IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 193 OF 2018

BETWEEN

ELIZABETH WANJIRU NJONJO RUBIA.....APPELLANT

AND

BRIAN MWAITURIA.....RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya

at Nairobi (W. Musyoka, J.) dated 12th *May, 2019*

in

Succession Cause No. 2377 of 2008)

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JUDGMENT OF THE COURT

The appellant is the widow of the late Bernard Njonjo Rubia, who died on 26th July, 2008 at the age of 51 years, while the respondent is the son of the deceased with another lady. The deceased and the appellant did not have children. After his death a grant of letters of administration intestate in respect of the deceased, was issued jointly to both the appellant and the respondent on 29th April, 2013.

The respondent took out an application dated 1st March, 2016 for the confirmation of the grant and proposed that the estate be distributed strictly in accordance with **section 35** of the Law of Succession Act; that the widow takes the personal and household effects absolutely and a life interest in the net intestate estate; and that upon termination of the life interest, the estate to devolve upon him.

In her affidavit in answer to the application, the appellant argued that the respondent never visited the deceased and was in any event raised and taken care of by his own mother and her husband and not the deceased. She therefore opposed the proposed mode of distribution of the estate, particularly over LR No. 13790/6 Karen, (the Karen property) which she submits was their matrimonial home. She insisted also that the Karen property was their wedding gift from the deceased's father and that they jointly proceeded to develop it. That is why she maintained that the same devolves upon her absolutely; and that the rest of the assets be shared out equally between her and the respondent.

By consent of the parties the application was allowed partially in respect of the other properties, but for the Karen property, it was agreed that a full trial be conducted to determine its distribution. A certificate of partial confirmation of grant was duly issued on 26th July, 2016.

During the trial the respondent confirmed that he was aware the Karen property was gifted to the deceased by his father, but he could not tell the circumstances under which the gift was made. In his view however the appellant was only entitled to a life interest in the Karen property.

On her part, the appellant contended that the Karen property had been given to her and her deceased husband by her father-in-law as a wedding gift; and that, although the property was retained in the name of the deceased, she made substantial contribution to its construction and improvement. Because of these factors, she begged the court not to order for the equal sharing of the property.

The court below (Musyoka, J.) upon consideration of the evidence above summarized, drew the conclusion that the Karen property was indeed the matrimonial home for the deceased and the appellants until the former's death; that upon the death of the deceased, the property ceased to be a matrimonial home but part of the estate that was available for distribution.

On whether the appellant made any contribution towards the development of the property, the Judge found no proof of such contribution but reiterated that he was;

> **"Alive to the fact that the deceased had set up a matrimonial home on the property..... I have it prime in my mind that the deceased had left the widow on this property, and therefore in distributing the property I should take that into account. To take care of her interests it may not be just to have the property shared out equally between her and the applicant, instead the property shall devolve upon the widow during life interest, and upon determination of life interest to the applicant absolutely".**

Applying **section 35** of the Law of Succession Act and bearing the foregoing considerations in mind, the Judge ordered that;

> **"(a) ..... LR No. 13790/6 Karen shall devolve upon Elizabeth Wanjiru Njonjo Rubia during life interest, and thereafter to Brian Mwituria absolutely;**
>
> **(b) ..... the certificate of confirmation of grant dated 26th July, 2016 shall be amended accordingly; and**
>
> **(c) ..... each party shall bear their own costs".**

This determination aggrieved the appellant who felt the learned Judge misapplied the Marriage Women's Property Act, 1882, overlooked the fact that in her affidavit she had made a claim over the Karen property, adopted a wrong procedure in conducting the proceedings, violated the appellant's constitutional rights guaranteed under **Articles 27, 41** and **50** of the Constitution, ignored her contribution towards the development of the property, ignored the fact that the appellant's claim was partly based on a joint gift to her and the deceased and partly on her contribution in improving the property and misunderstood the appellant's evidence.

For these reasons, the appellant urged the Court to allow the appeal, and substitute the orders made by Musyoka, J. with one directing the re-hearing of the issue of ownership of the Karen property, or in the alternative, declare that the appellant is entitled to 50% of the property to be transferred to her, while the other 50% may be retained by the estate; and that in addition to that, that she gets a life interest in the property.

From the written submissions, and oral highlights, the respondent's argument is that the issue of the wrong procedure used in the determination of the question of distribution came only at the stage of confirmation of the grant; that the appellant did not apply for the division of the matrimonial property hence **section 35** applied ; that the appellant failed to prove her contribution towards the building and improvement of the property as she was unemployed and suffered from alcoholism at the time in question.

Because this is a first appeal, the duty of the Court, so clearly set out in the *dictum* of Sir Clement De Lestang, V.P in the case of **Selle vs. Associated Motor Boat Company Ltd** [1968] EA 123 is to:

> **"....consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.**
>
> **.....this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally".**

This dispute concerns only one asset, the Karen property. There is equally no dispute that the only two beneficiaries to the estate are the appellant and the respondent; that the Karen property was transferred to the deceased by his father on 22nd April, 1997, after the appellant and the deceased were already married on 21st September, 1991; and that the property was subsequently developed.

To begin with the deceased died intestate on 26th July, 2008 and whereas the High Court gave the appellant a life interest in the Karen property and directed that it would devolve upon the respondent thereafter, the appellant has argued that she was entitled to a 50% share in addition to life interest.

The two broad questions, in our view, to be answered in this appeal are whether the Karen property constituted a matrimonial property and whether the appellant was entitled to half of it on account of a wedding gift to her and the deceased or as a result of her contribution towards its development.

There is also a peripheral question as to how the court below was moved; whether it was in error for the learned Judge to determine a claim to property rights by the appellant on summons for confirmation of grant.

It will suffice at this stage by way of background to simply say that subsequent upon the appointment of the respondent and the appellant as joint administrator and administratrix, the former took out summons for confirmation of grant. Pursuant to **Rule 41** of the Probate and Administration Rules, the court below listed the summons for hearing. By consent of the parties, it was agreed, as we have said earlier, that there be a partial grant in respect of all the other assets except the Karen property and further that;

> **" ...the distribution of LR No. 13790/6 to be delivered by the court after taking oral evidence".**

It is a mandatory requirement under **section 71(2)** of the Law of Succession Act that, in cases of intestacy, the grant of letters of

administration cannot be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant must specify all such persons and their respective shares. The consent reproduced above was in satisfaction of this; to determine the actual shares of the parties in the Karen property.

Under the Probate and Administration Rules, the court may either confirm the grant or ask the applicant to give it further consideration or adjourn the hearing for further evidence, **"or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen".** (Our emphasis).

This is however qualified by **sub-rules 3** of **Rule 41** that requires that;

> **"Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 (today Order 37(1) of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant".** (Our emphasis).

The procedure under **Order 37** of the Civil Procedure Rules requires the executors or administrators, or heir, or legal representative of a deceased person to move the court by an originating summons. The appellant faults the Judge for not adjourning the cause in order to allow her file an originating summons to present her claim to the Karen property.

Based on our reading and construction of the highlighted portions of the above provisions, we entertain no doubt that the trial court retains some discretion to, nonetheless confirm a grant if it is satisfied as to the identities, shares and interests of the persons beneficially entitled and to determine any question which may arise as to the identity, share or estate of any person if such question can be conveniently decided at that stage. The learned Judge considered that the question could conveniently be determined by him at that stage.

In addition, the parties, who were represented by counsel themselves, by free consent agreed to have the question determined in the manner adopted by the court. But more significantly, parties had the opportunity to call and present oral evidence. In any case, no prejudice was occasioned. Instead, it is our view that to remit the cause to the High Court will serve no purpose, apart from delaying determination of the cause and pile costs on the parties, considering that the facts forming the basis of the trial are not likely to be different from those that may be presented in the originating summons, the only question being the respective shares of the parties. The question is, therefore, with respect merely technical.

That ground, for those reasons, must fail and is rejected.

We turn to the merits of the appeal to determine, first, whether the Karen property constituted a matrimonial property, and secondly, what the appellant's entitlement is in the property. Relating to the first question is the issue whether the property was a gift for the couples.

Apart from the definition of **"personal and household effects"** in **section** 3 of the Law of Succession Act, as items associated with a **"matrimonial home",**

> no other reference is made to the term **"matrimonial home"** in the Act or in the Probate and Administration Rules.

Because the deceased died before the promulgation of the 2010 and the enactment in 2013 of the Matrimonial Property Act, it is the Law of Succession Act and the English Married Women Property Act, 1882 (now repealed) that are relevant in the resolution of this dispute. Under the latter, it was recognized that a married woman was capable of acquiring, holding and disposing of any real or personal property as her separate property. The respondent submitted that the property could not have been a gift as it was transferred to the deceased on 22nd April, 1997, six years after the couple's wedding. The respondent also argued that the Karen property was indeed a gift to the deceased and not the couple; and that as a result it did not qualify to be matrimonial property of the appellant and the deceased under the definition in **Miller v Miller: McFarlane v McFarlane** [2006] UKHL 24; that in **Miller v Miller: McFarlane v McFarlane** (Supra), the House of Lords (Lord Nicholls of Birkenhead) opined that 'matrimonial property' for the purposes of division does not include property acquired by inheritance or gift. What counsel did not say is that the Law Lords added that to constitute 'matrimonial property' the court must have regard to the circumstances of each individual case. Today in Kenya the Matrimonial Property Act provides, what in our view is the correct definition. Section 2 defines **"matrimonial home"** to mean;

> **"any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property"**
>
> On the other hand "matrimonial property" is defined in section 6 as;
>
> **"(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 and acquired during the subsistence of the marriage".**

The foregoing is enough for our holding that the Karen property was matrimonial property for the deceased and the appellant.

It is significant to note that judicial pronouncements and the Married Women Property Act, to a large extent informed the enactment of **Article 45(3)** of the Constitution and several provisions in the Matrimonial Property Act, 2013. The judicial pronouncements include, **PWK V. JKG,** (2015) eKLR, **HWM V. WNM** (2015) eKLR and **PNN V. ZWN** (2015) eKLR. The decisions recognized that both monetary and non-monetary contribution should be taken into account in determining contribution of a spouse to matrimonial property; and that the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition or development of the property.

In the instant dispute, the deceased was survived by a widow (the appellant) and a son (the respondent) from an earlier relationship before marrying the appellant. It is conceded that the latter never lived with the deceased; never lived in or visited the Karen property, save for only one or two occasions to attend a function as an "invitee" when he was in his 20s. The respondent similarly admitted that he did not know how the deceased acquired the Karen property or how or when it was built; and that he could not tell whether the appellant contributed towards the construction of the property.

For her part, the appellant, confirming that there were no issues of the marriage between her and the deceased, explained that they lived together up to the time the deceased died; that both the deceased and herself contributed towards the construction of the property; and that, for those reasons, the respondent can only claim half of the deceaseds' share in the property to devolve to him after her death.

In considering the present question, we bear in mind Part V of the Law of Succession Act, and in particular **section 35** regarding distribution of the estate of a deceased person who is survived by a spouse and one child. It states as follows;

> **"35 (1). Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to –**
>
> **a. the personal and household effects of the deceased absolutely; and**
>
> **b. a life interest in the whole of the residue of the net intestate estate;**
>
> **Provided that, if the surviving spouse is a widow that interest shall determine upon her remarriage to any person.**
>
> **.....**
>
> **(5). Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate, shall on the death, or, in the case of a widow, remarriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.'**

But this is a unique case where the child has never lived with the biological father but instead lived with the man who married his mother. On the other hand, there is a widow without children. We are, for our part, satisfied on the evidence that, apart from living with the deceased as his wife for 17 years, the appellant made significant contribution towards the construction of the Karen property.

There is no contradicting evidence to her assertion that she was employed and that she made both monetary and non-monetary contribution. She said as follows regarding her contribution in the construction of the house;

> **"I built it single handedly, he** (the deceased) **was out of the country.....1998-2001 I was working for Credit Reference Bureau. Then I left and went to Fidelity Bank, then to Alliance Media. .... I later on resigned from my employment and fully concentrated in the construction. I would hire women to come and cook for the employees. He would send money. The money would be used for hiring employees, supervisors, maintenance, and providing food for the employees."**

These assertions were not controverted. Indeed, the respondent confirmed that the deceased's work took him out of the country quite often and that he (the respondent) did not know much about the deceased's life with the appellant. He said that;

> **"He went to U.S. He worked there. I only know of when the deceased worked in Kenya. I would not know that Elizabeth** (the appellant) **contributed to the construction of the house. If she contributed then she definitely would have a share in the house....I am entitled to something out of the house".**

For the reason that the appellant spent all her marriage life with the deceased, living in the Karen property and contributed towards its construction, she was definitely entitled to more than what was proposed by the respondent and granted by the court below. This is so considering, on the other hand that the respondent is an adult aged 40 years; and that he has never lived in the property or contributed anything towards its acquisition and or development. By ignoring these factors and granting the appellant only life interest in the property, the learned Judge erred. Like the story of the Arab and the Camel, the arrival of the respondent late at the scene distorted the equation to the appellant's disadvantage.

So that, although the appellant is entitled to life interest in the property in terms of **section 35** aforesaid, her separate share in the property, arising from her contribution cannot be lost or ignored. As a widow, the appellant is entitled to hold until her death or remarriage, "**the whole residue of the net intestate estate"**. The key word is **" residue"** of the net intestate estate which refers to the estate after payment of the funeral-related expenses and other reasonable expenses, debts and liabilities of the deceased. Also to be reduced from the estate is the appellant's share in the Karen property.

The next question is what should constitute the appellant's share? The rest of the estate having been shared equally between the parties, we estimate that the appellant's financial contribution, direct or indirect on the property, in the absence of anything to the contrary, would translate to 50% shares in the property and that is what we must award her.

It is our determination, therefore that this appeal has merit and must succeed. Accordingly, we declare that the appellant is entitled to 50% of L.R No. 13790/6 Karen in addition to life interest in the property; and order that L.R No. 13790/6 Karen be subdivided and half of it be registered in the appellant's name, while the other half to devolve to the respondent upon death or remarriage of the appellant.

We make no orders as to costs in this appeal being a family matter.

Dated and delivered at Nairobi this 6th day of August, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR