



PGM v AWM (Civil Appeal 87 of 2017) [2022] KECA 777 (KLR) (10 June 2022) (Judgment)

Neutral citation: [2022] KECA 777 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 87 OF 2017
HM OKWENGU, MSA MAKHANDIA & AK MURGOR, JJA
JUNE 10, 2022**

BETWEEN

PGM APPELLANT

AND

AWM RESPONDENT

(An appeal from the judgment/orders and/or decree of the High Court of Kenya at Nairobi (M.W. Muigai, J.) dated 15th February, 2016 in Civil Case No. 71 of 2011 Formerly ELC No. 204 of 2011)

JUDGMENT

1 The appeal before us relates to the perennial squabbles that have existed world over between spouses over matrimonial property when the love between them fades, is eroded and a rock of divorce is planted between them. This debate has not always been easy to navigate. It has turned into what we may term as a Murky Waterway. We say so because of the confusion that has reigned between the different legislations invoked over the years to deal with this issue starting from the mother statute, The Married Women Property Act 1882. Fortunately, we now have our own legislation on the subject, the Matrimonial Property Act, No. 49 of 2013.

The dispute leading to this appeal was initially filed in the Environment and Land Court “ELC” on 29th March 2011 seeking in the main that leave be granted for severance of title with respect to land Parcel numbers Nairobi/Block xxxx and KJD/Kitengela xxxx “the suit properties” which were allegedly jointly owned by the appellant and the respondent.

2. This was after the finalization of the Divorce Cause Number 144 of 2006 involving the parties. The dispute was later transferred to the Family Division of the High Court and registered as High Court Civil Case Number 71 of 2011 on account of being a family dispute.

The appellant and the respondent were married in 1980 under Kikuyu Customary Law. The marriage was later solemnized under the African Christian Marriage and Divorce Act (repealed) in 1986.



They were blessed with three issues; EW, JM and CW. During the subsistence of their marriage, and according to the respondent, they acquired the suit properties as joint tenants.

3. That they had cohabited thus from 1980 until when the decree absolute dissolving their marriage was issued on 14th January 2011. When their marriage was dissolved as aforesaid, the respondent approached the ELC for the order in terms aforesaid.

In response, the appellant filed an affidavit dated 13th December 2011 in which he acknowledged the marriage but stated that the suit properties, were solely purchased by him. For Nairobi/Block xxxx, the appellant stated that he purchased the same by way of a mortgage provided by Housing Finance Corporation of Kenya (HFCK) which loan was repaid by way of deduction from his monthly salary until payment in full and the only reason the name of the respondent appeared in the title was because it was a requirement by HFCK that the borrower had to indicate the next of kin. That with regard to KJD/Kitengela/xxxx, it was bought using the appellant's funds and registered in his name for speculative purposes. That notwithstanding, even if the respondent contributed any money towards the purchase of the Kitengela property, then the same was from drawings of the company that was founded by the appellant called Nespete Enterprises limited "the company" in which he held 76% shareholding.

4. The suit was heard by way of oral evidence. The respondent testified that she married the appellant as aforesaid. By then the appellant had applied for a house mortgage from HFCK for the Langata house. That the appellant repaid the mortgage from his monthly salary whereas she catered for household expenses. After full payment, they obtained the title in their joint names in 1992. Thereafter they continued residing in the house. She was by then working for [Particulars Withheld] and earning a salary which she applied towards household bills and other related expenses. That the Kitengela land was acquired in 1996 during the pendency of the marriage and that the appellant was made the registered owner because it was a requirement of kikuyu customary law. However, the money used to purchase the same was from the company where they were both directors. In support of her evidence she exhibited statement from Standard Chartered Bank where the company held an account between 1995 and 1997 totaling to Kshs.300,000. That the appellant had acquired other properties in Mitibiri, Thika and shares which she did not wish to claim. That she was taking care of the two remaining daughters after the first one got married and that since they lived in the Langata property it was only fair that the property be given to her. Further that it would be fair if the Kitengela property could be given to the appellant. As regards the company, the respondent testified that both the appellant and herself were directors of the company. However, from 2004, their daughter EW had been running the same after the appellant transferred his shares to her. The appellant had resigned from running the company in 1997.

5. On the other hand, the appellant, testified that he was married to the respondent at some point. That he was an employee of [Particulars Withheld] then. That in 1985 his employer started a staff housing scheme financed by HFCK and he settled for a house in Langata which would cost Kshs.300,000. He produced a letter dated 6th April 1987 indicating that the employer would be making monthly remittances to HFCK from his salary towards the repayment of the loan.

6. As regards the company, the appellant testified that they started it in 1992 with his brother to trade in motor vehicle spare parts. That the same was subsequently incorporated into a limited liability company in 1996 with him having 76% shares while the respondent had 24% of the shares. That the company grew in leaps and bounds after he injected more capital and stock in it.

Thereafter it was agreed that the respondent resigns from her employment so that she would concentrate on the affairs of the company full time.



7. With regard to the Kitengela property, the appellant stated that he had bought the same from City Women corporation and demonstrated how the money was paid in 1996 long before the respondent had become a director of the company.

EW the daughter to the parties testified that the appellant's shares in the company were voluntarily transferred to her by the appellant. However, she could not tell whether they were paid for as she thought this was a family business.
8. After consideration of the matter the trial court in a judgment dated 15th February 2016, declared that the suit properties were joint property of the appellant and the respondent. That the appellant and the respondent shall within 120 days engage valuers or valuer to value the suit properties, file the valuation report (s) in court with a view to apportioning equally to the parties upon sale of the suit properties. That parties may also consider buying out one's half share interest upon valuation. That the shareholding in company shall remain with the respondent and EW until the matter is ventilated in the appropriate forum being the High Court, commercial division and lastly that each party to bear their own costs.
9. Being dissatisfied with the judgment and decree, the appellant has approached this Court by way of an appeal citing a whopping 19 grounds but which can be condensed into six broad grounds to wit that the trial court erred in law and fact when it failed: to appreciate at all or sufficiently all the evidence on record; to appreciate that the court had a duty to first appreciate and decide on the contested issue of jurisdiction; failed to first undertake a full enquiry of the status and the sources of the purchase prices of the suit properties so as to arrive at a fair decision of the contribution of each party; failing to find that the dissolution of the marriage between the respondent and the appellant was in 2010 well before the promulgation of *the Constitution*, 2010, and also before the enactment of the *Matrimonial Properties Act* 2013. Before then, the *Married Women Properties Act* (1882) provided that matrimonial properties should be shared on the basis of spousal contribution and failing to appreciate that the suit properties had solely been paid for by the appellant.
10. Parties filed written submissions in respect of their contra positions. The appellant submitted that the respondent had initially moved to ELC under Section 104 of the Registered *Land Act* (RLA) (now repealed) for the severance of the titles in respect of the suit properties. That being the case the High Court had no jurisdiction to entertain the dispute as it was not initiated pursuant to the *Married Women Properties Act*. That the Supreme Court in the case of *Samuel Kamau Macharia & Another Vs. Kenya Commercial Bank Limited & 2 Others* [2012] eKLR stated that without jurisdiction, a court of law cannot entertain a matter before it as jurisdiction is not an issue of mere procedural technicality. That without jurisdiction the court cannot entertain any proceedings. That in the circumstances of this case the trial court had no jurisdiction to handle the dispute because the respondent did not properly invoke its jurisdiction having earlier filed the matter in the ELC. The trial Court should thus have downed its tools.
11. On the 2nd ground, the appellant submitted that during their marriage he single handedly purchased the suit properties a fact confirmed by the respondent as well as documentary evidence tendered in the trial court. The appellant further submitted that he had also purchased a plot in Mitubiri in his name and other two plots in Embakasi ranching scheme which were registered in the respondent's name, which the trial court failed to take into account.
12. On evidence, the appellant submitted that there was overwhelming evidence that the suit properties had been purchased solely by him. That in the course of her testimony, the respondent conceded that the mortgage was solely paid by the appellant. With regard to registration-of title in their joint names, the appellant submitted that it was because of the financier's requirement that, for married people



seeking mortgage the spouses' names had to appear in the title not necessarily as a contributor but primarily as next of kin in case anything happened to the substantive purchaser whilst the mortgage remained unsatisfied.

13. The appellant further submitted that though the respondent had testified that the Kitengela property had been purchased through proceeds from the company in which she was a director, the company was registered in mid-1996; over six months after the Kitengela property had been purchased. He disputed the assertion by the respondent that the property was registered solely in his name due to the kikuyu culture and pointed out that he had purchased other properties which had been registered in her name.
14. As to the company the appellant submitted that this was a spare parts business and that the same had earlier been registered by him as a sole proprietor until 1996 when it was incorporated into a limited liability company and he invited the respondent to join him and run the company on a full-time basis on consideration of free share allocation of 24%.

That from the inception of the company, they managed it jointly until towards the end of the year 2000 when marital differences heightened forcing him to keep off the company. The appellant further submitted that he had never resigned as a director of the company and the evidence on record was clear that there was no legal transfer of shares from the appellant to his daughter as alleged. As such the alleged transfer was fraudulent and was clearly a plot by the respondent to remove him as the director of the company.

15. Relying on the Supreme Court decision in Samuel Kamau Macharia case (supra) the appellant submitted that the divorce was concluded before the promulgation of the Constitution of Kenya 2010 and further before the commencement of Matrimonial Property Act 2013. Accordingly, the trial court erred in invoking them in resolving the dispute as they did not operate retrospectively. That the law then in force on distribution of matrimonial properties was as propounded in the case of Peter Mburu Echaria Vs. Priscilla Njeri Echaria [2007] eKLR where this court held that a spouse had to prove contribution towards the acquisition of the property in question before entitlement to a share thereof.
16. As to whether the trial court had jurisdiction to handle the issue of shareholding in the company as part of distribution, the appellant submitted relying on the case of S.N.K Vs. M.S.K & 5 Others [2015] eKLR that the same is not a preserve of the family court but a commercial dispute. That in the aforesaid case this Court reiterated that the trial court with a jurisdiction under Section 17 of the Married Women Property Act did not have jurisdiction to distribute properties registered in the name of the company in which the spouses are shareholders.
17. In response, the respondent submitted that the issue of jurisdiction was never raised right from the inception of the suit. That the issue was not pleaded by the appellant and neither was it canvassed at the hearing. It was raised too late in the day in appellant's written submissions and therefore she had no opportunity to respond. The respondent while relying on Civil Appeal No. 219 of 2013, Independent Electoral & Boundaries Commission & Another Vs. Stephen Mutinda Mule & 3 Others [2014] eKLR submitted that it is trite law that parties are bound by their pleadings and cannot depart from them save by way of amendment which did not happen in the circumstances of this case.
18. On the applicable law in determining the rights of the parties as regards matrimonial property the respondent submitted that the decree nisi was issued on 23rd February, 2010 and the decree absolute was only issued on 14th January, 2011. That until a decree absolute is issued, the marriage is deemed to be still subsisting. Accordingly, the trial court did not err in making reference to the current Constitution. That the High Court further made it clear that the Matrimonial Property Act, 2013 did not apply to the instant case. As such the court decided the matter on the basis of Married Women Property Act, 1882, and Constitution of Kenya 2010.



19. As to whether the respondent contributed to the acquisition of the suit properties the respondent submitted that the Langata property was bought by both parties as documents from the financier indicated and that although she did not repay the loan directly, she took care of the household expenses as she was equally in employment. That even if there is no evidence to show what she contributed, the mere fact that the names of both parties appear in the title is sufficient proof for the court to share the property equally amongst them as held in the case of *Pettit Vs. Pettit* (1969) All ER 385.
20. The respondent urged that the Kitengela property should be shared equally as well since she contributed towards its purchase while working full time in the company. During the time the appellant was fully employed by [Particulars Withheld] and thus the respondent was in charge of the day to day running of the company formed by the appellant. That the purchase price for the property was Kshs.300,000 and was fully paid for from the proceeds of the company.
21. As to whether the evidence on record is sufficient to prove contribution by the respondent, it was submitted that it is a question of fact and that there was sufficient evidence to show that she indeed contributed to the acquisition of the suit properties. The respondent in the penultimate prayed that the appeal be dismissed with costs.
22. As a first appellate court, this Court's role is to subject the whole of the evidence tendered in the trial court to a fresh and exhaustive scrutiny and reach its own conclusions, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. See *Selle & Another Vs. Associated Motor Boat Co. Ltd. & Others* (1968) EA 123.

Upon perusal of the record, written submissions together with the authorities cited by both parties our deduction is that the following are the issues for determination in this appeal: whether the trial court had jurisdiction to entertain the dispute, the applicable law to the dispute; whether the trial court properly evaluated the evidence before it and lastly whether the trial court rightly apportioned the suit properties.

23. The trial court having considered all the evidence presented by both sides and relying on various case law came to the conclusion that, the suit properties were matrimonial property within the meaning of Article 45(3) of *the Constitution* and *Married Women Properties Act* and ordered to be shared on 50:50 basis.

The source of law when moving the court for distribution of matrimonial property under the old law was Section 17 of the Married Women Property Act of 1882. A party has to move the court under the correct provisions of the law as was rightly held by the Supreme Court in the case of *Hermanus Phillipus Steyn Vs. Giovanni Gneccchi-Ruscone* [2013] eKLR at paragraph 23 thus;-

.....it is trite law that a court of law has to be moved under the correct provision of the law.

24. However, we hasten to add that the issue of jurisdiction was not raised by way of pleadings by the appellant. It was only raised late in the day in the written submissions of the appellant. To this extent we agree with the respondent that the issue having been raised as such, she was denied the opportunity to counter it. We also agree with the respondent that a party is bound by his or her pleadings. The issue having not been pleaded and nor canvassed in the trial court we think that it will be unfair and unjust for us to determine it at this stage. Submissions are no replacement for pleadings.
25. There is equally another issue where the trial court opted to rely on *the Constitution* or the *Married Women's Property Act* 1882.



26. Whether the principles of equality espoused in *the Constitution* 2010 should be brought to bear in the interpretation and application of Section 17, of the *Married Women Property Act* “MWPA” in a case, as this one, which was filed before the promulgation is a question that commends itself to us to the reasoning that was given by the Supreme Court in the case of *Samuel Kamau Macharia and Another vs Kenya Commercial Bank Ltd & 2 Others*, [2012] eKLR when it rendered itself thus:

“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*.”

27. However, in the circumstances of this case the marriage was still alive when *the Constitution* was promulgated as the decree absolute had yet to be issued. It was subsequently issued long after the promulgation of *the Constitution*. Consequently, the trial court cannot be faulted for resorting to it in the determination of the dispute. In so doing the trial court was not applying *the Constitution* retrospectively as claimed by the appellant. With regard to Married Women Property Act the trial court was emphatic that it was the applicable law in the circumstances and we wholly agree.
28. Several decisions have been rendered in line with Section 17 of the *MWPA*. The courts have not applied a general principle of equality in the division of property in dispute. Just like in England, they have acknowledged the peculiar circumstances of each particular case. The interpretation of Section 17 of *MWPA* was best captured in *Echaria Vs. Echaria EALR* (2007) 2 EA 139 where this Court restated the position as follows:

“In all cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this court, the court has invariably given the wife an equal share. However, a study of each of these cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of each case and independently assessed the wife’s contribution as equal to that of the husband.”

29. The court in coming to this conclusion had considered its earlier decisions in *Essa Vs. Essa* (1995) LL 384 (CAK), *Nderitu Vs. Nderitu*, Civil Appeal No. 203 of 1997 (UR) and *Kamore Vs. Kamore* (2001) 1 EA 81. Other decisions which the Court considered along the same lines were *Muthembwa Vs. Muthembwa* (2001) LLR 3496(CAK) and *Mereka Vs. Mereka* Civil Appeal No. 236 of 2001 (UR).



30. When we look at the interpretation given to Article 45 of *the Constitution* by the courts it seems to be in tandem with reasoning in the above case. For instance. In *EGM Vs. BMM* [2020] eKLR this is what this Court said:

“With great respect, we find the learned judge’s interpretation of Article 45 (3) to be textually and contextually untenable. He failed to appreciate that the sub-Article simply deals with equality of the fundamental rights and freedoms of spouses during and after the dissolution of marriage. There was no basis for reading into the provision what the text does not ordain. Equality of spouses does not involve the re-distribution of property rights at the dissolution of marriage. The learned judge missed the mark on his interpretation of spousal equality as enshrined in that sub-Article. This Court espoused the meaning of that equality in *MEK Vs. GLM* [2018] eKLR as follows;

‘Equality in marriage is not a principle to be applied blindly nor is it intended to encourage dependency by one spouse. It is a situation where each party makes a contribution. In other words, it is not shifting the burden, but the sharing of responsibilities and benefits taking into account the gender limitations.’”

We would agree with the decision in the *EGM* case in so far as interpretation is concerned as the same reflects the meaning given to Section 17 of the *Married Women Property Act* 1882.

31. As to whether the trial court properly evaluated the evidence before it, we are in agreement with the respondent that the trial court properly evaluated the evidence tendered by the parties. It considered the fact that there was a marriage between the parties which marriage was dissolved by the court and whilst the same subsisted, the suit properties were acquired. The trial court further considered the fact that the Langata property was purchased through a loan obtained by the appellant which fact was admitted and acknowledged by the respondent. It appreciated the fact that payment was deducted from the appellant’s salary though the property was eventually registered in their joint names. That the respondent through her documents indicated that she had only contributed to the property by making some improvements thereon and that she had given the appellant space to repay the loan by meeting other house bills and taking care of him, the children and generally maintaining the home. It is not in contest that that the respondent was employed by the company and earned a salary and that she contributed towards the running of the homestead and related expenses. The company was co-owned by both the parties and in any case during the period within which the properties were bought, the majority shareholder was the appellant. We are of the view that these facts were well appreciated by the trial court in arriving at its decision.
32. As to whether the trial court rightly distributed the suit properties, we do not think that from the facts above that this should have attracted the sharing at 50:50. The Langata property was bought via a mortgage by the appellant and all through it was conceded that he solely repaid the loan. The respondent was then working too and there is evidence that she used to meet both monetary and non-monetary bills at home.
33. At the end of it all, it was clear that even though the Langata property was registered in joint names, the intent was never to be a joint ownership as there was no equal contribution. The appellant succinctly explained the reason why the respondent’s name appeared in the title. However, the respondent in one way or another made some contribution. It may not have been monetary, but all the same she made some contribution. Based on the fact that the two were husband and wife for a considerable period of time and the property being registered in joint names, we do make an order that the same be deemed to have a 60/40 share for the appellant against the respondent.



34. On the Kitengela property it is without doubt that the same is registered in the appellant's name and the respondent does not reside on the same. The evidence tendered by the respondent which was undisputed is that she had drawn money from the company account that was used in the purchase of the 16 said property. We have already stated that from the record before us, the business belonged to both parties. We are satisfied on that basis that this property was available for equal sharing between the parties at the ratio of 50/50.
35. To that limited extent, the appeal succeeds. We accordingly set aside that part of the judgment of the High Court ordering that the suit properties be shared on the basis of 50:50. We substitute thereof an order that the respondent is entitled to 40% of the Langata property. The Kitengela property shall be shared equally. Any party may proceed to pay to the other the monetary value of the said share upon valuation of the suit properties. Considering the relationship of the parties let each meet bear their own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

