purchased her own property and built a home for herself and her son, the 2nd appellant, which she did not do. His evidence is that he allowed her to move into his house to enable her complete her house, only to discover a year and a half later that she was not developing any house.

43. The 1st appellant's evidence was that the respondent gave her the half share of the Mtwapa property, not for her to construct any house, but as proof the said property was half owned by her. That she moved into the suit property on 25th February 2014 and by September 2015, the respondent gave her notice to vacant. The 1st appellant did not explain the sudden change of heart by the respondent.

44. We find that there is no evidence that the respondent and the 1st appellant had intention to create a trust in favour of the 1st appellant over the suit property. Given the respondent's conduct in relation to the Mtwapa property, had the respondent intended to create a trust in favour of the appellants, nothing would have been easier for him to do. As it were, the 1st appellant placed no documentary or other proof to establish an intention to create a trust in her favour over the suit property.

    The respondent's conduct of selling the property he had registered in their joint names, and sharing out the proceeds, and then registering the suit property, which he acquired thereafter in his sole name lays a clear foundation of his intention that each of them go solo, as far as property was concerned. We find that the circumstances under which the suit property was acquired as stated above, and the relationship that existed between the couple at that time; and, considering lack of any documentary or other evidence presented to the court to prove existence of a trust, the conclusion that could be made is that the two parties did not intend to create a trust in the appellants' favour. Further, the circumstances and facts of the case do not support the presumption of a trust, whether resulting or constructive, in favour of the appellants.The equitable relief of a constructive trust has not arisen in connection with the legal title to suit property in the appellants favour.

45. The only way that the 1st appellant could establish an interest in the suit property is if she could show her contribution towards acquiring the property or towards improving or developing it. There was no

pleading to that effect. The 1st appellant did not claim that she gave any monies towards the acquisition of the suit property in her evidence. Her contribution, as per her evidence and the submissions of her counsel, was supervising the construction, which the respondent denied. With due respect, the 1st appellant did not specify what her contribution as aforementioned was, neither did she quantify it, or give particulars that would aid in accessing the value of the contribution. The 1st appellant did not discharge her obligation to establish her contribution that would entitle her to claim interest in the suit property.

46. As to the respondent's evidence in cross examination by the appellants' counsel, of his willingness to share some of his property with the 1st appellant, what the respondent said he was willing to share part of his properties with the 1st appellant was an offer made on the floor of the court. What the appellants' counsel should have done in the face of that offer was to request for an adjournment and time for the parties to engage in out of court settlement under Article 159 of *the Constitution*. Having failed to do so, the court had no option but to apply the law to the evidence, the pleadings and the facts of the case in determining the rights of the parties in the case.

47. On the issue whether the respondent had parental responsibility over the 2nd appellant, Mr. Gikandi approached that point based on constitutional and statutory provisions on the best interest of the child under the *Children Act*, Section 4(2) thereof. He relied on the decision in *Serah Njeri Mwobi v. John Kimani Njoroge* Civil Appeal No. 314 of 2009, and submitted that having filed an adoption cause in which he made depositions to the effect that the 2nd appellant was his son, 'Equity regards as done that which ought to be done', and thus the adoption was complete. He urged that consequently, the respondent assumed responsibility as the 2nd appellant's father, the formality notwithstanding, and is estopped from denying the same. Counsel urged us to apply Section 4(2) of the *Children Act* and find that the 2nd appellant is entitled to be maintained in the high standard he was used to before the relationship between the 1st appellant and the respondent broke down, which includes enjoying the suit property.

48. Mr. Mulei in his submissions urged that no adoption order was produced pursuant to Sections 154 and 156 of the Children's Act, authorizing the respondent to adopt the 2nd appellant. He urged that since the 1st appellant and the respondent are not married, they are precluded from adoption proceedings by virtue of section 158 (3) (d) of the *Children's Act*.

49. The learned Judge considered the Originating Summons filed in the Adoption Cause No. 5 of 2013 in respect of the 2nd appellant. The Judge found that the application had been made by both the 1st appellant and the respondent, and was incapable of being granted by the Court by virtue of Section 158 (3) (d) of the Children's Act, and correctly so, as the two applicants were not married. While relying on the High Court decision of *ZAK & another v MA & another* [2013] eKLR, the Judge concluded that for a party to be saddled with parental responsibility, it must be demonstrated that such party has had a relationship with a child akin to that of a parent, and that the circumstances pertaining to the case were not such as would place the respondent in loco parentis to the 2nd appellant.

50. We have analyzed and evaluated the evidence adduced before the court and the judgment of the learned trial Judge. There is no dispute that the 1st appellant and the respondent had no intention of getting married, and even if they wanted to, the 1st appellant had no capacity to contract such a relationship. They were just friends living together. Further, no evidence was placed before the court to demonstrate that the respondent had a relationship with the 2nd appellant akin to that of a parent. In the circumstances, the learned trial judge did not err when she found that the respondent could not be burdened with parental responsibility over the 2nd appellant.

51. We have concluded that the appellants appeal has no merit and fails in its entirety. Accordingly, we confirm the judgment, declarations and orders of the learned trial Judge. We dismiss the appellants' appeal. We shall not make any orders as to costs.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MAY 2022.

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR