IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 81 OF 2017

(CORAM: VISRAM, KARANJA & KOOME JJ.A)

BETWEEN

M B O (Name withheld)..APPELLANT

VERSUS

J O O (Name withheld)..RESPONDENT

(Being an appeal from the entire judgment delivered by (Ougo J.), on 2nd February, 2017 at Nairobi

in

Civil Case No. 18 of 2010)

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JUDGMENT OF THE COURT

1. **M B O** (appellant) was married to **J O O** (respondent) sometimes in 1990 under the Kisii customary law but the union was later formalized under the Marriage Act (now repealed) on 30th August, 1995. The parties were blessed with two issues of the said marriage. They cohabited as husband and wife until the year 2008 when the union was beset with matrimonial disharmony upon which the husband petitioned for its dissolution and a decree absolute was issued on 15th October, 2015. Although the wife filed a suit by way of an Originating Summons in May 2010, under the old **Section 17** of the 1882 Married Women Property Act of England, the suit was concluded and finally determined in 2016 after the promulgation of the Constitution of Kenya 2010 and the enactment of a new regime of Family Laws including the **Matrimonial Property Act 2013** all of which underpin the principles of equality and respect of human worth not only in public sphere but also within the private sphere in a marriage.

2. The wife applied for a declaration that the properties listed in the schedule as Nairobi/Block 97/[particulars withheld] located in Tassia Estate, Embakasi Nairobi; two properties in Ngong; (no particulars were provided); Hillcrest Estate House No [particulars withheld] Athi River; Eagle Apartment House No [particulars withheld] and Subaru Motor Vehicle Registration No. [particulars withheld] were matrimonial properties. Upon such declaration, the appellant sought to be granted possession of **Nairobi/Block [particulars withheld]**; the rental income from units therein be shared equally with the husband, and possession of motor vehicle registration No KAL [particulars withheld]. The wife also sought an order of discovery seeking that the husband be compelled to disclose all properties, shares and bank accounts he held and all the proceeds thereto acquired during coventure be shared equally. The suit was supported by the wife's affidavit sworn on 28th May, 2010 and a witness statement in which she gave a detailed account of when the properties were acquired and how she made direct and indirect contribution towards the construction of the matrimonial home and the family's wellbeing by obtaining several loans to pay school fees for children. We shall advert to the said evidence later.

3. The husband opposed the suit; he equally filed a lengthy replying affidavit sworn on 24th February, 2015 giving a whole detailed life history, from his education, professional career; the places he worked, marriage life and how he bought the properties including how he set up a Cyber Café business for the wife in 2005 when she was retrenched from employment in the bank for having been found to be running a shylock business which was in conflict with the employers business, to how he continues to meet the needs of his children to a litany of complaints of acts of cruelty and lack of cooperation by the wife which led to a total breakdown of the marriage. According to the husband, the wife had contributed nothing in the said marriage but constant abuses, cruelty; hiring thugs to harm him; not serving him food and eventually kicking him out of the matrimonial property.

4. The suit fell for hearing before **Ougo J.**, who heard both parties and after considering the evidence, made the following key finding which is the subject of the instant appeal;-

> **"I find that the applicant in lieu of her contribution both monetary and non-monetary is entitled to a 30% share of the Nairobi /Block[particulars withheld] in Tassia Estate, Embakasi which served as the matrimonial home and 20% share of the rental units that are constructed therein. The parties will within 45 days from the date hereof appoint a valuer to carry out valuation of the property erected on Nairobi/Block [particulars withheld] (sic) in Tassia Estate, Embakasi and failing agreement by the parties such valuer as shall be appointed by the Chairman of the Institution of Surveyors of Kenya. The valuation costs shall be shared between the plaintiff and the respondent in the ratio of 30;70 respectively. The parties shall conduct valuation of the said property and the larger shareholder may opt to buy out the smaller shareholder in both the rental units and matrimonial property alternatively the properties can be sold at the current market value as ascertained by the valuation reports and the plaintiff be given 30% of her share with the defendant getting 70%. Costs of the transaction will equally be shared in the same ration of 30; 70. Thereafter the defendant shall pay to the plaintiff 30% of the assessed value of the property within 9 months from the date of the valuation, failing which the plaintiff shall be at liberty to institute execution proceedings to recover the sum due to her in terms of this judgment. Each party to bear their own cost. It is so ordered."**

5. This is what has provoked the instant appeal which is predicated on the grounds that the learned Judge erred in law and fact by finding that; the appellant had not shown any monetary contribution in the acquisition of matrimonial property in spite of evidence to the contrary; that a sum of Ksh 183,000 taken as a loan by the appellant and other amounts were evidence of monetary contribution; failing to find the respondent had at one time evicted the appellant from the matrimonial home and in the process he destroyed crucial documents; failing to consider the respondent had solely disposed and utilized other properties in Ngong, Hilcrest and the Motor Vehicle while apportioning the share of the matrimonial home. The learned Judge was also faulted for relying on the decision of **Echaria vs Echaria** (2007) e KLR and also the case of **Francis Njoroge Vs Virginia Wanjiku Njoroge** Civil Appeal No. 179 of 2009 which are now bad law by virtue of the new constitutional dispensation and the Matrimonial Property Act, while the latter case was decided *per incuriam* and generally for awarding a lesser proportion to the wife.

6. Incidentally, the respondent was also aggrieved by the same judgment and he too cross-appealed faulting the learned Judge for awarding the appellant 30% share of the matrimonial home and 20% share of rental income from the units despite having found she had not made any monetary contribution. Further, the respondent contended the award of 30% was inordinately high and for failing also to find the appellant was found to have contributed to the breakdown of the marriage through cruelty and therefore she cannot be allowed to benefit from her own wrong doing, *commodum ex injuria sua non habere debet.* Thus, the appellant prayed the entire judgment be set aside and be substituted with an order dismissing the suit.

7. At the plenary hearing, Mr Thuita, learned counsel for the appellant relied on the written submissions filed on behalf of the appellant and made some oral highlights. Counsel emphasized that the learned trial Judge heavily relied on this Court's decision in the **Echaria** case which is now bad law in view of the provisions of Matrimonial Property Act that recognizes both direct and indirect contributions. According to counsel, the learned Judge failed to take into account the evidence of contribution detailed in her witness statement which was filed together with the suit but the learned Judge did not make any reference to it at all; there was clear evidence that the appellant made various monetary contributions, although in a marriage union that is predicated on trust it is not possible for one to maintain a record of receipts for every expenditure, the appellant was able, to a large extent to demonstrate that she took a couple of loans which went into paying school fees for children and towards the construction of the matrimonial home and rental units. The learned Judge discounted this evidence which was supported by a loan application but gave no reasons. Further, when the rental units where under construction, the appellant obtained a loan of Ksh. 1,065,000 which was used in the construction; moreover as the appellant adopted the entire witness statement during the hearing, the Judge had a duty to take that evidence in consideration but she failed to do so. Counsel urged us to be guided by the cases of **PWK Vs JKG** [2015] e KLR, **HWM Vs WNM** [2015] e KLR and **PNN Vs ZWN** [2017] e KLR. The first two cases underscored the indirect contribution to acquisition of property by the wife and the beneficial interests of a spouse who is in occupation of the matrimonial home while last one explained the place of **Echaria Vs Echaria** (supra) within the context of the new Family law regime.

8. On behalf of the respondent, Mr Momanyi learned counsel for the respondent too relied on his written submissions and made some oral highlights in opposition of the appeal and in support of the cross-appeal. Counsel submitted that a party to a marriage must prove financial contribution and even though **Article 45** makes provisions for equality; that should mean equality according to one's contribution. According to counsel, the applicable law was the 1882 Married Women Property Act, of England. In this regard, counsel cited this Court's decision in the case of **Peter Mburu Echaria V Priscila Njeri Echaria** (supra) of 2001 which he urged us to follow where this Court held;-

> **"Where the disputed property is not registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards acquisition of the property. However, in cases where each spouse has made substantial but unascertainable contribution, it may be equitable to apply the maxim "equality is equity" while heeding the caution by Lord Pearson in Gissing v Gissing."**

Counsel further cited the case of **Njoroge and Njoroge** (supra) which was cited with approval by the Court of Appeal in **RMM v TSM** [2015] and it was held that ownership of matrimonial property vests in the spouses according to the contribution of each spouse towards its acquisition and should be divided accordingly when the marriage is dissolved. On monetary contribution, counsel for the respondent submitted that the appellant relied on loan application forms for a school fees loan which was discounted by the respondent's evidence that he single handedly paid school fees and medical insurance for them. According to counsel for the respondent, the appellant did not prove any monetary contribution or lead any credible evidence to show the respondent had properties in Ngong and the Eagle Park property was bought after separation thus it was not available for distribution. Counsel thus urged us to allow the cross-appeal which is merited as the learned trial Judge found the appellant had not made any financial contribution in which case awarding her a share of 30% and 20% of rental income respectively was inordinately too high.

9. This is a first appeal and in that case, 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 **Selle vs. Associated Motor Boat Company (1968) E.A. 123 at page 126**, where the Court of Appeal held:-

“…….. this Court must reconsider the evidence,

evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect…” See**Jivanji vs. Sanyo**

Electrical Company Ltd. (2003) KLR 425”.

Having gone through the record of appeal, the grounds and respective submissions by counsel, two issues stand out for our determination; that is, whether the learned Judge erred by awarding the appellant 30% share of the matrimonial home and 20% of the rental income and secondly, whether the cross-appeal should be allowed by substituting the said awards with lesser percentage or by dismissing the suit altogether.

10 We are cognisant of and agree with submissions by counsel for the appellant that the body of Family law has developed exponentially since the Constitution 2010. **Article 45 (1) (3)** of the Constitution states:

“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.”

The Constitutional provisions were further augmented by the Matrimonial Property Act 2013 that was enacted with the commencement date of 16th January, 2014. It defines what constitutes non-monetary contribution by spouses in a marriage. The Matrimonial Property Act makes the following definitions of 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.”

11. Although the suit was filed before the above law came into effect, the hearing and determination took place between 2015 and 2017 when the judgment was delivered. It is obvious the learned Judge took note of the above provisions of the law as submissions by respective counsel but did not bring them to bear in her determination which was largely guided by the case of **Echaria Vs Echaria** and **Njoroge Vs Njoroge** (supra). It is perhaps opportune to mention that before the promulgation of the Constitution 2010, and the enactment of the Matrimonial Property Act, suits filed by spouses claiming a determination of the share of properties acquired during marriage were brought under **Section 17** of the 1882 Married Women Property Act of England. **Section 3** of the repealed Matrimonial Causes Act gave jurisdiction to the High Court, but such jurisdiction was to be exercised in accordance with the procedures applied in matrimonial proceedings in the High Court of Justice in England. As far back as 1970, the High Court of Kenya in Nairobi (**Trevelyn,** J) decided in the case of **I. V. I. [1971] EALR 278** applying the said English law. The dispute was between a husband and wife both Europeans. They were contesting how to divide the proceeds of a sale of a matrimonial house they had bought while in England. It was held in that case that the **section 17** of MWPA of 1882 was a statute of general application in Kenya. The test to apply was also set out in the said case; first of all, a party invoking the said provisions had to establish whether a statute was applicable in England on 12th August, 1897 when Kenya was declared an English Colony. **Section 17** of MWPA merely provided that;-

“In any question between husband and wife as to the title to or possession of property, either of them may apply for an order to the High Court or a County Court and the Judge; may make such order with respect to the property in dispute…as he may think fit”

12. One of the earliest substantive judgments on the Kenyan woman married under the African customary law that was reported is **Karanja v Karanja** [1976] KLR 307 and the case of **I V. I** (supra) was heavily relied on. The case involved a dispute over a 42 acre farm in Karen, three properties in Kangemi, one in Lavington and another in Jamuhuri Estate which the wife sought that they be declared joint properties or in the alternative an order on respective ownership be made. The issues that were determined was whether the properties were acquired by joint venture; whether there was an implied trust, and generally the right of women to hold property under Kikuyu Customary Law. **Simpson J**., held;- at page 311 paragraph b.c.d.:

“On the basis of these authorities, payments by the wife need not be direct payments towards the purchase of the property,

but may be indirect such as meeting house-hold and other expenses including expenditure on clothing for the wife and children and the education of the children which the husband would otherwise have had to pay: and even though the husband may never have evinced on intention that his wife should have a share in the property the wife may in the circumstances of the case be entitled to a declaration that the property registered, in the husband's name is held wholly or in part in trust for her by virtue of its acquisition as a joint venture. Although most authorities deal with disputes in relation to the matrimonial home, it is because the majority of married couples in England have only one house. Section 17 is not limited in its application to matrimonial home and content."

The court proceeded to determine the amount of financial contribution made by the wife towards the acquisition of the matrimonial property and found the entire estate was worth about Kenya shillings 900,000/=. The Judge held the wife's contribution was one third, the husband was ordered to pay the wife a sum of Kenya shillings 300,000/- or to transfer two properties namely Jamuhuri and Lavington houses which were worth almost the said amount of money.

13. The principles set out in the **Karanja** case were applied in subsequent decisions. It was however an uphill task as sometimes due to problems associated in the interpretation and application of a foreign statute that had been repealed even in England, it gave judges a great latitude or discretion to determine the share to award to a woman as they deemed fit. Some judges expressed bias against women who had resulted to seeking property; and viewed them as a threat to *status quo,* see Kuloba J., in **Nderitu v Nderitu** HCCC No 2133 of 1992 (OS). The Court of Appeal that had to review many of those decisions lamented the state of lack of laws governing property rights within marriage. They kept on urging Law Reform Commission, the Attorney General, Parliament and whoever cared to read those decisions, that time was overdue for reforms. It was pointed out time without number that **section 17** of the MWPA was repealed in 1970 in England. That notwithstanding, the jurisprudence of judge made laws grew tremendously. This is demonstrated by the body of cases that were determined especially by the Court of Appeal that underscored a wife's contribution to properties acquired within marriage was an actionable right, through the application of **Section 17** of MWPA or by invoking the law of trusts.

14. We have recited the above history to demonstrate even under the old regime, a woman's direct and indirect contribution was taken into consideration and every case was determined on its own merit while bearing in mind the principles of fairness and human dignity. Once a spouse has been in occupation of a matrimonial home for a considerable period of time, where she lived with her children and established herself like the respondent did by even starting a business of selling cereals to support herself after she was retrenched from employment, all these are relevant factors to consider in determining the mode of distribution. On the other hand, the respondent was able to purchase another residential house on separation and the foremost question was to seek a mode of distribution that will not disadvantage one party and render them destitute. See the case of;- **Muthembwa Vs. Muthembwa** [2002] I KLR page 92:

"In assessing the contribution of spouses in acquisition of matrimonial property each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness.

The jurisdiction of the court is to determine a question or questions between husband and wife principally as to title to or possession of property.

In the instant case, where matrimonial property is intertwined with company property the court cannot decline jurisdiction under Section 17 to deal with the whole property as this would be unjust. In application under section 17 the court has wide and unfettered discretion to make such order or orders as justice may demand including sale and distribution of property subject of the application."

15. In the instant case, the learned Judge made a finding that the appellant was in gainful employment, where she was drawing a salary, she also took loans to pay school fees. This is what the learned Judge stated in her own words;

"Whether, and if so to what extent, the applicant contributed to the acquisition of matrimonial property? It is not in dispute that from the time the parties started cohabiting and prior to their marriage the applicant was in formal employment and was drawing a salary, there are also loan application forms that showed she borrowed funds to put towards the children's school fees. However, the respondent claims to have purchased and developed the said property solely without any contribution from the applicant. In support of his claim he has adduced loan application documents that showed he had mortgaged the parcel of land to his then employer to secure funds to develop the same. Though the applicant claims she contributed both monetary and non-monetary there is no evidence she directly contributed towards the acquisition of the parcel of land or the construction of the property therein despite her alleging to have secured loan of Ksh. 200,000 with only Ksh. 183,000 being approved a loan the respondent claims no knowledge of there is no evidence adduced that she gave the said approved sum of (sic) Ksh. 186,000 to the defendant. The applicant seems to have indulged in various business ventures although she does not disclose her finances savings or assets acquired if any."

16. We find the above conclusions somewhat problematic as there is a lot of evidence contained in the appellant's witness statement and a bundle of documents that she produced which do not seem to have been analysed by the learned Judge. The appellant was working as a secretary in East African Building Society from 1984 to 2005 when she was retrenched; she started cohabiting with the respondent in 1990 therefore she was earning a salary for 15 years until she was retrenched and the marriage subsequently broke down in 2008. Another aspect that was not considered was the fact that at one time the appellant was evicted from the matrimonial home and had to seek a restraining order of injunction against the respondent on 28th May, 2010. The appellant alleged that in the process of eviction, she lost several documents, therefore she was not able to produce the originals and this was overlooked when the Judge faulted her for not producing documents.

17. Another reason why we find ourselves disagreeing with the learned Judge is the dearth of documents that were produced by the appellant in the list of documents filed with the suit. There are no less than a dozen loan application forms from 1993 to 2004. Majority of those loans were for school fees. The appellant also stated that she gave some Ksh. 183,000 the proceeds of one such loan to the respondent when he was constructing the matrimonial home. Indeed, one such application for loan, the appellant applied for a whooping Ksh. 1,065,000 which indicated therein it was for construction of a house. She stated that she used the loan proceeds to build the rental units within the matrimonial

home. However, the learned Judge disregarded this evidence as there were no documents to prove.

18. It is necessary to state that in a marriage union, which is predicated on trust, no spouse anticipates that one day they will have to prove every contribution that they make to the marriage as that would negate the very essence of trust which is the cornerstone of marriage unions. The learned Judge having appreciated the appellant and the respondent were married for 18 years, and 15 of those years the appellant was in gainful employment; she constantly took loans, having found the only property that was acquired with joint efforts was the matrimonial home where the appellant was residing; the fact that the upon separation the respondent was able to purchase another home where he settled. For those reasons, we agree with counsel for the appellant that by virtue of a long period of occupation as a spouse, the appellant acquired beneficial interests therein; we also find for the same reasons the learned Judge erred by awarding the appellant a share of 30% of the house she has been in occupation and a mere 20% of the rental units which are in the same premises.

19. Having come to the above conclusions, it goes without saying that the cross -appeal is without merit. The judgement of the trial Judge is set aside, and substituted with an order directing the matrimonial house being **Nairobi/Block [particulars withheld]** located in Tassia Estate and the rental units thereon be shared equally between the appellant and respondent at the ratio of 50:50. This being a family matter, we make no orders as to costs.

Dated and delivered at Nairobi this 23rd day of February, 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