IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), WARSAME & SICHALE JJ.A)

CIVIL APPLICATION SUP NO. 6 OF 2018

BETWEEN

JOO.....APPLLICANT

AND

MBO.....RESPONDENT

(Being an application seeking leave to appeal to the Supreme Court of Kenya against the judgment of the Court of Appeal (Visram, Karanja & Koome, JJ.A) dated 23rd February, 2018

in

Civil Appeal No. 81 of 2017)

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RULING OF THE COURT

By a Notice of Motion dated 8th March, 2018 the applicant seeks certification and leave to appeal to the Supreme Court against the decision of the Court of Appeal sitting at Nairobi in Civil Appeal No.81 of 2017 (Visram, Karanja & Koome, JJ.A). The application is brought pursuant to **Article 163 (4)** of the Constitution, **Rules 40 (b), 42(1)** and **43(1)** of the Court of Appeal Rules.

The application is premised on the grounds that the intended appeal raises matters of general public importance. The applicant's grounds for certification are:

> *a) On 2nd February 2017, the High Court delivered a judgment where it awarded the respondent a share of 30% of the matrimonial home and 20% share of the rental units constructed on the premises, even though it had found that the respondent did not contribute towards acquisition and development of the property;*
>
> *b) The respondent filed an appeal challenging the award, and in turn the applicant filed a cross appeal seeking to reduce the apportionment ratios to fairer percentages;*
>
> *c) That On 23rd February 2018, the Court of Appeal dismissed the cross appeal, set aside the decision of the High Court (**Ougo J**.), and substituted it with an order directing: "**the matrimonial house being Nairobi/Block [..]/[..]located in Tassia Estate and the rental units thereon be shared equally between the applicant and the respondent at the ratio 50:50**";*
>
> *d) That the decision of the Court of Appeal is marred by contradictions, jurisprudential flows, application of wrong law and does not settle the old question of what a party to marriage ought to get upon dissolution of marriage.*
>
> *e) That the intended appeal raises substantial questions of law which are in the interest of the public and which will clarify the uncertainty in the law and guide pending disputes facing similar issues.*

The pertinent questions of law intended for determination by the Supreme Court are stated as follows:

> *i) What law was applicable to the dispute lodged by the respondent at the High Court;*

ii) What legal doctrine governs the applicable law- should the court consider the law in force or when the suit was lodged or when it was heard and determined;

iii) What was the amount of contribution by the respondent in the acquisition and/or development of Nairobi/Block 97/564 and the rental units that are constructed therein, if any;

iv) Does equality mean 50/50 sharing or to each according to his/her contribution.

Counsel for the applicant, **Mr. Odhiambo** submitted that there was great uncertainty as to the law applicable in matrimonial property, specifically, whether the law applicable is one in place when the suit was filed or at the time of determination of the suit thus, resulting in a retrospective application of the law.

It was contended that there were two schools of thought on the question of equality as envisaged under **Article 45(3)** of the **Constitution**; one that it means a 50-50 mathematical computation and the other, that each party is entitled to matrimonial property in so far as his/ her contribution is concerned and proved.

According to counsel, the application of the two schools of thought was evident in the contrasting judgments of the superior courts in this matter. On the one hand, the judgment of the High Court relied on the principles enunciated in the Echaria case whilst the appellate Court's decision was guided by the new regime, thus the applicant should be allowed to canvass the contradiction before the Supreme Court.

The Respondent's counsel opposed the application and contended that the 50-50 allocation by the Court of Appeal was based on the finding that the respondent had acquired a beneficial interest in the matrimonial home by a long period of occupation as a spouse, therefore urged us to dismiss the application.

We have considered the instant application, the grounds in support thereof, the affidavit sworn by the applicant, the submissions of counsel, the law and the determination by both Superior Courts.

The essence of certification under ***Article 163(4)(b)*** of the ***Constitution*** is to ensure that only appeals which raise issues of public importance find their way to the Supreme Court. The Supreme Court in ***Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone, Supreme Court application No. 4 of 2012*** gave the test for granting certification and leave to appeal as follows:

i. For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest

iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;

iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163(4) (b) of the Constitution;

vi. the intending applicant has an obligation to identify and concisely set out the specific elements of general public importance which he or she attributes to the matter for which certification is sought;

vii. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

In determining whether or not a matter involves a question of general public importance on a point of law, the same court aptly stated the following:

"It is plain to us that a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts below. Where the said point of law arises on account of any contradictory decisions of the Courts below, the Supreme Court may either resolve the question, or remit it to the Court of Appeal with appropriate directions".

Applying the foregoing, does the intended appeal involve matters of general importance as contended by the applicant?

We have considered the applicant's grounds in support of certification and in our view, the intended appeal primarily questions the applicable law in the division of matrimonial property where causes were filed prior to the current matrimonial property regime being the Constitution

and the **Matrimonial Property Act, 2013**. In essence should a matrimonial property cause filed prior to the promulgation of the **Kenyan Constitution, 2010** be determined under **Section 17** of the old **1882 Married Women Property Act** of England and in accordance with the principles espoused in ***Peter Mburu Echaria vs. Priscilla Njeri Echaria [2007] eKLR*** or should courts 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.

Having considered the issue, we find that the applicant has established that there is uncertainty in the law arising from contrary views in the High Court and in the Court of Appeal which requires clarification.

In ***Agnes Nanjala William vs. Jacob Petrus Nicolas Vander Goes, Civil Appeal No. 127 of 2011*** the High Court in its decision stated**:**

> ***"Article 45 (3) of the Constitution provides that parties to a marriage are entitled to equal rights at the time of the marriage during the marriage and at the dissolution of the marriage. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends..."***

In ***V W N vs. F N***, ***Civil Application Sup 3 of 2014 (UR 3/2014)***, the Court of Appeal in determining whether **Article 45 (3)** of the **Constitution** applies in matters filed before the promulgation of the Constitution and not yet determined held:

> ***"In light of Article 45 (3) and Section 2 of the Matrimonial Property Act which define contribution to mean monetary and non-monetary contribution, Echaria [supra] is no longer good law***."

In ***P N N vs. Z W N, Civil Appeal No. 128 of 2014*** where the matter was filed in the High Court on 22ndApril, 2004, before the promulgation of the Constitution 2010 and the Matrimonial Property Act, 2013, Waki, J. stated thus:

> ***"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"***

Conversely, in ***PWK vs. JKG, Civil Appeal No. 33 of 2014*** where the divorce cause was filed in the year 2002 the Court of Appeal stated:

> ***"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 -VS- ECHARIA (Supra)***
>
> ***'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'."***
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> ***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."***

In ***R.M.M vs. T.S.M., Civil Appeal No. 7 of 2013,*** the Court of Appeal concurred with the High Court's finding that it could not have applied the provisions of the new Constitution since the case was filed in 2002, long before the new Constitution was promulgated. The court, stated:

> ***"In the circumstances aforesaid, the learned judge was right in applying the provisions of section 17 of the Married Women's Property Act, 1882, under which the originating summons had been brought. The principles set out by this Court in Echaria vs. Echaria [2007] eKLR were the applicable ones in guiding the trial court in its determination of the matter before it".***

In view of the above, we are satisfied that this is a question that befits consideration and determination by the Supreme Court as a matter of general public importance. We are similarly satisfied the determination on the issue transcend the private interests of the parties in this matter.

More importantly and of concern, is whether **Article 45 (3)** provides for proprietary rights and whether the said article can be a basis for apportionment and division of matrimonial property without parties fulfilling their obligation of proof what they are entitled to by way of contribution. There is a concern that **Article 45** talks about equality and cannot and should not be used as a distribution matrix of matrimonial property. Again, whether **Article 45 (3)** can be or is a ticket for 50-50 distribution has to be sorted out by the Supreme Court. In our view, the matters raised by the applicant are not only weighty and substantial but completely transcend the dispute between the parties herein. These are so fundamental, that the Supreme

Court ought to have a bite.

For the foregoing reasons, it is our considered view that the question being brought forward by the applicant, is certainly one of general public importance. The application has met the test established in the **Hermanus Steyn** case and we therefore grant leave to the applicant to file the intended appeal in the Supreme Court, within the next 14 days. No orders as to costs.

Dated and delivered at Nairobi this 19th day of June, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR