PJS v MHAD; AMH (Interested Party) (Civil Appeal 350 of 2017)
[2022] KECA 641 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 641 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 350 OF 2017

DK MUSINGA, MA WARSAME & MSA MAKHANDIA, JJA

JUNE 24, 2022

BETWEEN

PJS ..... APPELLANT

AND

MHAD ..... RESPONDENT

AND

AMH ..... INTERESTED PARTY

(Being an appeal from the Judgment and Decree of the High Court at Nairobi (W. Musyoka, J.) dated on 31st July, 2015inHigh Court (Family Division) Civil Suit No. 50 of 2008 (O.S))

JUDGMENT

1. The appeal before us arises from the breakdown of a 6-year long dual income marriage where the appellant and the respondent (the parties) were gainfully employed, enjoyed a relatively comfortable standard of living, and had the financial wherewithal to individually contribute to the accumulation of assets during the tenure of the marriage. These fundamental facts underlie the main legal questions this Court faces in the current appeal which are, whether the accumulated assets were matrimonial property; if so, the appropriate method of determining the ratio of division of the matrimonial property and how it should be applied to a marriage of this nature.

2. The parties solemnized their marriage on 1st November 2003 before a Kadhi in Nairobi. Although, no issues were born from the union, the parties focused on developing their respective careers. The appellant, a British citizen residing in Kenya since the year 2000, worked as a Consultant and an employee for [particulars withheld] Inc. and [particulars withheld] Kenya from the year 2004 to 2008 while the respondent, a Kenyan citizen born of a father who is a citizen of the Republic of Somalia and a mother who is a Kenyan citizen worked for [particulars withheld] from 1997.

3. Their marriage broke down in April 2008 and the respondent petitioned for divorce before the Kadhi's court in Civil Case No. 107 of 2008. The divorce was finalized by the High Court in May 2009 after the appellant changed his religion.

4. During their marriage, the parties purchased two properties of significance. First was the purchase of a property known as LR. No. xxxx (Original Number xxxx) on 22nd March 2005 for Kshs.30,500,000/= registered in the names of both parties as joint tenants (hereinafter the Kilimani property). Erected on the Kilimani property are two maisonettes, one that served as the matrimonial home of the parties and the other, the bigger of the two, that provides a home for the respondent's extended family and is leased to AMH, the Interested Party herein and the mother of the respondent, for a term of 99 years from 27th March 2008.

5. The second property was "Almond Cottage" erected on Title Number Kwale/Diani Beach Block/xxxx, purchased in 2008 by the parties for Kshs. 8,500,000/= from Utunzi Limited (hereinafter the Diani property). The parties subsequently incorporated a company called Les Belles Sauvages Limited where they both served as directors, and each held 50 shares in the company. [particulars withheld] Limited and [particulars withheld] Limited executed a lease dated 27th March 2008 over the Diani Property, and a certificate of lease issued to [particulars withheld] Limited on 21st April 2008.

6. Looking to acquire her rightful share in the two properties, the respondent filed an Originating Summons dated 8th October 2008 in the High Court under section 17 of the *Married Women's Property Act*, 1882 (MWPA 1882) seeking the following orders:

    a. That she is entitled to 80% share of LR. No. xxxx (Original Number xxxx) (Kilimani Property).

    b. That on payment of 20% of the value of the above property to the appellant, the Registrar of Titles to cancel the name of the appellant from the title and issue a new Certificate of Title in her name

    c. That she is entitled to 50% of all that parcel of land known as Title No. Kwale/ Diani Beach Block/xxxx, (the Diani property) registered in the name of a nominee company called [particulars withheld] Limited.

7. The respondent's claim was premised on the fact that she contributed a significant portion of the purchase price towards acquisition of the Kilimani property, being Kshs.20,000,000/= through cheques drawn from her personal account with Kenya Commercial Bank (KCB). (She produced copies of the various cheques in support).

8. According to the respondent, the funds were partly from her savings that she had amassed during her employment with [Particulars Withheld] that she kept in her dollar accounts in Kenya and New York; and partly from cash contributions from her father who was a Minister of Finance in the Republic of Somaliland. The remaining balance of Kshs.10,000,000 /= was financed through a special Mortgage facility from Savings and Loans Limited available to United Nations staff.

9. The respondent conceded that the appellant made various contributions to the purchase price and paid part of the loan, but that the same amounted to a total of only Kshs.6,000,000/= which she was willing to reimburse.

10. Owing to the generous contributions made by her parents towards the purchase price, the respondent maintained that it was mutually agreed that one of the two units on the Kilimani property would be registered in the name of her mother by way of a lease.

11. As for the Diani property, she claimed that she paid the purchase price via two cheques drawn from her account for Kshs.850,0000/= and Kshs. 7,650,000.00/=. She admitted that the appellant had contributed 50% of the purchase price with proceeds from the share of his late mother's estate. She proposed that the property be sold, and the net proceeds be shared equally between the parties, given that it had been acquired during coverture and by the joint effort of the parties.

12. In a replying affidavit to the Summons dated October 30, 2009, the appellant while referring to his various affidavits filed before the court, averred that without substantial contributions of his monies and loans he secured, the respondent would not have written the cheques amounting to Kshs. 20,000,000/= used to purchase the Kilimani property.

13. He stated that during the marriage, he requested his employer to put his entire salary and all other earnings into the respondent's United Nations Federal Credit Union (UNFCU) accounts between October 2004 and February 2007. After entering into the purchase agreement of the Kilimani property in 2005, he also utilized various monies obtained from a variety of sources including a life insurance policy, savings, and inheritance, that were contained in the appellant's accounts with Halifax and Bank of Scotland towards the purchase of the Kilimani property through transfers into the respondent's UNFCU and KCB accounts.

14. The appellant claimed that it was through these deposits and transfers into the respondent's bank accounts that she was able to write the cheques to aid in the purchase of the Kilimani property. He contended that to move into the property by August 2005, the appellant and respondent had to pay half of the purchase price, to wit, Kshs.15,250,000/=. He explained that he had to use all his savings and earnings to raise Kshs.13,000,000/= whilst the respondent's contribution, with the help of her parents, was Kshs.2,250,000/=.

15. The payment of the balance, which the appellant alleges was mostly to fund the portion of the Kilimani property upon which the Interested Party's home is situated, was financed through two loans; first, was Kshs.10,000,000/= given by KCB on 18th April 2006 which was repaid within 16 months from the appellant's salary deposited in the respondent's account, whilst a one-off of Kshs.2,325,565/= was paid by him from his inheritance in August 2007. The second loan was for US$80,000/= from (UNFCU) which translated to Kshs.8,500,000/=. From that sum, Kshs.5,250,00/= went to the balance of the purchase price of the Kilimani property and the rest was used to pay stamp duty of Kshs.1,220.000/= and legal fees of Kshs.600,000/=.

16. He emphasized that the decision to leave one of the maisonettes on the Kilimani property to the respondent's mother was born of a moral obligation on his part to provide a roof over the head of his wife's family who were in crisis and lacked the financial capacity and the credit to purchase a home for themselves. He further alleges that it was based on a verbal agreement that he would be repaid for the assistance in purchasing the home over a reasonable period of time. The appellant stated that, despite the fact that the respondent, the Interested Party and their family were not able to raise the greater part of their share of the purchase price for their part of the property beyond the initial contribution of Kshs.2,250,000/=, upon taking legal advice, the appellant and respondent had executed a 99-year lease in favour of the Interested Party on March 23, 2008. The appellant further points out that the lease was registered against the tile on June 9, 2008 and divorce proceedings instituted on 4th July 2008.

17. Regarding the Diani property, the appellant averred that the respondent did not contribute a single cent to the purchase price and that the purchase price came from his inheritance. He stated that as part of his inheritance from the death of his mother in November 2005, he received GPB 26,000 being half of his mother's savings and GBP 76,337.05 from the sale of her house in London. He then arranged for BP 69,017 of the said sum to be transferred into the respondent's New York account which realized

over Kshs.9,000,000/=. The respondent then transferred this amount to her Kenyan accounts and drew the cheques placed before the court which were used to buy the Diani property. Consequently, the nominee company, Les Belles Sauvages, holds the property in trust for him. Nevertheless, he swore that the Court lacked jurisdiction over the Diani property since it was registered in the name of a company. In addition, he accused the respondent of removing his chattels from the matrimonial home and excluding him from the matrimonial home.

18. The matter was heard by Musyoka, J. and both parties gave their testimonies and were cross examined at length. In a judgment delivered on July 31, 2015, the learned Judge found that most of the resources for the purchase of the subject property were raised by the appellant and that the appellant made the greater percentage of the contribution in financial terms to the acquisition of the assets, given that he was undoubtedly in a superior financial position than the respondent. The Judge consequently found that the appellant contributed 70% to the respondent's 30%.

19. As to whether the Kilimani Property ought to be divided between the parties in the above ratio the court stated that that the issue ultimately depends on the law as regards property registered in joint names of spouses. Citing with approval the decision in *Peter Mburu Echaria v. Priscilla Njeri Echaria* (2007) eKLR the court held that the Kilimani property is held by the parties in the ratio of 50:50. The learned Judge reasoned as follows:

> " The Nairobi property, that is to say, LR No. 1/1298, is registered in the joint names of the parties herein. The material placed before me is clear that the same was intended to be a family asset, acquired specifically to meet the needs of the parties to this suit as well as the applicant's extended family. It cannot therefore in my view, be argued that the respondent did not intend it to be family property."

20. As regards the Diani property, the learned Judge declined the invitation to issue any orders in view of the fact that the property was registered in the name of a limited liability company called Les Belles Sauvages Limited which was subject to winding up proceedings at the commercial division before a bench of concurrent jurisdiction.

21. In the end, the court issued the following orders:

> " (a) That the applicant and the respondent are each entitled to an equal share or interest in LR. No. 1/1298 (Original Number 1/1297/2);
>
> (b) That, as there stand two masionettes on the said property, I direct the Registrar of Titles to cause the subdivision of LR. No. 1/1298 (Original Number 1/1297/2) into two equal portions with each of the parties hereto taking a portion with a masionette on it;
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> (c) That, should execution of (b) above be impossible for whatever reason, as alternative to (b) above, that;
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> i. a valuation of the said property shall be carried out by a professional valuer to be agreed upon by the parties or failure of which the court shall appoint one;
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> ii. based on the value arrived at from the valuation mentioned in (i) above, the applicant shall buy out the respondent by paying him half the value of the property, upon which the respondent shall transfer his interest in the suit property to the applicant;

iii. Should the applicant fail to buy out the respondent as ordered in (ii) above within six (6) months of the date of the judgement, the respondent shall be at liberty to buy out the applicant; and

d. That there shall be no orders as to costs."

22. Aggrieved by that decision, the appellant has now preferred this appeal against the judgment of the trial court, contending that the learned Judge erred in his finding on the parties' direct financial contributions and with the mode of asset distribution. In summary, the 9 grounds of appeal set out in appellant's Memorandum of Appeal fault the learned Judge for not awarding him 70% of the Kilimani property after finding that he contributed 70% of the purchase price, failing to hold that the equitable doctrine of resulting trust applied and therefore the rights of the parties depend on the financial contribution of each party regardless of the mode of tenancy; and for considering the intention of the parties while purchasing the property to determine the rights of the parties.

23. Also dissatisfied with the judgment, the respondent filed a notice of cross appeal dated July 9, 2019, seeking to vary part of the judgment. She contends that the learned Judge failed to appreciate that one of the maisonettes on the Kilimani property (hereinafter maisonette 2) was leased to the Interested Party and was no longer matrimonial property and consequently it should be excluded in the 50-50 division of matrimonial assets awarded by the court.

24. Vide an application dated March 15, 2019, the Interested Party, AM H, motioned this Court seeking orders to be joined to this appeal as an Interested Party, on grounds that she is the registered lessee of maisonette 2. She asserted that, by virtue of the registered long- term lease, she held an indefeasible title under law and had legal claim over the property which is separate and distinct from the appellant's and the respondent's claim, as it is not matrimonial property.

25. The application was allowed by a consent order dated July 10, 2019

26. When the appeal came up for hearing before us virtually on 1October 2, 2021, learned Senior Counsel Dr. Kamau Kuria appeared for the appellant. Learned counsel Mr. Adano appeared for the respondent and learned Senior Counsel Mr. Kiragu Kimani was on record for the Interested Party.

27. Urging us to allow the appeal, Dr. Kuria submitted that the trial court was duty bound to examine the quantum of financial contribution made by each party towards the acquisition of the property as envisaged in Echaria v. Echaria, but it had failed to do so. If it had done so, it would have found that the appellant's affidavits paint a credible, consistent and authentic narrative as to how the properties were purchased and that the appellant contributed 85% of the purchase price through salaries, pension contributions, consultancy fees payments, his inheritance and savings. On the other hand, the respondent earned a meagre Kshs.247,000/- per month from her employer and could not afford to contribute 20,000,000/= as claimed, given that she contributed to the daily living expenses shared with the appellant; and had no proof of savings or evidence that her parents sent her a cent to aid in the purchase of the house and supported her mother.

28. As for the trial court's pronouncement that "at the time the property was acquired, the parties intended it to be used as a family property", it was the Senior Counsel's view that the court had gravely erred by applying a foreign concept which had no basis in the Echaria decision. Instead, the court ought to have followed the persuasive decision in *Stack v. Dowden* [2007] UKHL 17, [2007] All ER(D) 208 where a cohabiting couple acquired property which was registered in their joint names. The woman earned a higher salary than the man and the court found that she contributed 65% of the purchase price. In his view, the House of Lords based its decision purely on the contributions made by the respective

parties as had also been decided in cases of *Gissing v. Gissing* (1970) 2 A11 ER 780 and P*ettitt v. Pettit* (1970) AC 777, and that it was impossible to ignore the unequal contributions of the parties herein towards the purchase price. Counsel asserted that the evidence before the court clearly showed that the appellant had more income than the respondent, contributed a larger portion of the purchase price and used his inheritance, salary and money borrowed from friends to repay the loan from KCB and from UNFCU.

29. Senior Counsel for the appellant conceded that while there was a presumption that the parties had equal and corresponding beneficial interest in the matrimonial property on account of their joint tenancy, the same was rebuttable and a resulting trust applied upon tendering evidence to demonstrate that one party had contributed more and was therefore entitled to more than the equal share of the beneficial interest in the property, a task which the appellant had clearly illustrated.

30. The appellant's Senior Counsel further submitted that while the trial judge had a wide discretion in distributing matrimonial property and to do what he thought fair under the circumstances, the discretion did not entitle him to act contrary to well established principles of law. In the appellant's view, the legal principle applicable in distributing matrimonial property is not based on whose name the title appears or by one spouse offering a particular property to the other by virtue of their marriage, but on the proportion of financial contribution, direct or indirect, towards the acquisition of the matrimonial property.

31. Quoting Baroness Hale in Stack v. Dowden(supra), the appellant's Senior Counsel stated that there may be reason to conclude that, whatever the parties' intentions at the outset were, they are subject to change. In this case the intention had changed and therefore the real intention of the parties must be viewed from their contributions. It was submitted that the appellant had uplifted the respondent's family from poverty and consequently made available all his savings, his inheritance, consultancy fees and salaries for their benefit. It was emphasized that the agreement between the parties was that the appellant's role was to assist the respondent's family to purchase one of the two houses on the Kilimani property, but he was to be paid back accordingly, which was never done. He further lamented that on 14th November, 2008, the respondent and her family decided that the appellant had outlived his usefulness and evicted him from his property, a fact that the learned Judge failed to consider.

32. In the end, the appellant's Senior Counsel urged us to find that the High Court was bound by the five judge bench decision in Echaria case and that it had no option but to award the appellant 70% of the property as per its own finding that the appellant contributed 70% towards purchase of the property (if not 85% which is just in the circumstances). We were similarly urged to find that the court's reasoning that the Kilimani property was intended to be a family asset that was held in the ratio of 50-50 was contrary to the settled law and incorrect in view of the evidence on record.

33. Regarding the Interested Party's role and interest in the matter, the appellant maintained that she had absolutely none. The appellant's view was that the Interested Party did not contribute towards the purchase of the Kilimani property; that she had not sought to be joined to the proceedings by the respondent, her daughter, even though she was vividly aware of the case in the High Court; that she was guilty of laches and could not at this late stage, 11 years later, purport to assert her claim to maisonette 2; and that the lease claimed was void for uncertainty as it was made under mutual mistake by the parties as to their respective rights and it is trite that no person can claim a better title than they possess.

34. Citing the case of *Housing Finance of Kenya Limited v. Faith Kimeria and Another* [1998] eKLR, the appellant's counsel submitted that any suit filed by a wife under Section 17 of the MWPA1882 is for a speedy resolution of the issue of what share, if any, the wife is entitled to in the matrimonial property; that issue can be of no concern to a chargee or third party.

35. Finally, relying on the case of *Prest v. Petrodel Resources Limited 299 Mont.219 (Mont. 2000) and Others* [2013] UK SC 34 and the American case of *In Re Marriage of Bell* 998 P.2d 1163 (Mont.2000), it was submitted that while the appellant transferred legal title of a part of the Kilimani property to the Interested Party, the property was still matrimonial property and the beneficial interest remained solely with the appellant in view of the fact that the Interested Party was to reimburse him for the relevant portion of the purchase price but failed to do so.

36. In response to these submissions, Mr. Adano, learned counsel for the respondent, urged us to consider that the intentions of the parties were plainly expressed by the proportion of the payments made through the bank account of the respondent. It was pointed out that the appellant did not have a bank account in Kenya and that the payments indicated an 80: 20 contributions in favour of the respondent and that the final share of 50:50 determined by the trial court was well founded in law.

37. The respondent submitted that it agreed with the trial court's finding that matrimonial property was not a simple mathematical equation and that the court was obliged to consider all the unique and relevant circumstances of the case, including but not limited to the original intention of the parties. The respondent however faulted the trial Court for failing to appreciate that Maisonnette 2 erected on the Kilimani property and occupied by the Interested Party was no longer matrimonial property and therefore did not fall for distribution as directed by the court. Consequently, the learned Judge erred in fact and law in making a decree founded on L.R. No. 1/1298, rather than the actual maisonettes found thereon.

38. Citing this Court's decisions in PNN vs ZWN [2017] eKLR and VWN vs IFN [2014] eKLR, the respondent's counsel submitted that the strict and narrow application of contribution espoused by Echaria Vs Echaria was no longer good law and that the appellant's contentions were out of touch with the progression of law and jurisprudencial developments in the country post-Echaria.

39. Citing the *Matrimonial Property Act* 2013 and Article 45 of *the Constitution*, the respondent posited that both monetary and non- monetary contribution should be taken into account by the court. In the respondent's view, the parties herein pooled their resources together to buy the property and the appellant opted to transmit his salary through the respondent's UNFCU account instead of his personal bank accounts, so that they could enjoy preferential loan rates. The respondent asserted that it was her membership of UNFCU that made them eligible for the loan of USD80,000 which enabled them to pay part of the balance of the purchase price of the Kilimani property. Furthermore, since the loan was not sufficient to cover the entire balance, it was by virtue of her membership and eligibility to preferential rate facilities that they managed to secure a loan facility from Savings and Loans (K) Limited for Kshs.10,000,000/=. It was not disputed that both parties had in fact worked jointly to repay both loans.

40. The respondent further submitted that once the purchase was concluded, together with the appellant they were registered as the joint owners of the Kilimani property and that their original intention was that one of the maisonettes thereon be given to the respondent's mother. The respondent asserted that in lieu of the partitioning of the property, they voluntarily and consensually divested their matrimonial interest in Maisonette No. 2 and transferred it to the respondent's mother by way of a long term 99- year lease which was registered against the Kilimani property on 9th June 2008. The respondent maintained that on the strength of her pleadings before the High Court and from the appellant's submissions as well as the registered 99-year lease on Maisonette 2 in favour of the respondent's mother produced in court, there was little need for the Interested Party to be called as a witness or joined as a party to the proceedings.

41. Similarly, opposing the appeal, Mr. Kiragu Kimani, SC, emphasized that the starting point of the Interested Party's case was Article 40 of *the Constitution* of Kenya, 2010. In his view, there were two pertinent questions for this Court to consider. First, whether the Interested Party legally acquired the property in question, and secondly, the implication of the leasehold of 99 years with no consideration.

42. Learned Senior Counsel contended that there cannot be any doubt that the Interested Party acquired an interest in the property. She identified the property for the appellant and the respondent, she and her husband made funds available for the purchase of Maisonette 2, that the appellant and the respondent willingly executed a 99 year in her favour and the Interested Party and her family occupied one of the maisonettes in question.

43. It was his assertion that a lease was a temporary right to hold land or property and that Section 2 of the *Registration of Titles Act* Cap 281(repealed), which was the applicable law then, gave a clear definition of a grant and a lease was a grant. He asserted that the Interested Party's interest in the property was valid in law and could therefore not be denied since she contributed to the purchase of the property and resides in maisonette 2. He asserted that the appellant's claim that the lease was a sham, that the Interested Party had waived her interest in the property for lack of joinder and by the fact that she was aware of the issues in contest, could simply not hold. He urged that just like the rights of a bank are taken into account in the division of property, so should those of the Interested Party. In his view, it was unjust for the Interested Party to be caught amid a feud between the appellant and the respondent or for her to be required to accommodate her daughter.

44. In a brief rebuttal, Dr. Kuria for the appellant stated that that Article 40 of *the Constitution* of Kenya, 2010 was not applicable, especially since the Interested Party had failed to file an appeal against the trial court's decision and further failed to submit evidence of her contribution in the purchase of the suit property before the trial court. It was simply too late in the day for her to assert any claim.

45. As for the doctrine of intention claimed by the respondent and the Interested Party, he submitted that it could not be maintained, and that it could not outweigh the outright financial contributions of the parties.

46. The appellant maintained that the Interested Party could not be a party to the proceedings before the High Court and referred us to the decision in *HFCK v Kimeria*, Civil Appeal No. 214 of 1996 where the Court set aside an order made against a non-spouse and struck out the party from the proceeding commenced under Section 17 of the MWPA 1882.

47. In conclusion, the appellant submitted that the court lacked jurisdiction to grant a non-spouse any reliefs, as was held in *Owners of the Motor Vessel Lillian S v Caltex,* [1989] KLR 1. He further submitted that even if the court had jurisdiction, it could not entertain the claim because of the doctrines of acquiescence and laches, which forbade the court from granting a party that has remained idle for so long any reliefs.

48. We have anxiously considered the record of appeal, grounds of appeal, the law and the submissions of the parties and their respective counsel. As this is a first appeal, we are at liberty to delve into matters of fact as well as law and make our own conclusions in the circumstances, but bearing in mind that unlike the trial court, we did not have the privilege to observe and assess the credibility of witnesses. (See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123).

49. The preliminary hurdle to be surmounted is the applicable law in determining this appeal. It is common ground that the suit before the High Court was filed in 2008 under Section 17 of the MWPA, 1882 prior to the promulgation of *the Constitution* of Kenya, 2010 and the enactment of the *Matrimonial Property Act* of 2013. The appellant submits that Section 17 of the MWPA, 1882 as

applied in Echaria v Echaria is the only relevant law in this instance. More specifically, that under that section of the law an applicant is obliged to clearly prove the extent of her actual monetary and non-monetary contribution towards the acquisition of the property in dispute.

50. Contrary to this view, the respondent's position was that times had changed and Echaria vs Echaria was no longer good law; that both monetary and non-monetary contribution should be taken into account and this Court should apply various Articles of *the Constitution* because they come out strongly in favour of protecting the right to property and equality in marriage.

51. The history of matrimonial property laws and the evolution of case law in this country is well known. This history was appropriately summarized by Waki, JA. in *PNN v ZWN* [2017] eKLR and we see no reason to rehash all the developments in the case law. What is clear is that times and attitudes changed from *Essa v. Essa* [1996] EA 53 and *Nderitu v Nderitu*, [1995-1998] I EA 235 where under section 17 of the Married Women's Property Act, the wife's contribution, both direct and indirect, was considered and assessed as equal to that of their husbands; to Echaria v. Echaria(supra), which negated the general principle of equality applicable to matrimonial property and emphasized the necessity of proving financial contribution; to the differing interpretations of the provisions of Article 45(3) of *the Constitution* which expressly declares equality of rights between parties to a marriage at the time of the marriage,

during the marriage and at the dissolution of the marriage, and finally the enactment of the *Matrimonial Property Act* No. 49 of 2013, where Parliament drew the line and gave a clear definition of contribution during marriage to include monetary and non- monetary contribution.

52. Despite this progress, the inevitable question is whether a matrimonial property cause filed prior to the promulgation of *the Constitution* of Kenya, 2010 should be determined under Section 17 of the MWPA, 1882 and in accordance with the principles espoused in Echaria case, or whether courts should follow the new regime as at the time of determination by applying the provisions of Article 45(3) of *the Constitution* and the *Matrimonial Property Act*, 2013 which underpin the principles of equality.

53. On our part, and until the Supreme Court holds otherwise, we echo the powerful observations of Waki, JA. in *PNN v ZWN* [2017] eKLR that the *Matrimonial Property Act*, 2013 is not applicable to cases filed before its enactment and that a court in such a case may seek guidance of the new Constitution and the covenants which Kenya has ratified to inform its application of Section 17, MPWA, 1882 taking caution to ensure that individual vested rights legitimately accrued before the commencement of *the Constitution* are not affected.

54. In so holding, the learned Judge expressed himself as follows:

> " 40. The answer that commends itself to me was given by the Supreme Court in the case of Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd & 2 others, [2012] eKLR when it rendered itself thus:
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> "At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting *the Constitution* to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of *the Constitution*. If the words used in a

particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of *the Constitution*. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of *the Constitution*".

41. It seems to me that each case must be examined on its own facts particularly where retrospectivity would affect accrued rights. Generally, however, *the Constitution* ought to be given a broad and purposive interpretation that enhances the protection of fundamental rights and freedoms. The right to equality, for example, is inherent and indefeasible to all human beings. It would therefore matter not that the cause of action accrued before the current constitutional dispensation. In sum, I do not fault the High Court in this matter for seeking guidance of *the Constitution* 2010 and the Covenants which Kenya has ratified to inform its application of Section 17, MWPA." (emphasis ours)

55. In our view, and in the circumstances of this appeal, the application of the stated constitutional provisions will not affect the vested rights of the parties which accrued before the promulgation of the 2010 Constitution. The principle of equality enshrined in Article 45 does not ordain the court to re-distribute vested property rights at the dissolution of marriage and does not automatically mean that the parties here are entitled to an automatic 50-50 share of the accrued wealth. (See *PWK v JKG* [2015] eKLR).

56. We also cannot agree with the respondent's contention that the Court should consider non-monetary contribution as espoused under the *Matrimonial Property Act*, 2013.We shall consequently apply the dictates of the law under Section 17 of MWPA, 1882 and *the Constitution* where a broad and purposive interpretation enhances the protection of fundamental rights and freedoms.

57. The next question which we are concerned with is the consequence of registration of a title in the joint names of a married couple without a declaration of the individual beneficial interest.

58. It is not in dispute that both parties originally decided to purchase the Kilimani property as their matrimonial home and that the property was purchased and conveyed into their joint names as joint tenants. The question is, does a joint tenancy in such circumstance automatically give rise to equal ownership or does a beneficial trust arise under which the degree of ownership is determined by the direct financial contributions of the parties?

59. The legal starting point is clear, where the legal estate in land is in the joint names of parties, those named are presumed to hold the beneficial interest equally. This presumption is however rebuttable and can be displaced by evidence to the contrary. (See *Pecore v. Pecore*, [2007] 1 S.C.R. 795, 2007 SCC 17, *Kamore v Kamore* [2000] 1 EA 81 and *Kivuitu v Kivuitu* [1991] LLR 1411 CAK). How then, is such presumption to be rebutted? The appellant appears to propose that the answer lies solely in the examination of the financial contribution of the parties to the purchase of the house as determined in *Echaria v Echaria* (supra) and that the intention of the parties is irrelevant. However, the devil is in the details.

60. The distinction between the Echaria case and this one is quite evident, and of course well known to Dr. Kuria, who represented the respondent in that matter. In that case, the property in dispute was bought and registered in the name of only one spouse, being the husband. The wife's claim was that

she contributed both financially and indirectly to the acquisition of Twiga farm. Discussing the nature of the registration of title between spouses, the Court stated thus:

> " Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim "Equity is equity" which heeding the caution by Lord Pearson in Gissing vs Gissing (supra) at page 788 paragraph c that:
>
> "No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one-quarter, I do not think it is helpful or right for the court to feel obliged to award either one-half or nothing".

61. The significance of the above passage is that where spouses hold property jointly, the beneficial share of each does not solely depend on their proven respective proportions of financial contribution towards the acquisition of the property. In Kivuitu v. Kivuitu, where the husband and wife held property jointly but the original deposit and the subsequent mortgage instalments were paid by the husband, the court found that the wife clearly made a financial contribution through employment and the businesses she ran. The court stated that even though her contribution was intermittent and not as much as the husband's, she and the husband bought the property as a family venture, had it registered in their joint names and that they clearly intended to hold it in equal shares as a family asset. Agreeing with this decision, the learned Judges in Echaria stated the following:

> " On analysis, we have come to the conclusion that Kivuitu's case was correctly decided both on law and on facts as it is a case where the husband and wife had a joint legal interest and a resultant equal beneficial interest in the property. The court in Kivuitu's case did not lay any general principle of equal division as suggested."

62. According to the decision rendered in Stack v. Dowden (supra), in a case of joint legal ownership the onus is on the party who wishes to show that the beneficial interests are not equal.

63. The starting point is not a resulting trust but to look at the intention of the parties with respect to the property and their conduct in relation to it. In the views of Baroness Hale in Stack v. Downden, whether the couple is married or cohabiting, the principles of law are the same in ascertaining the intentions of the parties with respect to their beneficial ownership. The only difference may be the inferences drawn from their conduct. The question therefore is not simply "...did the parties intend their beneficial interests to be different from their legal interests?"

64. Undeniably, when a couple agrees to share their lives in a joint home, they do so on the basis of mutual trust, love and affection and in the expectation that their love will endure all trials and tribulations. "Till death do us part" is not an aspirational ideology to most couples at the moment of making important legal and family decisions but a genuine expression of an expectation made in good faith. Most couples consequently do not make any agreement, or have any express common intention as to what should happen in the event of the dissolution of the marriage. Unfortunately, that is what the parties herein did not envisage when the original decision of marriage and subsequent acquisition of the properties

in dispute. It is natural and common ground that an unexpected end or dissolution of the marriage was not in their plan and mind.

65. In the landmark case of Stack v Dowden (supra), a cohabiting couple lived together in a house which they occupied as their home until the breakdown of their relationship. Of the purchase price of £190,000, £129,000 came from Ms. Dowden's savings and sale of her previous property. The remainder came from an interest only mortgage and two separate endowment policies. Mr. Stack paid the mortgage instalments of £27,000, whilst Ms. Dowden paid £38,000. Ms. Dowden paid most of the utility bills. They had separate bank accounts and made separate investments. The parties then separated and Mr. Stack brought an action for sale of the property and distribution of the proceeds in equal shares, claiming that the house was held upon trust by the court as tenants in common. The court held that equity follows the law and stated that the legal ownership of the property reflects the beneficial ownership. The Court confirmed that this presumption is rebuttable and that the onus was on Ms. Dowden to prove that she was entitled to more than Mr. Stack and that there was a common intention to that effect.

66. In order to determine the intention of the parties, Baroness Hale, J. gave an indicative list of factors that can be taken into consideration. We shall reproduce the same here to capture the extensive factors that may be taken into consideration in appropriate cases. The learned judge expressed herself as follows:

> "In law, "context is everything" and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoing on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual."

67. Where there is no express agreement as to the respective beneficial interest of each spouse, it may be possible to infer their common intention as to their respective beneficial interest save from their conduct. In this regard, the contribution to the purchase price, payment of the loans taken and the

manner in which parties conducted themselves will be telling. In Pettit v. Pettit [1962] 2 all E.R. 385, Lord Morris said:

> " The mere fact that parties have made arrangements or conducted their affairs without giving thought to questions as to where ownership of property lay does not mean that ownership was in suspense or did not lie anywhere. There will have been ownership somewhere and a Court may have to decide where it lay. In reaching a decision the court does not find and, indeed, cannot find that there was some thought in the mind of a person which never was at all. The court must find out exactly what was done or what was said and must then reach a conclusion as to what was the legal result. The court does not devise or invent ä legal result. Nor is the court influenced by the circumstances that those concerned may never have had occasion to ponder or to decide the effect in law of whatever were their deliberate actions. Nor is it material that they might not have been able – even after reflection- to state what was the legal outcome of whatever they may done or said. The court may have to tell them. But when an application is made under s. 17 there is no power in the court to make a contract for the parties which they have not themselves made. Nor is there power to decide what the court thinks that the parties would have agreed had they discussed the possible break-down or ending of their relationship. Nor is there power to decide on some general principle of what seems fair and reasonable how property rights are to be reallocated. In my view, these powers are not given by S. 17".

68. In *Springette v Defoe* (1993) 65 P&C.R. where the court applied the strict contribution principle in joint tenancy (and which has since been overtaken by events given the decision in Stack v Dowden, the Court of Appeal of England and Wales recognized that where there is evidence of a common intention that the parties were entitled to proportions in equal shares notwithstanding unequal contributions, equality will be presumed. The court in that case stated that:

> " In the absence of any express declaration of the beneficial interests, joint purchasers will hold property on a resulting trust for themselves in the proportions in which they contributed directly or indirectly to the purchase price unless there is sufficient specific evidence of their common intention that they were entitled to other proportions– e.g. in equal shares notwithstanding unequal contributions – to rebut the presumption of resulting trust and the common intention must be founded on evidence such as would support a finding that there is an implied or constructive trust for the parties in proportions to the purchase price. The court does not as yet sit, as under a palm tree, to exercise a general discretion to do what the man in the street, on a general overview of the case, might regard as fair ... 'But the common intention of the parties must, in my judgment, mean a shared intention communicated to have in his or her own mind but had never communicated to the other."

69. In clarifying the reasoning in Springette v. Defoe, Baroness Hale in Stack Dowden (supra) agreed with the comments of Chadwick, LJ. in *Oxley v Hiscock* [2005] Fam 211, where he stated:

> " I have not altered my view that, properly understood, the authorities before (and after) Springette v Defoe do not support the proposition that, absent discussion between the parties as to the extent of their respective beneficial interests at the time of purchase, it must follow that the presumption of resulting trust is not displaced and the property is necessarily held in beneficial shares proportionate to the respective contributions to the purchase price."

70. In short, what we are saying is that the direct contribution of spouses is an important factor for consideration where parties intend their beneficial interest to be different from legal interests. But the

starting point rests with the maxim; 'equality is equity' and follows the law in ascertaining the beneficial interest of parties, the same is only rebuttable after having due regard to the whole course of dealings between the parties with regard to the property.

71. This then, is the duty that this Court is tasked with. We must make enquiries and determine upon re-examination of the evidence on record, whether the appellant provided clear and cogent proof that the presumption of equality should be displaced. This evidence must be convincing, in that it instantly tilts the scales in the affirmative when weighed against the evidence in opposition, leaving us with abiding conviction that it is true.

72. In this case, the purchase price of the Kilimani property, was Kshs.30, 500,000/=. It is common ground that the appellant and respondent pooled their resources to raise part of the purchase price being Kshs.15,250,000.00/= and took out two loans to raise the balance. The first loan was Kshs.10,000,000/= given by KCB Savings & Loan Limited on 18th April 2006 in the parties' joint names and the second loan was USD80,000/= given by UNFCU which translated to Kshs.8,500,000/= and was paid out in early 2006. From that sum, Kshs.5,250,000/= went to the purchase price and the balance was used to pay stamp duty of Kshs.1, 220,000/= and to pay legal fees of Kshs.600,000/=.

73. The cheques that were drawn by the respondent to pay the purchase price originated from the respondent's account where the spouses deposited their collective funds and the amounts obtained from the loan. In fact, the appellant during the course of the marriage does not appear to have had a Kenyan account and all his monies were channeled through his wife's account. He trusted her completely to hold their shared finances without reservation for most of the duration of their marriage and to distribute them as agreed and when necessary for their mutual benefit.

74. It is undisputed that the appellant earned a higher salary than the respondent. He submitted that he raised Kshs.13,000,000/= of the purchase price from his salary and savings. There is evidence of the monies from the appellant's bank accounts in the United Kingdom that were deposited into the respondent's account to facilitate the purchase of the property.

75. According to the respondent's affidavit dated October 30, 2008 and her submission before the court, she alleged that she raised most of the purchase price from money she had saved in her dollar account and Kenyan Account and which originated from her employment with the United Nations and from her father who was a minister in Somalia. Her testimony before the court was that her father used to send her money through the 'Somali Awala' money transfer system which was based on trust and consequently there was no record to show that she received any money.

76. There is no doubt that the respondent earned a good salary at the United Nations and that her parents gave her some of the money used to purchase the suit property in cash and through bank deposits. Exactly how much remains a mystery, save for the appellant's submission in his affidavit dated 5th November 2008, that the respondent's father sent about 4.5 Million to her for the purchase of the property and that the respondent through her parents contributed Kshs.2,500,000/=. There was also little evidence as to the deposits made into the respondent's account from the account from which the cheques exhibited in court in payment of the purchase price were drawn as the respondent failed to provide the requisite bank statements.

77. The learned trial judge upon careful consideration of the evidence placed before him rejected the respondent's contention that she contributed 80% of the purchase price. He considered the individual

circumstances of the parties, their employment history, their earnings before and, after the marriage, their financial arrangements and the movement of their finances. In so doing he rendered himself thus:

> "I am convinced that most of the resources from the purchase of the subject property were raised by the respondent. He made the greater percentage of the contribution in financial terms to the acquisition of the assets as he was undoubtedly in a more superior financial position than the applicant."

78. We find no fault with this determination. Indeed, the evidence on record clearly points to the fact that the larger financial wherewithal belonged to the appellant. He earned a higher salary and also provided evidence that he channeled his savings and part of his inheritance into the respondent's account. He gave a clear and concise chronology of where, how and when funds were procured to enable the purchase of the Kilimani property. We also cannot ignore the lack of evidence of the respondent's father's deposits into her bank account, the dollar remittances allegedly made to the remitting companies by her family, her bank statements, or even proof that she received funds through the 'Somali Awala' system. In any event, the respondent's salary alone could not cater for the Kshs.20,000,000/- she claimed to have raised. We also find it tenable that the appellant used the USD80,000/= given by the UNFCU for his own cause and not for the purchase of the property as alleged by the respondent.

79. The appellant's correspondence with UNFCU dated 22nd November 2005 explaining the situation with the houses they were buying and why they made their loan request and the parties' letter to the UNFCU dated 22nd November authorizing the transfer of the loan proceeds to be sent to their lawyers account is also quite telling. It is clear that the money was borrowed to aid the purchase of the property for their mutual benefit.

80. As for the loan repayments, we are satisfied that both parties contributed to the repayments. The Kshs.10,000,000/- advanced by KCB Savings & Loan Limited was repaid by their joint effort in 16 months with funds deposited in the respondent's account.

81. The repayment of the loan from UNFCU was what strained the parties. It is clear that the respondent is the one who initially serviced the UNFCU loan even after the divorce. The appellant had stopped remitting any funds into the respondent's accounts when the marriage entered into murky waters but she carried on with the repayments even after the divorce and stopped them in September 2009 when she realized that the appellant was the primary borrower and her attempts to contact him bore no fruit.

82. Even though we have no way of determining whether the loan was made from some residual funds left by the appellant, what is clear is that the appellant received a demand for payment in December 2009 to normalize the arrears of the debt and to settle the remaining amount and that despite being out of work at the time he managed to pay off the loan by October 2012.

83. For all intents and purposes, we agree with the learned trial Judge that the appellant contributed 70% of the funds. This in no way diminishes the respondent's financial contribution but is a rough estimation of the percentages contributed. There is no doubt that even a skilled auditor would have a trying time ascertaining the exact amount to the last cent that was contributed by each party, their respective expenditure from the account and at what point a coin from the appellant's savings and salary was used vis-à-vis the respondent's. The situation is seldom precise and where documentary evidence falls short of establishing the exact amount of monetary contribution made by each party, the court must make a rough approximation of the most probable proportion after due regard to the veracity of each party's version of events reflected in their affidavits and testimony as well as the documentary evidence.

84. In addition to the above and our prior analysis of the law, we must also consider the context of the payments made by the parties and the conduct of the parties towards the property to ascertain the common intention, if any, to hold different beneficial shares. It is undeniable that the parties from the inception pooled their resources together and the respondent's account was technically their joint account. Their salaries, savings and investments all went into this account and is the same account from which the cheques for the payment of the Kilimani property were drawn.

85. It is also common ground that the Kilimani property had two maisonettes erected thereon. The intention was of for maisonette 1 as conceded by the parties to serve as their matrimonial home. Maisonette 2, the parties allege, was purchased for the purpose of housing the respondent's family who were facing a housing crisis and were on the verge of being rendered destitute and homeless as they could not afford to pay rent. According to the appellant, the agreement at the time was that he would purchase the property on their behalf and they would pay him back. Of course, there is no written agreement to ascertain this claim but the lease agreement with the Interested Party and the appellant's correspondence with UNFCU in the letter dated November 22, 2005 shed some light.

86. The lease agreement with the Interested Party grants her a long term lease of 99 years as a gift by virtue of her role as the mother and mother-in-law to the parties. It is a familial consideration of love and affection. In the aforementioned letter, the appellant states:

> " we are buying one freehold plot with two houses on it. We will be living in both as one will belong to Mona's mother. Mona's mother will be bearing as much of the costs as she can right now for her house but it is in our name for the sake of the lease.
>
> We originally planned to only buy one of the houses. How ever if we only bought one of the houses the freehold would be lost and the title would have to be subdivided and that would take time to do here in Kenya...
>
> One house will belong to Mona's mother. Her husband is in the Ministry of Finance in Somaliland Government and from salaries plus rent from houses they have they will be remitting about 2000USD per month towards the loan repayment".

87. The next question that logically arises is whether the entire Kilimani property is matrimonial property or whether the division was only limited to maisonette 1 where the parties cohabited, given that maisonette 2 was leased to the Interested Party.

88. It is trite law that a leasehold after its expiry reverts back to the lessor. Here the lessors were the appellant and the respondent. At the time of the divesting the leasehold to the Interested Party, she was connected to both of them by way of marriage. She was the mother and mother-in-law of the parties. Legally speaking, the Interested Party was a parent of both parties and in the absence of that marriage, having been dissolved mutually, it means that the benefit which was conferred upon her cannot be absolute.

89. Legally, a leasehold is a reversionary interest or right; and it would be absurd for it to revert to only one spouse where it was jointly held. It clearly means that after the expiry of the lease one cannot say that it is not matrimonial property and that it should revert back to benefit of only one party. This would not only be an injustice but a legal absurdity. The law cannot countenance a situation where a right that was jointly given to a third party reverts to only one party. The position taken by the respondent, that the leasehold is not matrimonial property can be said to be true but legally speaking and in the circumstances of this case, it is would be unreasonable to allow the respondent and her family to benefit twice.

90. Again, and more importantly, the property occupied by the Interested Party, stands on a land which was and still is matrimonial property. It therefore means that the argument that a portion of a property standing and constructed on a matrimonial property is not a matrimonial property cannot hold unless there is evidence to show that before conveying the gift of the long-term lease, the appellant and the respondent expressed willingly and with proper legal advice that they had forgone or donated their legal rights and interest to the Interested Party.

91. The vexing issue for our determination is whether in the aforesaid circumstances, the respondent and her family can disentitle the appellant of his interest in maisionette 2 on account of the existing leasehold interest in favour of the Interested Party. In our view, that is not what the law provides and that was not the intention of the respondent and the appellant. It is also clear to us that to do so and to so hold would be tantamount to conferring an illegal benefit to the respondent.

92. A further issue for our consideration is whether the appellant contributed significantly to the purchase of the two properties, and although the Interested Party enjoys a leasehold interest over part of the property, the substratum of the lease has been lost by way of dissolution of the marriage.

93. In the circumstances, we think that the portion of land occupied by the Interested Party forms part and parcel of the matrimonial property. It is appropriate that we cite the latin maxim, "quicquid plantatur solo solo cedit" to the effect that the owner of the land becomes the owner of the soil and all objects permanently affixed or embedded thereto, bearing in mind the purpose of the attachment. We are also aware that the appellant has been evicted from the original house for almost a decade, leaving the two properties to the exclusive use of the respondent and her family members.

94. There is no doubt that the respondent has since remarried and is using a portion of the original matrimonial property with her new husband. It would be the greatest form of injustice for her and her family members to enjoy the two properties without taking into consideration the original intention and respective contributions towards acquisition of the properties. That is why we have arrived at the decision that the Learned Judge was right in determining the contribution of each party. Nonetheless, he failed to take into account the beneficial right of the appellant in the leasehold and the effect it has on the division of the matrimonial property. We also fault him for his determination that joint requisition is equal to equal ownership. That is a legal fallacy which is not supported by any evidence or case law.

95. Consequently, we think that the best way to approach this issue is to proceed from the premise that the land is matrimonial property and apportion it at 70:30 according to the evidence placed before the court.

96. We thus allow the appeal and direct that the property be divided into two portions at 70:30, Maisonette 1 to stand on 70% of L.R. No. 1/1298 and Maisonette 2 to stand on the remaining 30% of the said plot. Maisonette 1 occupied by the respondent shall go to the appellant and Maisonette 2 occupied by the Interested Party shall go to the respondent.

97. To facilitate the subdivision of the suit property, we direct the respondent to vacate Maisonette 1 within the next thirty days, failing which she will be evicted.

98. The appeal is thus partially allowed to the extent outlined above. The cross appeal has no merit and it is dismissed.

98.Each party shall bear its own costs before this Court and the High Court.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR