ENK v MNNN (Civil Appeal 559 of 2019)
[2021] KECA 219 (KLR) (3 December 2021) (Judgment)

Neutral citation: [2021] KECA 219 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 559 OF 2019

HM OKWENGU, MA WARSAME & S OLE KANTAI, JJA

DECEMBER 3, 2021

BETWEEN

ENK ..... APPELLANT

AND

MNNN ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Musyoka, J.) dated 10th May, 2019 in H.C.C.C. No. 31 of 2014 (OS))

JUDGMENT

1 The two questions before Musyoka, J. in the consolidated petitions were whether the marriage between the appellant, ENK and the respondent, MNNN should be dissolved and the issue of distribution of three properties. In the Judgment delivered on 10th May, 2019 the Judge dissolved the marriage and on the issue of sharing out properties the Judge held that the same be shared on 50:50 basis. Both parties had prayed for dissolution of the marriage and that issue is not before us in this appeal. The appeal challenges the holding that the parties share the matrimonial properties equally – the 14 grounds of appeal set out in Memorandum of Appeal drawn for the appellant by his lawyers, M/S E.M. Wachira & Company Advocates revolve through that issue only. It is said that the Judge erred in law and fact in failing to hold that the respondent had not proved entitlement to a 50% share of the properties; that the Judge should have found that the appellant had contributed 100% in the acquisition of the properties and that the Judge should have found that the respondent was entitled to nothing more than 1%; that the Judge erred in law and fact in not finding that the appellant had rebutted the presumption of equal ownership of the properties despite documentary and oral evidence adduced by the appellant; that the Judge should have ascertained specific shares of contribution by either party towards the acquisition of any or all of the 3 properties; that the Judge misinterpreted Article 45(3) of the Constitution of Kenya, 2010 and the *Matrimonial Property Act*, 2013; that the Judge failed to apply binding precedent thus falling into error and, finally, that the Judge erred both in law and fact in failing to determine all

issues placed before him for determination and/or arising from the pleadings and the evidence. It is prayed that we allow the appeal, set aside the Judgment of the High Court and that we make an order that the properties be shared in the ratio 99:1% in favour of the appellant, that the appellant pay to the respondent the monetary value of her share upon valuation and that the respondent pay costs of the appeal.

2. This is a first appeal from a decision of the High Court in first instance and rule 29 of the *Court of Appeal Rules* requires that we re-appraise the evidence and draw inferences of fact. That mandate has received many judicial pronouncements as in the oft-cited case of *Selle & Another v Associated Motor Boat Company Limited & Others* [1968] EA 123 where the following passage appears:

> "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

3. It is common ground that there were 3 properties acquired during the marriage. Two of the properties – Title No. Ngecha/Kabuku/T.xxx and Title No. Ngecha/Kabuku/T.xxx (the Limuru properties) were registered in the joint names of the parties in this appeal while Town House No. 4 erected on L.R. No. xxx/xxx/xx (the town house) was unregistered but the evidence was that the parties intended to have it registered in their joint names.

4 There was the petition filed by the appellant at the Chief Magistrates Court, Nairobi, and the Originating Summons taken out by the respondent at the High Court of Kenya at Nairobi. They were consolidated.

5. In the petition the appellant stated that on 21st December, 2007, he, a widower, married the respondent, a widow, under the African Christian Marriage and Divorce Act. They set up matrimonial homes in Hurlingham, Riverside Drive and Kileleshwa (all in Nairobi), that the appellant was a Professor in Environmental Sciences, a Chief Executive Officer of a local Non-Governmental Organization (NGO) and part time lecturer in local universities while the respondent is a social worker and a Chief Executive Officer of an NGO. The parties had no issues borne in the marriage but the appellant had 3 grown children borne with his deceased wife while the respondent had 1 grown up child from her previous marriage. It was alleged that the respondent had treated the appellant with cruelty leading him to suffer mental anguish, physical injury, humiliation, demoralization, disillusionment leading to stress, headaches, fear and anxiety. The appellant stated that his marriage with the respondent had broken down irretrievably and it should be dissolved.

6. The respondent in her Originating Summons prayed for a declaration that she was entitled to 50% or such other or higher proportion of the 3 properties; that she be at liberty to purchase the appellant's share of the said properties upon valuation or in the alternative the properties be sold and net proceeds be shared equally and that the appellant be restrained from alienating or encumbering or disposing of the properties. Other prayers in the Summons have no relevance in this appeal.

7. There was an amended Cross-Petition by the respondent but the matters set out there are already set out in the petition and originating summons, the only other issue raised being that the appellant was cruel and had committed and was committing adultery with a named woman joined in the cross-petition as co-respondent. The parties filed many affidavits in support of the rival positions they took in the dispute.

8. The respondent stated in one of the affidavits in support of the Summons that during the subsistence of the marriage she had contributed financially to the welfare of the family through purchase of food, clothing and meeting other household and family expenses; that they had acquired the 3 properties through joint efforts and had them registered in their joint names; that the appellant had moved out of the matrimonial home in 2013 and had taken away some items from the home; that he resided in Lavington with the co-respondent.

9. In replying affidavit to the Summons the appellant stated amongst other things that his marriage to the respondent was his second one while the respondent was in her third marriage; at paragraphs 12 and 13 of the affidavit:

> "12. THAT I have at all material times been a Professor in Environmental Sciences, the Chief Executive Officer of a Local Non Governmental Organization (NGO) known as [Particulars Withheld] and a part time Lecturer at the St. [Particulars Withheld] while the Applicant is a Social Scientist and has at all material times also been a CEO of a local NGO known as [Particulars Withheld] (Kenya), she is also a part time Lecturer at the [Particulars Withheld] University, [Particulars Withheld] University, [Particulars Withheld] University among others and a Consultant for Organizations such as [Particulars Withheld], [Particulars Withheld], [Particulars Withheld] KENYA amongst a host of others and sits in the boards of several schools such as [Particulars Withheld] Girls High School and [Particulars Withheld] Primary School. Annexed herewith and marked as "ENK 2" in a bundle are copies of the Applicant's official business card, the Certificate of Registration of her NGO and the organization's profile.
>
> 13. THAT the Applicant's said NGO is a beneficiary of generous funding and contributions of an organization known as [Particulars Withheld] in BRITISH COLUMBIA, a charitable organization operating in Canada whose funding of the local chapter was through my personal initiative. Annexed herewith in a bundle and marked as "ENK 3" is a copy of an abstract profile of the said Canadian Society and the co-operation agreement between the Canadian Society and the Applicant's NGO."

10 The appellant admitted that the 3 properties were acquired during subsistence of the marriage but denied that the same were acquired through joint efforts claiming that the respondent had not made any contribution to the town house. Again the appellant stated that he had in 1990 with his late wife purchased a property in Hurlingham (House No. xx on L.R. No. xxx/xxx/xx) (the Hurlingham property); that upon the death of his first wife and two years after marrying the respondent, he decided to sell that property; he then utilized the funds (Ksh.16,700,000) to buy the town house at Ksh.20,000,000 in 2009. He produced documentation to show how he paid purchase price for the town house being a cheque for Ksh.15,000,000; Ksh.3,000,000 by bank funds transfer; two bank transfers for Ksh.800,000 each and a final bank transfer Ksh.383,000; that he paid legal fees Ksh.500,000 (he produced documents in support) and stated that stamp duty Ksh.800,000 was to be paid by the respondent but she had not paid. Further, that he utilized all his personal savings and borrowed money from Barclays Bank and from a Sacco to meet the deficit after utilizing the whole sale price from the Hurlingham property to pay for the town house. The appellant also stated that he used his personal savings and loans to pay the total purchase price of Ksh.3,700,000 for the Limuru properties and produced documents in support. Further, that he had paid entire purchase price for the 3 properties and that the respondent's contribution was limited to adding aesthetic value to the matrimonial home like planting flowers and shrubs on a 12 x 10 feet garden adjacent to the town house.

11 It is case of the appellant that he paid insurance for the town house, settled security fees, paid salaries and wages for domestic help and a gardener, bought household furniture, electronics and appliances, bought recurrent household consumables and settled bills for water, electricity and garbage collection. He had expended Ksh.1,300,000 to refurnish the respondent office apartment to enable her manage her NGO, spent Ksh.700,000 to purchase furniture and other equipment for the respondent's NGO, paid salaries and wages for staff at the said NGO and he had purchased a motor vehicle for the respondent's use. The appellant further contended that he rendered intellectual aid and contribution towards the respondent setting up the NGO; had served in the NGO as a board member without salary; that the house help would hand over to him a shopping list and it was his driver who would go to the supermarket to make purchases for the house; he denied that the respondent bought clothes; he alleged that the respondent had acquired named properties in her own name during the subsistence of the marriage.

12. In a further affidavit the respondent admitted to having been married twice before she met the appellant; that it was her who personally searched for and identified the plot where the town house was built; she personally supervised the construction and assisted financially and physically to shop for building materials, decorated the house and shopped for furniture; that she had given the appellant "....lump sums of money in cash but unfortunately and since I sincerely believed and trusted him I did not insist on him acknowledging receipt of the said money."** She stated that they jointly (with the appellant) paid for security, house help and gardener and they jointly bought furniture and electronics. Of the properties she acquired during her marriage to the appellant she stated that they were acquired for her son from a previous marriage; that the properties were acquired with the appellant's knowledge. She admitted that she had dual citizenship (Kenya and United States of America).

13. There is nothing much more added to the material we already have by the appellant's further affidavit in response to the Originating Summons. He depones at paragraphs 7 and 8 of that affidavit:

> "7. THAT it is not true that the Applicant either physically searched for or identified the matrimonial home or that she ever supervised the construction of the same and the truth of the matter is that I was able to identify the said property from an agent namely Mr. Sammy Buruchara who was working on behalf of Prof. Sam Ongeri who was the vendor of our house and further that the said house was among other 4 units which were all being constructed on the same parcel of land and which were all built by a one (sic) Mr. Prof. Sam Ongeri and no supervision was thus required or necessary as I was buying a completely built house.
>
> 8. THAT in answer to the allegations contained in Paragraph 10 of the said Further Affidavit, I wish to categorically state that I have never received any of the alleged "lumpsums" of money in cash or otherwise from the Applicant and in any case the purpose for which the same was allegedly given to me is curiously not revealed despite the fact that I have never needed or required any money whatsoever from the Applicant."

The Cause was heard through *viva-voce* evidence.

14. The appellant stated, relevant to this appeal, that the town house was to be registered in joint names; but that had not happened as the respondent had failed to pay for stamp duty. He produced documents in proof that he had paid purchase price in full. He also produced documents to prove that he had paid for the Limuru properties. He stated of the respondent:

> "Dr. N has PHD in Socio Physo Sciences. She is highly educated she has two (2) Masters Degrees, a PHD and a Bachelors Degree. She lectures in several universities, including

> [Particulars Withheld] University (see Item No. 56) - ... she has lectured at [Particulars Withheld] University – HIV/AIDS and during .....2015....(see Item No. 57). I have learnt that she was appointed by CS Devolution, Anne Waiguru, on x/xx/2015 – Kenya Gazette Member of NGO Coordinator Board (see Item No. 58). She was also appointed by Dr. Kidero, to be a member of a Committee on 15th February, 2016 a public committee to find out deaths at Mama Lucy (See Item No. 59). She gives lectures at top schools in Kenya – like [Particulars Withheld] – See Bulletin (Item No. 60). Dr. N makes good money from these engagements....."

15. Of the properties acquired by the respondent during the marriage the appellant questioned why the respondent would not have registered them in her son's name when he was over 30 years old.

16. SB was called as a witness by the appellant. He testified that he was the manager in a project involving erection of 5 town houses for his father in law (the developer). The construction was done by a contractor, Bubeco and, in his own words:

> "I managed the project for Prof. Ongeri. It did not require the prospective buyers to supervise the works. The works are standard. We do not require the prospective buyers to come in. The landscaping was part of the contract. I supervised on a daily basis. It would not have been possible for Dr. N to have come landscaping on House No. 4. It was done by the contractor ..."

17. He further testified that he received the full purchase price for the town house from the appellant and that the appellant and the respondent visited the house when it was complete.

Then it was the respondent's turn in the witness box.

18. She stated that she bought all fruits and vegetables for their home; it was she who shopped at supermarkets; in 2009 she identified the property where the town house was built. She admitted that purchase price for the town house was from sale proceeds of the Hurlingham property and that the appellant took loans to top up the deficit but that she was also contributing ".... say Ksh.50,000 or Ksh.100,000. I did not keep records."

19. RRT, the respondent's sister-in-law, was called as a witness. Her testimony was that the properties acquired by the respondent during marriage were for the respondent's son who was abroad and still a student. She admitted that he was an adult at the time the properties were acquired.

20. The learned Judge considered all the evidence presented by both sides and in line with Section 6 of the *Matrimonial Property Act*he held that the 3 properties (town house and the Limuru properties) were matrimonial property within the meaning of that Act. Citing Article 45(3)of the Constitution and relying on various case law the Judge came to the conclusion that, as we have seen, the 3 properties be shared on 50:50 basis.

21. When the appeal came up for hearing before us on a virtual platform on 14th June, 2021 learned counsel Mr. Evans Wachira appeared for the appellant while learned counsel Miss Susan Ndirangu appeared for the respondent. Both parties had filed written submissions and Lists of Authorities; the lawyers did not wish to highlight those submissions and they left the whole issue to us for determination.

22 We have perused the submissions and case law cited and we are grateful to counsel for the industry employed in support of the rival positions they take in the appeal. Article 45(3) of the Constitution declares that:

> "Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage."

23. The *Matrimonial Property Act* No. 49 of 2013 (it commenced on 16th January, 2014) defines at Section 2 contribution during marriage as monetary and non- monetary contribution and includes:

a. domestic work and management of the matrimonial home;

b. child care;

c. companionship;

d. management of family business or property; and

e. farm work.

24. The said Act defines matrimonial property at Section 6 to mean:

a. the matrimonial home or homes

b. household goods and effects in the matrimonial home or homes; or

c. any other immovable and movable property jointly owned or acquired during the subsistence of the marriage.

25. On ownership of matrimonial property Section 7 of the said Act provides:

> "Subject to Section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved."

26. Still on the said Act it is provided at Section 14 on presumptions as to property acquired during marriage:

> "Where matrimonial property is acquired during marriage –
>
> a. in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
>
> b. in the names of the spouses jointly, there shall be a rebuttable presumption that their beneficial interests in the matrimonial property are equal."

27. The petition at the Chief Magistrates Court (CM Divorce Cause No. xx of 2014) was filed on 23rd January, 2014 and Originating Summons (HCCC No. xx of 2014) was also filed the same day. They both fell within the purview of the *Matrimonial Property Act* which had come into force a week earlier.

28. The Judge found that the three properties were matrimonial properties; they were jointly owned and the parties should have 50% share each because, as per his holding, Article 45 (3) of the Constitution decreed that to be the proportion of sharing of matrimonial property upon dissolution of marriage.

29. In *EGM v BMM* [2020] eKLR decided by this Court on 20th December, 2020 this is what we said of that kind of interpretation of Article 45(3) of the Constitution:

> "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 v GLM[2018] eKLR as follows;
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> > "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."

30. In *MGNK v AMG* [2016] eKLR on an interpretation of Section 14 of the said Act:

> "When matrimonial property is registered in the joint names of the parties, there is normally a presumption that each party made equal contribution towards its acquisition. The presumption is however, rebuttable by either party...."

31. In *PWK v JKG* [2015] eKLR this Court held:

> "We think that this is an appropriate case where, subject to what we shall say hereafter, a distribution of 50:50 would have been appropriate. This would not be on account of any compelling legal principle that spouses must share equally in matrimonial property but rather, as was succinctly put by a five-judge bench of this Court in *ECHARIA v ECHARIA* (Supra).
>
> > "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 "Equality or equity" while heading the caution of Lord Pearson in GISSING –VS- GISSING [1970] 2 All ER 780 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 costs 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'."

> We are of the respectful view that the principles restated by ECHARIA VS. ECHARIA are good law and contribution as the basis for distribution of matrimonial property remains valid."

32. This is how Kiage, JA expressed on interpretation of Article 45(3) of the Constitution in respect of distribution of matrimonial property in the case of *PNN v ZWN* [2013] eKLR :

> "Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement."

33. The respondent deponed at paragraph 9 of further affidavit sworn on 28th May, 2014:

> "9. THAT in further answer I wish to state that I am the one who physically searched and identified the plot on which our matrimonial home is built and at the time of construction I personally supervised the construction assisted financially and physically to shop for the building materials, decorated the house and shopped for the furniture with the Respondent."

34. That deposition was contradicted by testimony of SB, the Manager in the project where 5 town houses were built. It was his evidence that the town houses were standard and were sold on completion, the appellant and respondent buying house No. 4 in the said development. The project belonged to a developer who owned the plot and construction was by a contractor, buyers of the finished houses not having done anything in the course of the construction. It is thus difficult to understand the assertion by the respondent that she identified the plot on which the town house was built and that she supervised construction and brought construction materials. That is not how town houses are developed at all.

35. The appellant produced evidence in form of cheques and bank transfers to prove that he had paid full purchase price for the town house and for the Limuru properties. Part of purchase price for the town house was from proceeds of sale of the Hurlingham property which was registered in the name of the appellant and his late wife.

36. Testimony before the Judge was that both the appellant and the respondent were top professionals in their respective fields. They were consultants and also taught in various universities and there was evidence that by the time they married the respondent was pursuing her Ph.D at a university in the USA. According to the appellant even household chores like purchases at the supermarket were undertaken by a house help and his driver, the respondent's time and effort being engaged in running her NGO and in teaching duties. There were no issues to the marriage.

37. According to the interpretation of contribution we have seen at Section 2of the *Matrimonial Property Act* the respondent did not place any evidence before the trial court to show that she engaged in domestic work or management of the matrimonial home; there were no children for her to care for; there was no management of any family business or property. Her contribution would only fall under "companionship" and the evidence placed before court on that issue was by MWN (the appellant's sister-in-law) and TK (an ICT expert). The former testified on how the respondent had engaged her in various conversations to the effect that she planned to eliminate her husband (the appellant) and

that all she wanted in the marriage was to acquire the appellant's property. The latter (K) downloaded information from MWN's mobile phone in respect of those conversations but the CD or video were not produced into evidence.

38. On the material placed before the Judge, there was no basis at all to reach the conclusion that the parties to the marriage were entitled to an equal distribution of the matrimonial property. They were not. Evidence showed that the appellant paid for the properties in full with no monetary contribution by the respondent at all. Although the properties were registered in their joint names, the appellant was able to show that he did that purely for the affection he had for his wife at the material time. When divorce came the appellant proved to the required standard that he had personally purchased and paid for the properties. The respondent did not make any monetary contribution. The appellant was able to rebut the presumption that the properties which were jointly registered were equally owned. In any case marriage per se is not a ground for sharing properties acquired during marriage in an equal basis. The law in a well trodden path has established that parties must show evidence of their respective contribution to the properties and secondly to the family well being. It is clear beyond doubt that there was no issue to the marriage for the respondent to assert that she was taking care of children and other family issues. Admittedly both parties were top professionals who pursued their personal and professional interest separately.

39. As stated earlier, this is evidence to show that the respondent purchased her our properties during the subsistence of the marriage and the appellant is not to his credit claiming any share interest in the said property. We do not understand why the respondent want to benefit the hard earned labour of the appellant.

40. Considering the facts of the case that was before the Judge and putting all factors into play including provisions of the *Matrimonial Property Act* we are of the considered opinion that the respondent was not entitled to anything more than 10% of the total value of the town house, which was the matrimonial home. This appeal has merit and we allow it. We set aside that part of the Judgment of the High Court delivered on 10th May, 2019 ordering that the 3 properties be shared on the basis of 50:50. We substitute thereof with an order that the respondent is entitled to 10% to be shared at a ratio of 90:10 in favour of the appellant. The other two properties shall be for the appellant fully. The appellant may pay to the respondent the monetary value of the said share upon valuation of the town house. Considering the relationship of the parties let each meet their own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR