IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, KIAGE & KANTAI, JJ.A)

CIVIL APPEAL NO. 231 OF 2018

BETWEEN

EGM.....APPELLANT

AND

BMM.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (W. Musyoka, J.) dated 3rd May, 2017

in

HCCC No. 79 of 2013 (O.S))

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JUDGMENT OF THE COURT

The respondent **BMM**, filed an Originating Summons dated 18th December 2013 under **Section 17** of the **Married Women's Property Act 1882** of England (the repealed Act). This followed a divorce Petition filed by the appellant at the Chief Magistrate's Court being **Petition No. 6 of 2013**. She asserted that following their marriage, which was solemnized on 3rd August 2001, the couple had acquired matrimonial property through joint funds and efforts. Her contribution towards such acquisition was both direct and indirect.

The respondent accordingly sought for orders that the matrimonial properties, which were registered in the name of EGM, the appellant, be declared joint properties and be shared equally. The said properties were listed as follows;

a) LR No. […] in Garden Estate

b) Motor vehicles; BMW X5 […, BMW 5351 KBR […], Totoya Vitz KBM […], Toyota NZE KBC ….]

c) Shares in Broadspan (EA) Ltd and Jersey Property Holdings.

d) Life Assurance Policy at Old Mutual.

e) Cash deposits in CBA Upper Hill Branch and CFC Bank, Chiromo Branch.

f) All domestic goods and appliances.

In her supporting affidavit, the respondent swore that they went to the United Kingdom (UK), where they lived for 10 years, at the behest of the appellant. She went in order to support him and the marriage as he settled in his new job. Her role as a mother and homemaker were her greatest contributions to the welfare and wellbeing of the family. Additionally, she engaged in employment and was even able to pay school fees for their children. She deposed that her earnings supplemented the appellant's, which enabled him save a great deal of finances with which he purchased their matrimonial properties both in Kenya and in the UK. Therefore the properties currently in the name of the appellant were held in trust for herself and for the children.

The appellant filed a replying affidavit dated 15th January 2015 deponing that he was reassigned to work in the UK by his then employer,

Pricewaterhouse Coopers (PwC). The appellant stated that the parties mutually agreed to relocate in order to start a family. Contrary to the respondent's assertions, the appellant claimed that he singlehandedly catered for all the family expenses as the respondent declined to make any input into the family budget. According to him, the respondent spent her small income on herself, mostly on alcohol, cigarettes, cosmetics and clothing.

He contended that the purported matrimonial properties were purchased solely by him without any input from the appellant. He pointed out that LR No. […] was acquired from a bonus he received while working for [Particulars withheld] Bank. The ongoing construction on the parcel of land was pursuant to a mortgage from, CFC Stanbic. Motor Vehicle KBC […] was bought by the appellant and gifted to his mother. KBR […] was in the possession of the respondent for her daily use, while KBJ […] was acquired through a loan from Equity Bank, which he was still servicing.

The appellant brought to light the fact that the respondent had a successful salon under the name **[particulars withheld]**, was an agent for Britam and regularly travelled to the UK and China to procure merchandize for resale in Kenya. The respondent also bought for herself a Toyota Carina car registration number KBD [….] He also asserted that the respondent has never paid any school fees for the children.

Instead he affirmed that at the time of the suit, he solely provided for the needs of the family including school fees, school related expenses, rent, all house utilities (electricity, water, satellite TV and broadband), food, clothing, wages for the house help and an annual holiday for the appellant and the children. These expenses were causing a severe strain on his income and he was thus unable to make investments. He urged the court not to grant the orders sought.

The learned Musyoka, J. considered the affidavits and submissions filed in court and by a judgment notable for its brevity, dated 3rd May 2017 granted prayers in the Originating Summons. Noting that the principal basis for division of matrimonial property were the Constitution and the **Matrimonial Properties Act**, **2013**, he held, crucially, that the provisions of the Act contradicted **Article 45 (3)** of the Constitution. He then resolved that conflict by holding that the provision of the latter on equality of parties at the dissolution of a marriage must hold sway. On that basis he ordered equal division of the property in dispute.

Disgruntled by the judgment, the appellant has filed the instant appeal containing 12 grounds complaining in summary, that the learned judge erred in law by;

a) Failing to apply the applicable law which was the **Matrimonial Property Act**, **2013**.

b) Applying the Constitution retrospectively.

c) Failing to appreciate that the parties managed their finances separately.

d) Disregarding the financial contributions of each spouse towards the acquisition of the properties.

e) Failing to appreciate that the respondent did not adduce any proof of her contribution towards the purchase of the matrimonial properties.

f) Overlooking the fact that some properties were charged to Banks.

g) Assuming jurisdiction, which the court did not have, over shares owned by the appellant in the two Companies.

During the hearing of the appeal, the firm of **Kamau Kuria & Company** represented the appellant, while the firm of **Mwangi & Partner Advocates** represented the respondent. Both parties had filed written submissions.

It was submitted for the appellant that the respondent did not establish on a balance of probabilities her financial input towards the purchase of the matrimonial properties and neither did she prove that the funds used to purchase the properties was from a joint fund. Relying on dicta in **MUTHEMBWA V. MUTHEMBWA [2002] 1 EA 186**, it was asserted that what is distributed is the net benefit and the respondent was therefore not entitled to any property that was charged to a financial institution. It was explained that the life assurance policy was deducted from the appellant's salary and therefore the respondent failed to establish how the same was held in trust for herself in accordance to with the doctrine of trust.

The appellant offered that the only contribution made by the respondent amounted a maximum of 5% and therefore the appellant was entitled to 95% of the matrimonial property.

It was also submitted that the learned judge misapprehended the jurisdiction of the court by applying the **Matrimonial Properties Act, 2013** as opposed to the applicable repealed **Act**. The 2013 Act commenced on 16th January 2014 yet the Originating Summons was filed on 18th December 2013. Accordingly, it was argued, the applicable law for the distribution of property acquired during the marriage was **Section 17** of the repealed **Act** as was interpreted by this Court in **PETER MBURU ECHARIA V PRISCILLA NJERI ECHARIA [2007] eKLR**. The Constitution was also retrospectively and erroneously applied since the properties were acquired prior to its promulgation. Such retrospective application improperly conferred on the respondent an advantage that she previously did not have. For this submission, Counsel relied on the holding in **P N N v Z W N [2017] eKLR**.

We were urged to allow the appeal either set aside the respondent's awarded judgment and instead make a declaration that the appellant is entitled to 95% of the matrimonial property or in the alternative be pleased to order the suit to be remitted for trial before any Judge within the Family Division apart from Honourable Justice W. Musyoka.

In opposition to the appeal, it was submitted that the learned judge applied **Article 45 (3)** of the Constitution and not the **Matrimonial Properties Act, 2013** and appropriately so because what was at stake were the fundamental rights of the respondent. In **ECHARIA Vs. ECHARIA** (supra) was denigrated as being inconsistent of **Article 45 (3)** and hence is no longer good law. Counsel relied on the holding in **V W N V F N [2014] eKLR**.

It was argued that the evidence on record showed that the respondent contributed 'immensely' towards the well-being of the family and as such her contribution cannot be assessed at 5% as offered by the appellant. It was contended that the appellant failed to prove that his contribution amounted to the alleged 95%. The issue of the distribution of the properties charged to a financial institution was minimized as a non-issue since it was merely a matter of accounting. The respondent urged the Court to dismiss the appeal.

After carefully considering the record of appeal we think that the sole issue for our determination is whether the learned judge erred by using **Article 45 (3)** of the Constitution as a basis for the distribution of the matrimonial property on a blanket 50:50 basis.

In the disturbingly brief judgment, the learned judge justified his chosen mode of distribution of matrimonial property as follows;

> ***"The principle statutory basis for division of matrimonial property is the Constitution and the Matrimonial Property Act, 2013. Article 45 (3) of the Constitution pitches for equality of the parties to a marriage at the time of its celebration, during its course and at its dissolution. Section 7 of the Matrimonial Property Act, 2013 requires that ownership of matrimonial property be determined on the evidence of contribution of either spouse to the property.***
>
> ***The two provisions appear to be mutually inconsistent. The Constitution appears to say that parties to a marriage have equal rights, so that when property is acquired during marriage for the benefit of the family, then, at dissolution of the marriage, it shall be divided equally between the parties. The other provision appears to advocate for proof of contribution to acquisition as basis for assessing the rights of either party to the property."***
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> **Article 45 (3)** of the Constitution provides;
>
> ***"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."***

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 **M E K v G L M [2018] eKLR** as follows;

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

We think it was erroneous for the learned judge to assume and hold that the Constitution gives spouses an automatic 50% share of the matrimonial property simply by being married. The stated equality means no more than that the Courts to ensure that both parties at the dissolution of a marriage get their fair share of the property. This has to be in accordance with their respective contribution. It does not involve denying a party their due share or unfairly a party by giving such party more than he or she contributed. We reiterate the dicta of **Kiage, JA** in his concurring judgment in **P N N v Z W N [2017] eKLR** when he stated;

> ***"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.***
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> ***The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts."***

The learned judge committed a reversible error and misdirected himself in not applying the relevant provisions of the **Matrimonial Property Act**, **2013**. Far from being inconsistent therewith, the statute in fact effectuates the principle entrenched in **Article 45 (3)**. The Act reflects the equality of both parties before, during and at dissolution of a marriage. It clearly provides in **Section 6 (3)** that parties may enter into a pre-nuptial agreement before getting married in order to determine their property rights. **Section 7** then provides that ownership of matrimonial property, at the dissolution of a marriage, is vested to parties according to their respective contribution. It is the duty of the courts to fairly and accurately determine such distribution and the learned judge but abducted that duty. His blanket of a 50:50 formular ostensibly on the basis of **Article 45(3)** of the Constitution effectively made the distributive scheme of the statute completely of no effect and orchestrated a failure of justice.

The learned judge misapprehended and misapplied the Constitutional provision and failed to adjudicate the matter before him in accordance with the statute which he declared unconstitutional without a proper basis. In the result this appeal succeeds. We set aside the judgment dated

3rd May 2017 and order that the suit be remitted to be re-heard at the Family Division by a Judge other than W. Musyoka, J.

Each party shall bear own costs.

Dated and delivered at Nairobi this 20th day of November, 2020.

HANNAH OKWENGU

……

JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR