IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO, (P), MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 146 OF 2018

BETWEEN

TKM alias TKS...........APPELLANT

AND

SMW.........................RESPONDENT

(Being an appeal against the Judgment of the High Court at Mombasa (M. Thande, J.) dated 19th January, 2018

in

Originating Summons No. 5 of 2014 formerly Commercial Case No. 38 of 2013)

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JUDGMENT OF THE COURT

The marriage between the parties in this appeal was solemnized on 10th December, 1999 at the Registrar's Office in Mombasa. They were blessed with three issues, FOM and twins INM and MSM, who were respectively 14, 12 and 12 in 2013 when the originating summons was taken out. Following the marriage, the couple cohabited in Nyali, Mombasa, up to 2002 before they relocated to Serena area, Mombasa. They separated on 24th March, 2009 when the respondent left their matrimonial home after a disagreement, which made it difficult for them to continue living under the same roof. They were granted joint custody and equal maintenance of the children in **Children's Case No. 234 of 2009**. The respondent then petitioned for divorce on grounds of cruelty and desertion, as a result of which their marriage was dissolved on 8th February, 2016 in **Divorce Cause No. 63 of 2012**. Apart from the children the couple were also blessed with real and personal property.

The respondent took out an originating summons for orders that their joint ownership of one of the properties, where they had established their matrimonial home, being IR No. xxxx (Original No.xxxx/xx) be severed; that he be allowed to buy the appellant's share; that the Deputy Registrar be empowered to sign any documents that the appellant may refuse to sign; that the appellant be ordered to account for rent for the matrimonial home from 24th March, 2009 until the determination of the suit and to pay over to the respondent his share of the rent. It was his case that he purchased the plot on which the matrimonial home stands at a consideration of Kshs. 1,050,000/= out of which the appellant contributed Kshs. 300,000/=; that the latter demanded a refund of her contribution, pursuant to which he paid her Kshs. 98,000/= leaving a balance of Kshs. 202,000/=; that he singlehandedly, from his resources, built and furnished the home without any contribution from the appellant; and that he solely paid land rent and rates. According to him, the appellant's contribution was insignificant.

The appellant for her part insisted that she too made substantial contribution towards the acquisition and development of the matrimonial home; that in fact, it was her idea to purchase the plot upon which they built their home; that she supervised the construction; that she put in money and time in the furnishing and decoration of the property; towards the installation of electric fence and CCTV; reconstruction of the gate, bathrooms and jacuzzi; that she made monthly payments towards home security, salaries for house helps, dog feed and treatment, DSTV and electricity; and that since their separation in 2009 she has had the sole responsibility of financially supporting the children and maintaining the matrimonial home. The appellant was in effect saying that she made both direct and indirect, monetary and non-monetary contribution in the matrimonial home.

In addition to the matrimonial home, the appellant sought to be included in the distribution of other properties to which she claimed to be entitled to an equal right of share: Plot Nos. xxx/VN/MN, xxxxx/I/MN, xxxxx/I/MN, farm at Kanduyi, Bungoma, Swahili houses at Likoni and Changamwe on plot No. xxx/VN/MN and cash in the bank account for [particulars withheld] Limited.

The Judge, (Thande, J.) in her judgment considered and determined all the issues raised by both sides, applying the English Married Women

Property Act (1882) and noting that the Matrimonial Property Act, 2013, on which the parties appeared to rely had not been enacted by the time the suit was filed on 17th April, 2013. The Matrimonial Property Act came into force on 16th January 2014. Citing **section 17** of the Married Women Property Act, and **PNN V. ZWN** (2017) eKLR, the learned Judge determined the question of joint ownership of the matrimonial home thus;

> **"32. From the evidence placed before me, I do find that both the applicant and respondent purchased the matrimonial home plot for Kshs. 1,050,000 with the aespondent's contribution being Kshs. 300,000……..Although the applicant claims to have refunded the sum of Kshs.98,000 to the respondent no evidence was produced to persuade the Court that such refund was ever made. On construction of the matrimonial home, I do find that the applicant financed the same through the sources set out in his claim with no financial contribution from the respondent. The receipts for building materials exhibited by the respondent were for construction of her father's house as stated in her affidavit.**
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> **...**
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> **The respondent claims that she bought food and met other household expenses. She also carried the pregnancies of the 3 children of the marriage, took care of them as well as giving companionship to the applicant. The applicant however contends that the respondent was ever travelling and was away from home for extended periods. The respondent did not do any farm work and domestic work was done by employees. To date as per her testimony she maintains two house workers even though she lives alone. He further contends that she offered him no companionship at all as he was the one who provided care to the children as stated by the judgement in the Children's Court's judgement.** (sic) **The exhibited decisions in the Children's Court paint a picture of the respondent as a woman who abdicated her responsibility as a mother of taking care of the children. She often came home late including the wee hours of the morning. It was the applicant who ate with the children and assisted them with homework. The conduct of the respondent informed that Court's decision to grant the parties jont custody notwithstanding that the children were of tender years.**
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> **As outlined above, the evidence on record demonstrated beyond peradventure that the respondent's contribution towards the purchase of the matrimonial home plot was minimal while there was no discernible contribution towards the construction of the matrimonial home. Construction was financed exclusively by the applicant from his personal resources and borrowings. That being the case, the presumption as to a joint tenancy in equal shares is rebutted. It follows therefore that this Court has jurisdiction to sever the tenancy."** (Our Emphasis)

The learned Judge, determining whether the respondent should buy off the appellant's shares in the matrimonial home, noted that though the latter's contribution to the purchase of the land was minimal, she made no contribution towards the construction of the matrimonial home. He was of the view that this fact notwithstanding, the appellant had nonetheless maintained the matrimonial home albeit with the help of employees; that she had improved it by painting it, acquired furniture and furnishings and carried out repairs since their separation. But the judge could not ascertain the **"exact portion of her contribution to maintain the matrimonial home"** but that that contribution could not be disregarded. In the learned Judge's estimation the appellant's share in the matrimonial home was no more than 10%. The Judge, on that basis granted the respondent the prayers to buy off the appellant's shares. As a corollary to this ordered that, should the appellant refuse to sign the relevant transfer documents, the Deputy Registrar would sign them on her behalf.

The Judge dismissed the prayer asking the appellant to account for rent for the matrimonial home, explaining that the appellant had never been the respondent's tenant and was not in illegal occupation of her matrimonial home.

Regarding the other properties claimed by the appellant to be part of matrimonial properties, the Judge was satisfied, in respect of Plot No. xxx/V/MN comprising a block of 16 flats, that it was acquired by the respondent before the marriage and further that it was sold to cater for the maintenance of the children. For these reasons, it was not available for distribution. As for Plots Nos. xxxxx/I/MN, xxxxx/I/MN and Motor Vehicle Reg. No. [particulars withheld] Toyota Premio, all registered in the name of [particulars withheld] Limited, the Judge rejected the appellant's claim, holding that neither she nor the respondent were directors of that company; and that the directors were their three children. On the respondent's shares in [particulars withheld] Freighters (K) Limited, the Judge was once again satisfied that the shares were not acquired during the subsistence of the marriage. Likewise, the appellant failed to persuade the learned judge that she was entitled to part of the respondent's shares in [particulars withheld] (K) Limited or in the 5-acre farm in Kanduyi, Bungoma.

The upshot of these findings was that the joint tenancy in respect of the matrimonial home was severed and distributed at the ratio of 90:10 in favour of the respondent, based on their respective contribution towards the acquisition of the land and its development. The property was to be valued and the respondent paid her share by the appellant in accordance with the above ratio. Pending full payment of her share, the appellant was to retain possession of the home and to vacate it within 6 months of receipt of the funds. In addition to this, she was awarded all the furniture, furnishings and appliances in the matrimonial property. In reciprocation, the appellant was ordered to maintain the property in the same condition it was; and to execute, within 30 days of the judgment all documents required to effect the transfer of her interest in the said property to the respondent, failing which the Deputy Registrar was empowered to execute them in her place.

The appellant has now proffered this appeal on 14 grounds which were summarized as follows in the submissions: that the learned Judge failed to appreciate the entirety of the evidence placed before her; that, for example, the appellant was in gainful employment while married to the respondent and that she made monetary contribution towards the acquisition of the matrimonial property; that the Judge did not take into consideration her indirect contribution which included, carrying for 9 months and taking care of the issues of the marriage, providing companionship to the respondent and managing the matrimonial home.

It was contrary to **Article 16(1)** of the (UDHR), Universal Declaration of Human Rights **Article 7(d)** of the Protocol of the African Charter on Human and People's Rights which provide, like Article 45(3) of our own Constitution, for equal rights of parties of a marriage, during the marriage and at its dissolution, to insist that only monetary contribution towards the purchase of the matrimonial home is the measure that will be considered in determining entitlement to a share of the property upon dissolution of a marriage; that as a result the learned Judge erred in dividing the property at the ratio of 90:10; and that this ratio defied the provisions of **section 24** of the Land Registration Act and

rationale.

It was further posited that the court ignored the evidence to the effect that the respondent willfully deserted the matrimonial home for 9 years, to live in Nairobi with his other family whilst the the appellant knows the matrimonial home as her only abode; that the court failed to recognize that the appellant made substantial improvements to the property which entitled her to equitable division of the home.

The appellant also contended that the learned Judge misunderstood the decision of the Children's Court by stating that that court had found that she had abdicated her parental responsibility, whereas the truth was that the court awarded both her and the respondent joint custody of the children.

Regarding the other properties, it was submitted that the respondent's testimony was inconsistent on the existence, ownership and existence of some of those properties. For example, it is alleged that at one point, the respondent averred in his pleadings that he was not aware of all properties the appellant had listed, Old Mutual Equity Funds and funds in Imperial Bank Account. However, during the trial he admitted their existence but explained that he had sold some of them to raise money for the maintenance of the children. In support of her case, the appellant asked us to be guided by the decisions in **MBO V. JOO** (2018) eKLR and **Muthembwa V. Muthembwa** (2002) eKLR.

Miss Osino, learned counsel for the respondent, opposed the appeal and submitted that **section 2** of the Matrimonial Property Act defines "contribution" to mean both monetary and non-monetary contribution; and that under **section 7** of the Act, ownership of matrimonial property vests in the spouses according to their contribution towards its acquisition.

In view of the foregoing, counsel submitted that the learned Judge properly directed that the joint tenancy in respect of the matrimonial home be severed and divided between the parties according to their contribution; that the court arrived at the correct assessment of contribution made by each of the parties, based on the evidence before her; that the respondent was able to show that he alone provided funds to construct the home; and that the contribution of each one of them towards the purchase of the land on which the home stands was correctly established from their respective financial contributions. It was contended that the presumption of joint ownership in equal shares under **section 7** of the Act and joint tenancy under the Land Registration Act was rebutted by the respondent by proving his income and expenditure incurred in the construction.

On the other properties, the respondent maintained that there being no dispute that those properties belong to [particulars withheld] Limited, in terms of **section 6(2)** of the Act, the court had no jurisdiction to deal with those properties since both parties were not shareholders; and that the company was created as a trust for the benefit of the children and **section 6(2)** specifically excludes trust property from the realm of matrimonial property. The respondent, however insisted that the company does not own the flat on Plot No. xxx/VN/MN at Mikindani and explained that he acquired it on 15th January, 1999 before the marriage; that the transfer of this property to [particulars withheld] Limited was never finalized; and that this property was later on sold on 8th January 2010 for Kshs. 800,000 to enable the respondent pay for the children's maintenance. Likewise, shares in [particulars witheld] Freighters (K) were acquired on 29th March, 1999 and fully paid for as at 30th June, 1999 long before the marriage.

Further, it was submitted that the appellant failed to prove her contribution towards the shares in [particulars withheld] (Kenya) Ltd; that these were shares bought by the respondent using his personal funds in his name and later sold for Kshs. 750,000 to cater for the maintenance of the children, just as there was no proof of the appellant's contribution towards the ownership of the farm at Kanduyi in Bungoma and Swahili houses without land at Likoni and Changamwe which were all in the respondent's name.

The respondent relied on **MGNK V. AMG** (2016) eKLR, **Kivuitu V Kivuitu** (1991) KLR 248 and **S.N.K V M.S.K & 5 Others** (2015) eKLR in support of his case.

We remind ourselves from the onset that this being a first appeal, we are required by **section 3(2)** of the Appellate Jurisdiction Act to approach it as if it was a rehearing; that this Court has all the powers of the court that made the decision appealed from; and that in hearing and determining appeals in the exercise of its jurisdiction the Court;

> **"… shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court".**

Appellate review by way of rehearing is not a retrial or a *de novo* hearing but one where this Court is not limited to a review of the lower court's decision; one in which it forms its own judgment and draws its own independent conclusions on the issues on the merits of the case; a rehearing and not review for errors. It is generally a rehearing based on the material on record and the Court cannot ignore the trial judge's findings because of the special advantage the trial judge had, being the person who received evidence in the first place, and therefore there is a measure of deference to that court. For that reason the Court will only interfere if it is apparent that on evidence, no reasonable tribunal could have reached that conclusion; that the decision is bad in law. This is the very essence of the decision in the oft-cited **Selle V. Associated Motor Boat Co. Ltd** (1968) EA 123, in a long line of others.

For the appellant and respondent, after their marriage was formally dissolved, their attention turned to the three issues of the marriage and the properties. What has particularly aggrieved the appellant is the apportionment to her of only 10% share of the matrimonial home and the dismissal of the rest of her claim to other properties.

The success of any case, criminal or civil, depends on the evidence presented in support thereof and the burden of proof, in terms of **section 107** of the Evidence Act rests on the party;

> **"…..who desires the court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist".**

Such a person would fail if no evidence at all were given on either side.

The respondent prayed in the originating summons for orders that their joint ownership of the matrimonial home be severed because the land on which it stands was purchased by him at a consideration of Kshs. 1,050,000/=; that out of the appellant's contribution of Kshs. 300,000/=, Kshs. 98,000/= was refunded to her leaving to her credit only Kshs. 202,000. And that was all she contributed; that he alone built and furnished the home without any contribution from the appellant. Because of the appellant's insignificant contribution, he applied that he be allowed to buy her share.

The learned Judge accepted as true the respondent's assertion that the appellant's contribution towards the purchase of the land was insignificant; and that that (insignificant share) was all she could claim.

We bear in mind the edict in **Muthembwa V. Muthembwa** (2002) 1 EA 186, and many other decisions reminding the courts that in assessing the contribution of spouses in acquisition of matrimonial property, each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness.

For our part, from the documentary evidence on record, we think there was enough evidence to prove that the appellant was in full time employment with the [particulars withheld] as [particulars withheld] during the period under review, and that with her annual income of Kshs. 2,253,575, according to [particulars withheld] Personnel Action Form and her other resources, such as dividends from [particulars withheld] Sacco Society Limited, she made both direct and indirect contribution towards the acquisition and subsequent development of the matrimonial home. We are equally persuaded from uncontroverted evidence that she played significant role during construction by supervising it, even at a time when she was expecting the twins. She exhibited numerous invoices and receipts in her name from which we are convinced that she furnished and re-decorated the home by installing electric fence and CCTV, reconstructing the gate, re-decorating the bathrooms and installing the jacuzzi. She paid for security, paid salaries for workers and supported and maintained the children.

There are also other receipts in her name to prove payment of electricity bills, for pest control services, purchase of a fridge, television set, cooker, among many other household items. While the appellant admitted contributing Kshs. 300,000/= towards the purchase of the land, she maintained that she did much more. She denied ever receiving a refund of Kshs. 98,000/= as alleged by the respondent. With respect, we accept this evidence as true since there is no material on record to the contrary.

We have perused the record and nowhere, not in the petition for divorce, not in his oral evidence did the respondent accuse the appellant of financial recklessness or suggested that she lacked the means to do all these things. Indeed, in 2002, it is on record, she was able to build for her parents a house in Mikindani, Mombasa at a cost of Kshs. 3,000,000/=.

From our analysis of the evidence, we have no doubt that the appellant had the resources and indeed contributed to the purchase of the land, development and improvement of the matrimonial home whose value, according to a valuation report of January, 2013, was, at that time Kshs. 32,500,000/=.

We turn briefly to the law. Although the Judge applied the English Married Women Property Act (1882), noting that the Matrimonial Property Act, 2013 had not been enacted by the time the suit was filed on 17th April 2013, this Court has clarified in **M B O V. J O O** (2018) eKLR and others, that under **section 17** of the former statute, like the latter, a woman's direct and indirect contribution was taken into account when considering the entitlement of each spouse as the marriage comes to an end. **Section 17** aforesaid simply stipulates that;

> "**In any question between husband and wife as to the title to or possession of property, either of them may apply for an order to the High Court or a County Court and the Judge may make such order with respect to the property in dispute...as he may think fit".**

For decades, until the enactment of the 2013 statute, this was the basis of division of matrimonial properties. Some of the early leading decisions include **I. V. I** (1971) EALR 278, on which the Court in **Karanja V. Karanja** (1976) KLR 307 relied.

Simpson J, as he then was explained the point thus;

> **"On the basis of these authorities, payments by the wife need not be direct payments towards the purchase of the property, but may be indirect such as meeting house-hold and other expenses including expenditure on clothing for the wife and children and the education of the children which the husband would otherwise have had to pay: and even though the husband may never have evinced an intention that his wife should have a share in the property, the wife may in the circumstances of the case be entitled to a declaration that the property registered, in the husband's name is held wholly or in part in trust for her by virtue of its acquisition as a joint venture. Although most authorities deal with disputes in relation to the matrimonial home, it is because the majority of married couples in England have only one house. Section 17 is not limited in its application to matrimonial home and content."**

When the learned Judge rendered this opinion, no one imagined that it would inform the basis of a legislation 37 years later. **Section 2** of the Matrimonial Property Act, 2013 now defines **"contribution"** to mean;

> **"monetary and non- monetary contributions 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."

This definition, therefore, meets the kind of contribution made towards the matrimonial home by the appellant, to which we have alluded. In the circumstances, we find that the appellant made substantial monetary contribution in the purchase of the land and both monetary and non-monetary contribution to develop the land and subsequently to improve it. This contribution cannot, as the learned Judge estimated, amount to only 10%. We shall, at the end of this judgment, return to this question with what, in our opinion, is the reasonable assessment of the appellant's contribution.

We focus now on the claim by the appellant to the other properties and state briefly that, with respect, the learned Judge arrived at the correct decision in rejecting the claim for want of proof. We reiterate what we said at the beginning of this judgment that the burden of proof rests on the party who desires the court to give judgment in his or her favour. Before the trial court the appellant listed assets that she believed belonged to her by virtue of her marriage to the respondent. That was not enough. It was her burden to link the assets to the marriage and demonstrate her stake in each one of them. This she failed to do, as it turned out some of these properties belonged to third parties, while some had been sold, yet others were purchased before or after her marriage to the respondent. For example, the shares, investments and funds belonging to [particulars withheld] Limited belonged to neither the appellant nor the respondent as they were not shareholders. The shareholders were their three children.

Secondly, [particulars withheld] Limited as a limited liability company has a separate life from that of any of the shareholders or directors and its assets belong to it. The respondent denied that the flat on **Plot No. xxx/VN/MN** at Mikindani was a matrimonial property and explained that he acquired it on 15th January, 1999 before the marriage; that he had intended to transfer it to [particulars withheld] Limited but the transaction was never finalized; and that he later sold it on 8th January 2010 for Kshs. 800,000/= to pay for the children's maintenance. Likewise, there was uncontroverted evidence that shares in [particulars withheld] Freighters (K) were acquired by the respondent on 29th March, 1999 and fully paid for on 30th June, 1999, also before the marriage. There was no proof that the appellant made any contribution towards the acquisition of shares in [particulars withheld] (Kenya) Ltd; that the shares later sold for Kshs. 750,000/= by the respondent to cater for the maintenance of the children. The farm in Kanduyi in Bungoma was confirmed to have been an ancestral land inherited by the respondent and was therefore unavailable for distribution.

The upshot is that these additional claims did not meet the threshold required to discharge the burden of proof and, so, like the learned Judge we dismiss the claim to those other properties.

Altogether, the appeal succeeds in so far as IR No. xxxx (Original No.xxxx/19) is concerned. We assess both her direct and indirect contribution in it to be 50%. We set aside the trial court's ratio of 10:90 in favour of the respondent and substitute it with a ratio of 50:50.

The respondent, having relocated from this property in March 2009, approximately ten years ago, while, since its construction the appellant has throughout lived in the property and the children know of no other home, the order that, in those circumstances, commends itself to us is that the joint ownership be severed and the respondent to sell to the appellant his half share in the matrimonial home after the establishment of its value by a reputable valuer, to be agreed upon by the parties within 45 days from the date hereof, and failing agreement, by such valuer as shall be appointed by the Chairman of the Institution of Surveyors of Kenya. The valuation costs shall be shared equally between the appellant and the respondent.

Each party to bear own costs. Orders accordingly.

Dated and delivered at Nairobi this 8th day of May, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

D.K. MUSINGA

…………………………….

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR