



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: VISRAM, KARANJA & KOOME, J.J.A)**

**CIVIL APPEAL NO. 52 OF 2016**

**BETWEEN**

**EZ.....APPELLANT**

**VERSUS**

**FS.....RESPONDENT**

(Being an appeal from the judgment (Chitembwe J.), delivered on 28<sup>th</sup> April, 2016 *in Matrimonial Cause No 2014 (OS).*)

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**JUDGMENT OF THE COURT**

1. The singular issue raised in this appeal is in regard to the legality or otherwise of a share of matrimonial properties acquired during marriage which was granted to the wife. The marriage union between the appellant and respondent solemnized under the repealed Marriage Act lasted for 10 years from 10<sup>th</sup> March, 2004 to 3<sup>rd</sup> December, 2015 when it was dissolved. A brief background is that FS, (respondent) is the one who filed a suit against EZ (appellant) by way of an originating summons under the provisions of **section 17** of the Matrimonial Property Act. The respondent sought a declaration that the properties contained in the schedule be divided equally between her and the husband.

2. There were three properties, a motor vehicle registration no KBM [xxxx]; Plot No. [xxxx] Malindi bought in August 2004 and registered in the name of the respondent and a Plot No. [xxxx] also in Malindi purchased in 2011 registered in the joint names of the appellant and respondent. In essence the respondent was seeking a declaration that the two properties registered in her name be awarded to her and one half share of the plot registered in the joint names as well as other properties in the name of the appellant outside Kenya be shared equally. Nonetheless, there no evidence was given in regard to properties outside Kenya. It seems there was undisputed evidence that the appellant provided the purchase price for the properties but the respondent claimed she made indirect contributions towards the acquisition. Also, the learned Judge seems to have accepted the evidence that the appellant gave the motor vehicle to the respondent as a gift during her 31<sup>st</sup> birthday and the same was registered in her name.

3. The suit was opposed by the appellant who although admitting there was a marriage between him and the respondent, he claimed the respondent deserted the matrimonial home in Spain and returned to Kenya in 2006 denying the respondent had provided him with companionship that would entitle her to a share of the properties that he bought in her name. The appellant contended that the respondent did not make any monetary contributions towards the acquisition of the properties listed in the schedule and that the said properties were registered in the name of the respondent merely because at the material time of acquisition, the appellant was not in Kenya to execute the necessary documents. The appellant contended that the respondent did not provide any monetary support towards the purchase of any property in Kenya or elsewhere therefore she was not entitled to any share. The appellant urged the Court to dismiss the respondent's suit.

4. The suit fell for hearing before Chitembwe, J., and both parties gave evidence which culminated in the judgment appealed against. In summary the learned Judge awarded the motor vehicle registration number KBM [xxxx] and Plot No. [xxxx] (0.1727 Ha) to the respondent, while the appellant was awarded Plot No. [xxxx] (0.200 Ha) together with all the household goods in the house except the respondent's personal belongings.

5. It is the aforesaid orders that provoked the present appeal which is predicated on some 7 grounds of appeal in which the appellant faulted the learned trial Judge for holding that the respondent did contribute to the acquisition of the 3 properties; in failing to quantify (if any) the respondent's contributions towards the acquisition of the three properties and distributing the properties according to each parties contributions; in awarding Plot No. [xxxx] together with household effects to the respondent and finally for failing to consider the submissions and to exercise his discretion judiciously and thereby arriving at a wrong and unjust conclusion.

6. This appeal was disposed of by way of written submissions and oral highlights. Mr. Ndungu, learned counsel for the appellant emphasized that since it was common ground the respondent made no financial contribution towards the acquisition of the 3 properties, the Judge erred by considering extraneous matters by holding that the respondent managed the matrimonial property well which was not supported by evidence. According to counsel, the learned Judge ought to have assigned the share of the property commensurate to indirect contribution allegedly made by the respondent. The assessment of contributions should have been done in accordance with the provisions of **Section 7** of the Matrimonial Properties Act. The parties were married for 10 years but the appellant was not able to obtain a resident VISA thus the property was registered in the name of the respondent. Counsel cited the cases of **WKG versus JWG** [2013] e KLR; **AMR versus ANJ** [2012] e KLR and **CWN versus BN** [2015] e KLR and urged us to allow the appeal by apportioning a share of Plot No. [xxxx] to the appellant according to his monetary contribution.

7. This appeal was opposed; Ms Muhonja for the respondent, relied on the respondent's written submission and by way of oral highlights stated that the appeal was overtaken by events for reasons that after judgment was pronounced, there was no order of stay. Consequently the suit property appealed against being Plot No. [xxxx] was sold and transferred. By way of written submissions, counsel for the respondent cited **Article 45(3)** of the Constitution which 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.”**

Also the provisions of the Matrimonial Property Act 2013, **Section 2** which defines “contribution” to mean:- (a) work and management of the matrimonial home; (b) child care; (c) companionship (d) management of family business or property; and (e) farm work. For the period of 18 years when the marriage subsisted the appellant was involved in all the aforesaid aspects of the family and the Judge was wrong to dismiss her claim. Counsel highlighted the provisions of **Section 7** of the Matrimonial Property Act that provides:

**“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.”**

8. Counsel went further and cited the International Conventions and Treaties that Kenya is signatory to; the International Covenant on Civil and Political Rights (ICCPR) as well as other key decisions by this Court that have pronounced the rights of women to a share of matrimonial property acquired during marriage and where indirect contribution of the wife was taken into account even where the wife did not make monetary contribution. We shall advert to the said citations in the course of the analysis of the single issue that is raised in this appeal and that is whether the learned Judge erred by awarding the respondent Plot No [xxxx] in Malindi.

9. First of all this is a first appeal and that being so, we are mandated to reconsider the entire evidence before the trial court and give it fresh analysis but with the usual caveat that we never saw or heard the witnesses testify. (See the case of **Kenya Ports Authority vs. Kuston (Kenya) Limited** (2009) 2EA 212;

**“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”**

10. As stated above, the single issue for determination is whether the learned Judge erred in awarding the respondent Plot No. [xxxx] which in any event was in her name. Another key aspect to bear in mind is the fact that the suit was filed by the respondent and the appellant did not file a counter-claim. Of significant relevance as well, we were informed by counsel for the respondent during the hearing that the suit plot was transferred to a third party after the judgment as there was no order of stay of the said judgement. Thus the property having been sold or transferred, the appeal was overtaken by events.

11. Both the Constitution and the statute law, herein before referred to as the **Matrimonial Property Act of 2013**, protects family property and underpins the principles of fairness and non-discrimination of a spouse who has made contribution in the manner provided in the Act. **Article 45 (1) (3)** of the Constitution makes provisions regarding the rights of parties during marriage and upon dissolution and anchors the principle of “equal rights” as thus:-

**“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.”**

12. The aforesaid Matrimonial Property Act defines with clarity what constitutes “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.”**

...

Ownership of matrimonial property is described under **Section 7** of the Matrimonial Property Act as:-

**“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.”**

13. The evidence in this appeal was largely not disputed that the appellant is the one who made the monetary contribution towards the purchase of the three properties. Indeed the motor vehicle was solely bought and registered in the name of the respondent as a gift during her 31<sup>st</sup> birthday. The marriage lasted for 10 years and the learned Judge was very much alive to the provisions of the Constitution and alluded to the principle of equality provided therein and the need to establish an equitable share for each spouse according to their respective contribution. The learned Judge also considered and analysed some decided cases among them the case of **MK v SK** [2008]1 KLR page 204. In that case the Court of Appeal held that where a property is registered in the joint names of husband and wife, it means that each party owns an individual equal share in the property. In this regard the Judge had the following to say:-

**“This means that evidence can be adduced to rebut and defeat the presumption that the interest on the property is equal. It is not a fixed presumption. One spouse can buy a property and have it registered in the names of the other spouse. Whenever an issue of distribution arises, what would count will be the level of contribution by each party whether monetary or non-monetary contribution.”**

14. There was very scanty evidence led by the appellant which in our view cannot be said to amount to a rebuttal of the presumption of the intention of equal sharing of property registered in joint names. This is all that is recorded as his evidence in chief:-

**“I swore an affidavit on 17.11. 2014. More of the properties were a gift. The vehicle is a last of series of vehicles. In 2004 I imported a vehicle. We had several vehicles. She wanted a nice car. It was not a gift. Plot [xxxx] is a villa next to Scorpio Beach. We married in 2004. I told her I loved Malindi and told her to look for a house. We wanted to have a house in Kenya. I was in Spain. I cannot deny if I had given them as gifts. They were not gifts. She stayed in Spain for a while. She is a teacher by profession. In Kenya she never tried to get a job. The Masai curio was in the house. All properties were not gifts. I was not meant to be excluded. There are other properties like furniture. There is a saving account in her name. I never thought that there was need to have the properties in both names. The saving account has money. It is at Barclays Bank. All what I need is a fair distribution of the properties”.**

15. Looking at the above evidence and also the affidavit sworn by the appellant, one would wonder why he has in the first place challenged the said judgment. Firstly the appellant did not file a counter-claim yet the learned Judge perhaps in recognizing the need to administer substantive justice, awarded him the entire share of the plot that was registered jointly and the motor vehicle which was in the sole name of the respondent. Secondly, the appellant did not raise a rebuttable presumption that the joint registration was obtained by fraud or misrepresentation to negate the principle of equal sharing and of joint ownership which connotes equal sharing unless otherwise proved. The appellant told the trial Judge, all he wanted was a “fair distribution” without saying what it was. Thirdly, the respondent had occupied the plot which was awarded to her which fact of occupation gave rise to a beneficial interest and a legitimate expectation which is consistent with the fact that she was the registered owner of the plot. Lastly even if one were to draw a parallel of this marriage relationship and a business relationship, it is inconceivable that, if the appellant obtained the services of a business person to hold his assets as a registered owner without swindling him and look after them for 10 years while he was away in Spain, would he have expected her to walk away with nothing. Similarly the respondent cannot be expected to walk away and relinquish properties which she occupied, took care of and were registered in her name with nothing. That would not be a just resolution or fair distribution and would be contrary to the provisions of both the Constitution and statute law. Suffice it to state that the inclusion of equal rights between parties in a marriage in the Constitution and under statute law was aimed at eliminating discrimination against women and underpinning the principle that parties are of equal worth and human dignity, whatever their station in life.

16. What we have stated above demonstrates what the respondent contributed to deserve an award of the suit plot. The way the appellant presented his case, we find that he was lucky to have been awarded two properties one of which was wholly owned by the respondent being a motor vehicle that was given to the respondent as a birthday present. He should also count himself lucky as the respondent did not file a cross appeal; as in our understanding, a gift is a voluntary transfer of an item without consideration and once it was completed with a transfer we have very little doubt it can be recalled unless there is evidence of fraud or misrepresentation which were not alluded to in this case. The parties cohabited as husband and wife, and the learned Judge who heard the parties testify held as follows:-

**“The respondent was out of the country while the applicant took care of the properties. Nothing was wasted. That amount to contribution. The applicant was taking care of the properties knowing that she had a recognisable stake over them. The applicant indirectly contributed towards the acquisition of the property. The respondent had faith in her and that is why he allowed some of the properties to be in her name only. I therefore hold that there was non-monetary contribution by the applicant. She oversaw the purchases and managed the properties.”**

17. We agree with the learned trial Judge, the aspect of holding the property from the time they were purchased, up until the marriage broke down and the matter was taken to court, in addition to companionship which is recognized as an indirect contribution were relevant considerations that could not be ignored as argued by counsel for the appellant. The fact that the respondent was registered as a joint owner and other properties were in her name as a wife; she was in occupation of the property awarded to her; although she did not make a direct

monetary contribution, she was entitled to a share thereto. We also find the learned Judge spelt out clearly the reasons why the respondent was entitled to a share of the matrimonial properties in the above cited excerpts taken from a portion of the judgment.

18. The last issue in this appeal was to do with the disclosure by counsel for the respondent that the suit property was sold/transferred to a third party. There was no order staying the judgment by the trial Judge, therefore the appellant should have known the implications as the plot was in the name of the respondent if it was sold or transferred nothing could have prevented her from dealing with it as she deemed. It is always prudent to await the outcome of court proceedings touching on a property before disposing of it. However, in this case, we find no merit in the grounds of appeal and for those reasons, we say nothing about the sale/transfer of the suit plot.

19. We think we have said enough to demonstrate this appeal lacks merit. We hereby order it dismissed and each party to bear their own costs, this being a family matter.

**Dated and delivered at Mombasa this 25<sup>th</sup> day of January, 2018.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M.K. KOOME**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**