IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, W. KARANJA & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO 4 OF 2012

BETWEEN

ENM.....APPELLANT

AND

MMN.....RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court *at Nairobi (J. Aluoch J)*

delivered on 18th April 2008 **in Civil Case No 24 of 2006 (O.S))**

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JUDGMENT OF THE COURT

Background

1. ENM (the appellant) and **MWN** (the respondent) were married in 1980 under customary law and subsequently solemnized their marriage in 1996 under the **Marriage Act**. The union was dissolved in 2005 and the respondent filed a divorce petition alleging cruelty and adultery. On 28th April, 2008 the respondent filed an Originating Summons (OS) seeking orders declaring that the matrimonial property listed in the schedule to the OS were jointly owned on a 50-50 basis with the appellant. The property included;

a. a plot in Hardy (Karen) with a house (the Karen property;

b. a house in Onyonka Estate (Langata) (the Langata property;

c. a plot in Machakos town;

d. two plots in Makutano, Mwala;

e. two plots in Wetaa, Mwala;

f. two shops in Wetaa, Mwala;

f. a parcel of land with house in Wetaa, Mwala;

h. several grade cows;

i. three (3) parcels of land in Wetaa; Mwala;

j. a parcel of land in Kibwezi;

k. Nissan Sunny Kxx xxxL;

l. pick-up D-Cabin Kxx xxxM;

m. Toyota Prado Kxx xxxN;

n. pick-up Kxx xxxT;

o. tractor Kxx 2xx 2xxxxx.

2. The respondent sought orders declaring that the appellant disclose all income collected from the said properties, that the appellant be restrained from disposing off or in any way encumbering the suit properties until the suit was determined and for costs of the suit. The suit was supported by the respondent's affidavit dated 28th April, 2006 and further affidavit dated 20th June, 2007 in which she averred that she acquired the suit properties jointly with the appellant; that during the subsistence of the marriage she was in formal employment and was able to make substantial financial contribution towards the purchase of the suit properties; that apart from the Karen property which was jointly registered, the rest of the suit properties were registered solely in the appellant's name; and that in view of the foregoing, an injunction be granted to prevent the appellant from disposing the suit properties which were registered in his sole name. The appellant did not file a replying affidavit in response to the petition.

3. Vide an order dated 14th June, 2006, the trial court granted an injunction restraining the appellant from alienating or encumbering the suit properties pending the hearing and determination of the suit. At the hearing before the trial court, the respondent gave sworn testimony that she was married to the appellant from 1980 and they had 4 children together; that the marriage broke down in 2005 as a result of cruel treatment by the appellant; that during the subsistence of the marriage she was gainfully employed by the Ministry of Education and thereafter with Post-Bank; that she used her salary to invest in treasury bills which enabled her to make substantial financial contributions to the acquisition of the suit properties; and that she continued to support the four children without any support from the appellant.

4. In support of her testimony, the respondent produced;

a. marriage certificate;

b. title deed for the property in Karen LR No 1xxxx/1x (Karen property);

c. title deed for the property in Onyonka Nairobi/Block/7x/3xx-; and

d. log book for motor vehicle Kxx xxxL.

The respondent also produced bank slips from different dates between 1999-2002 evidencing cash deposits of various amounts as proof that she had made significant financial contributions to the purchase of the suit properties.

5. The trial court found that the respondent had sufficiently proved financial contribution to the acquisition of the matrimonial property and granted the prayers sought. In the judgment, the trial Judge stated as follows;

> **"From the evidence on record, I am satisfied that the applicant made financial contribution to the purchase of the properties acquired by her and her husband the respondent, during the subsistence of their marriage. This case falls within the decision of Peter Mburu Echaria v Priscilla Njeri Echaria Civil Appeal 75 of 2001 quoted above. I therefore find judgment for the applicant MMN against ENM, on a balance of probabilities and proceed to grant the declarations and prayers as per prayer 1, 2, 3, 4 and 6 of the originating summons dated 28*th April 2006. I am unable to proceed as was requested by counsel in the written submissions to make further orders that the petitioner be entitled fully and exhaustively in the properties named under paragraph 1(a), (b) and (k) in the originating summons, and an order for the demarcation and transfer of the properties to the petitioner, and the charges for the said transfer be borne by the respondent. I have not found any basis in law for making an order in the above manner."***

6. The trial court ordered that the suit properties listed in the schedule attached to the OS be apportioned on a 50-50 basis between the appellant and the respondent and that the appellant account to the respondent for all income derived from the said property.

7. Aggrieved by that decision, the appellant appealed against the judgment on the grounds that the learned Judge had erred in law and fact by finding that the respondent had proved her case on a balance of probability. The memorandum of appeal contained 7 grounds of appeal that the learned Judge erred in law and fact: in apportioning the appellant's properties without any evidential basis that the respondent contributed towards their acquisition; in failing to ascertain the exact financial contribution, if any, made by the respondent; in assuming the monies deposited belonged to the respondent who was on a fixed and determinable monthly salary; in failing to approach the respondent's *viva voce* evidence with circumspection given that it was not tested under cross-examination; in failing to appreciate that the *viva voce* evidence on acquisition of the properties by the respondent did not meet the required legal standard of proof; in conducting the trial before compliance

with the mandatory provisions of the then Order 36 Rule 8B of the Civil Procedure Rules; and that the verdict of the trial court was at variance with the evidence produced at trial resulting in the learned Judge apportioning to the respondent properties whose value was disproportionate to her alleged contribution.

The appellant sought orders for the judgment and decree to be set aside and for the suit to be remitted back to the High Court for hearing *de novo.*

Submissions by Counsel

8. Mr. Ibrahim Sankoh, learned counsel for the appellant, relied entirely on the appellant's written submissions that the respondent had failed to demonstrate the nexus between the deposited funds and the properties listed in the schedule to the OS; that the respondent had not produced evidence to prove that she was a joint account holder; and that the title deeds for the Karen and Langata properties indicated that they were acquired in 1982 and 1993 respectively, long before the alleged joint account was opened in 1999. The appellant cited the case of **Karugi & another v Kabiya & 3 others [1983] eKLR** to augment his assertion that the respondent had not discharged the necessary burden of proof that she had made any financial contributions as alleged.

9. The respondent opposed the appeal. At the hearing, **Ms. Gatimu** holding brief for learned counsel, Mr. Mwanza, relied on written submissions dated 7th March, 2019. It was the respondent's contention that the appellant had a corresponding duty to produce evidence to rebut her allegations at trial but had failed to do so; and that the instant appeal is a thinly veiled attempt at introducing new evidence without leave of the Court. Counsel urged us to dismiss the appeal.

Determination

10. This is a first appeal and we have a duty to reconsider the entire evidence before the trial court, give it a fresh analysis and draw our own conclusion but with the usual caveat that we did not see or hear the witnesses testify. (see **Selle v Associated Motor Boat Company (1968) E.A. 123**)

11. We have considered the record of appeal, the grounds of appeal, the rival submissions, the authorities cited and the law. Two issues stand out for our determination;

a. whether the evidence of monetary contribution adduced by the respondent met the necessary standard of proof; and

b. whether the learned Judge erred in apportioning to the respondent properties whose value was disproportionate to her alleged contribution.

12. The suit proceeded by way of formal proof and the only evidence on record is that which was put forth by the respondent. The appellant did not file a replying affidavit rebutting the respondent's claims nor did he testify at the hearing despite service of the requisite hearing notice. We, therefore, can only address the evidence that was placed before the trial court. (See **Housing Finance Company of Kenya v J N Wafubwa [2014] eKLR**)

13. The burden of proof in civil cases is on a balance of probability. Lord Denning J. in **Miller v Minister of Pensions (1947) 2 ALL ER 372,** discussing that burden of proof had this to say-

> **"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.**
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> **Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."**

14. From the record, the respondent produced several exhibits to prove that indeed, there was a marriage between herself and the appellant from 1980; that there were properties in Onyonka and Karen which were acquired during the subsistence of the marriage; and that she had made several substantial deposits in Daima Bank during the period between 1999-2002. In her submissions, the respondent explained that she was able to make the financial contributions as she was gainfully employed by Post Bank since 1986 and prior to that she worked for the Ministry of Education. The respondent further submitted that she dealt in Treasury Bills, bonds and stocks but did not produce any evidence to this effect.\

15. We agree with the appellant's assertion that the burden is always on the plaintiff to prove his/ her case and that such burden is not lessened even if the case is heard by way of formal proof.

Section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the

person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Uncontroverted evidence must be interrogated in order to ascertain its truthfulness.

16. The trial Judge duly considered and analyzed the evidence, taking into account the respondent's history of employment and the evidence of deposits into the joint bank account and found that the facts fell well within the principles espoused in **Echaria (*supra*)** where the Court held that for a spouse to be entitled to a share of matrimonial property, she must show direct financial contribution.

17. The learned Judge concluded as follows:

> **"From the evidence on record I am satisfied that the applicant made "financial contribution" to the purchase of the properties acquired by her and her husband the respondent, during the subsistence of their marriage. This case falls within the decision of Peter Mburu Echaria v Priscilla Njeri Echaria."**

18. In the case of ***MGNK VS. AMG [2016] eKLR***, this Court observed that:-

> **"In Echaria -v- Echaria, [2007] 2 EA 139, a five judge bench of this Court stated that a wife's non-monetary contribution cannot be taken into account when determining the total amount of contribution from the wife towards acquisition of the property. The Court somewhat non-gallantly observed that marriage per se does not entitle a spouse to a beneficial interest in the property registered in the name of the other nor is the performance of domestic duties. The Court however, relying upon the English case of Burns -v- Burns, [1984] 1 All ER 244, accepted that non-direct financial contributions by a spouse may be taken into account. The court stated:**
>
> **If there is a substantial contribution by the woman to the family expenses, and the house was purchased on a mortgage, her contribution is, indirectly referable to the acquisition of the house since in one way or another, it enables the family to pay the mortgage installments. Thus a payment could be said to be referable to the acquisition of the house if, for example the payer either:**
>
> **a. Pays part of the purchase price or**
>
> **b. Contributes regularly to the mortgage installments or**
>
> **c. Pays off part of the mortgage, or**
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> **d. Makes a substantial financial contribution to the family expenses so as to enable the mortgage installments to be paid."**

19. Further, this Court in ***P A W-M v C M A W M [2018] eKLR*** observed that:-

> **"…even under the old regime that a woman's direct and indirect contribution was taken into consideration and every case was determined in its own merit while bearing in mind the principles of fairness and human dignity."**

20. We agree with the learned Judge's findings on proof of financial contribution; the respondent was employed at the time the property was acquired and she made several deposits into a joint account.

21. **Sections 107 and 108 of** the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence. The failure by the appellant to file any pleadings and participate actively in the proceedings irresistibly leads to the conclusion that the respondent's claim was uncontroverted and unchallenged. We find from the respondent's uncontroverted evidence, that the respondent discharged the burden of proof as required in civil cases. That ground of appeal therefore fails and is hereby dismissed.

22. On the issue whether the learned Judge erred in failing to evaluate the exact proportion of the respondent's contribution towards the acquisition of the property, the appellant claimed that even though the respondent produced evidence of several bank deposits, she did not demonstrate the specific properties acquired with the funds. The appellant's case hinges primarily on the fact that he is the sole registered proprietor of the properties in dispute.

23. The appellant cited the decision in **Echaria (supra)** where the matrimonial property was found to have been purchased and registered solely in the husband's name. We however distinguish the present appeal from **Echaria** because in the respondent's case, she was in paid employment when the matrimonial property was being acquired and her claim that the funds she deposited went towards acquiring the suit property remains uncontroverted.

24. The current law on division of matrimonial property is the Constitution and the **Matrimonial Property Act, 2013**. It is notable that Section 7 of the Matrimonial Property Act, 2013 provides as follows:

> **"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."

Further, the **Matrimonial Property Act, 2013** defines the word "contribution" to mean monetary and non-monetary contribution which includes domestic work and management of the matrimonial home; child care; companionship; management of family business or property; and farm work.

25. In the instant appeal, since the marriage between the parties was registered in 1996 and the suit instituted in 2008, **Married Women's Property Act, 1882** (now repealed) is the law applicable in the circumstances of this case. Whenever the court was called to divide property between spouses, **Section 17 of the Married Women's Property Act, 1882** gave the court wide discretion to do what it thought was just and fair under the circumstances. Sir Raymond Evershed made reference to this notion in **Rimmer v Rimmer (1952) ALL E ER 863** where he cited with approval a passage from the judgment in **Newgrosh**

v. **Newgrosh** (unreported); in that case Bucknil L.J., said of **Section 17** as follows:

"That section 17 gives the judge a wide power to do what he thinks under the circumstances is fair and just. I do not think it entitles him to make an order which is contrary to any well-established principle of law, but subject to that, I should have thought that disputes between husband and wife as to who owns property which at one time at any rate, they have been using in common are disputes which may very well be dealt with by the principle which has been described as "palm tree justice". I understand that to be justice which makes orders which appear to be fair and just in the special circumstances of the case".

26. We find that the learned Judge arrived at the correct conclusion that even though the property was registered in the appellant's name, the suit properties were acquired during the marriage at which time the respondent was in paid employment. For this reason, we dismiss this ground of appeal.

27. The appellant sought orders that we set aside the *ex parte* judgment. Setting aside an ex parte judgment is a matter of discretion of the Court. In **Joseph Ngunje Waweru v Joel Wilfred Ndiga [1983] eKLR,** it was held that the court's discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist anyone who deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

28. As we can discern from the record, once the summons was filed, the appellant did not file a defence or in any way challenge the claims despite being fully aware of the suit. Furthermore, the appellant repeatedly failed to enter appearance, failed to file any submissions and failed to instruct his advocates on record. The affidavit of service dated 14th February, 2007 as sworn by a process server one **Anthony Nganga**, indicates that the respondent was personally served with the Originating Summons, and hearing notice requiring him to attend court on 15th February, 2007. On the material day, the appellant did not enter appearance and the court ordered a fresh hearing notice be served. The hearing was set down for 24th May, 2007 but once again the appellant did not enter appearance nor was a replying affidavit filed. At the hearing on 1st November, 2007, the appellant's counsel sought for an adjournment which was denied. The learned Judge stated as follows;

"I refuse to grant adjournment on the basis that the respondent is no longer in town and has therefore not sworn a replying affidavit. I am taking into account the fact that when the respondent's advocate took over this case, on 7.3.2007, the originating summons was already on record and they should have moved to respond to it."

29. The appellant was clearly indolent in filing his defence once the summons was served and he has not shown this Court that he was prevented by any sufficient cause from appearing when the suit was called out for hearing. In the result, we find that this is not a proper case for us to exercise discretion to set aside the *ex parte* judgment.

30. In the result, we find that the learned Judge properly directed her mind and applied principles of fairness and equity in the circumstances of this case. Accordingly, this appeal has no merit and we hereby dismiss it.

31. As regards costs, the order that commends itself to us given that the parties are former husband and wife respectively is that each party should bear their own costs of the appeal.

Dated and delivered at Nairobi this 5th day of June, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR