IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME JJA)

CIVIL APPEAL NO. 104 OF 2016

BETWEEN

P A W-M…….....…….APPELLANT

VERSUS

C M A W M…….....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Malindi (Chitembwe J.,) dated the 24th day of October, 2016

in

Matrimonial Cause No 33 of 2015)

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JUDGMENT OF THE COURT

[1] The parties in this appeal are British citizens although the respondent is a second generation Kenyan. The parties were married on 31st May, 1997 in the United Kingdom under the 1949 Marriage Act. It was a second marriage for each of them having have been in previous marital relationships which were dissolved. The parties cohabited in the United Kingdom and in Kenya from the year 2007 until the said marriage was dissolved by the High Court in Malindi in **Divorce Cause No. 1 of 2010** on 25th February, 2016.

[2] The wife filed the suit by way of an originating summons seeking certain declarations that a property known as **Plot No. [Particulars withheld]** measuring one decimal eight four five (1.845) (hereinafter referred to as suit property) which is registered in the name of the husband is matrimonial property which is being held in trust for the wife. Upon such declaration, there be an order that the wife is entitled to exclusive possession of the same under common law. This prayer seems to have changed in the course of evidence and submissions to a declaration that she was entitled to 50% of the suit property.

[3] It is common ground the suit property belonged to the husband's family, upon the demise of his father in 1993, he inherited the property with his brother but he bought his brother's interest and he was registered as proprietor in 1995. In 2007, the respondent brought the appellant in Kenya and they settled at the suit property in Kilifi. At the time, the house was leased to a tenant who was unwilling to continue leasing due to the poor state of the house that needed renovations. The appellant lived in a small room within the suit premises and supervised the renovations that went on for a period of 18 months. When the renovations were completed, the suit premises became her matrimonial home, although soon thereafter, the marriage started falling apart. The respondent provided all the money for the renovations by depositing a sum of Ksh 13 million in a joint account out of which the appellant used to pay the contractor the costs of renovations which amounted to about Ksh 9 million.

[4] When the parties moved to Kenya in 2007, their marriage relationship was soon thereafter beset with problems; as a result, the respondent filed divorce proceedings in the UK in 2009; however, those proceedings were stayed as the appellant also filed another petition for divorce before the High Court at Malindi which issued the order dissolving the marriage on 25th February, 2016 as stated above. The respondent denied that the appellant was entitled to any share of the suit premises which in his view was not a matrimonial property. It was acquired before the marriage, and all the funds used towards renovations were provided by the respondent; the appellant did not make any financial contribution towards the repair or maintenance of the said property. Moreover, the respondent stated that he had leased the suit property to tenants from 1995 to 2005. The Respondent moved therein in 2007, and during the renovations, he also made many trips to Kilifi also to supervise the renovations and in 2009, the appellant obtained orders barring him from accessing the suit premises; the appellant had no interest in the respondent's house in Rushmore England which was acquired before marriage. The respondent further contended the appellant has her own property in England valued about over Ksh 52 million which she rents.

[5] The matter fell for hearing before **Chitembwe J**., who fastidiously went through the pleadings, evidence and submissions by the respective parties and in the impugned judgement, the appellant was awarded a sum of Ksh 2 million being her share of contribution towards the renovations of the suit premises. The prayers seeking that the appellant be declared the owner of the suit property were dismissed. The appellant was ordered to continue occupying the suit premises until the said sum was paid and thereafter to vacate upon payment. This is what the learned Judge posited in a pertinent paragraph of the said judgment;-

> **"In the end, I do answer the issue as to whether the plaintiff is entitled to monetary compensation for her role in the renovations in the above terms. I do find that the property in Kilifi was not being held in trust for the benefit of the plaintiff. She went to the property by virtue of her marriage. Now that the marriage is dissolved she should exit the property. The facts of the case show that even the plaintiff has her own property in the U.K. The supervision of the renovations by the plaintiff does not raise any trust in her favour. I also find that the plaintiff is not entitled to exclusive possession of the property under any type of law. The property belongs to the defendant and was acquired before the marriage. Article 45 (3) of the Constitution provides for equal rights at the time of marriage, during the marriage and at the dissolution of the marriage. The Article does not give 50% percent share to each spouse to a marriage irrespective of their contribution towards property acquired during marriage."**

[6] This is what provoked the instant appeal that is predicated on some 12 grounds of appeal which are longwinded and contain arguments best left to submissions. The **Court of Appeal Rules** are quite clear as to what a proper memorandum of appeal should be. In respect of civil appeals, **Rule 86(1)** states as follows;

> **"A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make."**

In a nutshell; the appellant complaints are that the learned Judge erred by failing to award 50% share of the matrimonial home to the appellant after finding that the property was a matrimonial home; finding that since marriage was dissolved, the appellant should exit the property; contradicting his own finding that the suit premises was a matrimonial property and at the same time for holding that it belonged to the respondent; failing to apply the principles of law as per the Matrimonial Property Act and the Constitution of Kenya; failing to consider the appellant managed, financed the running of the matrimonial home for 10 years paying all the utility bills; failing to take into account relevant evidence and making findings that were not supported by evidence.

[7] Similarly, the respondent too cross-appealed in a long winding notice containing some 20 grounds of appeal which are argumentative and repetitive. We will highlight the salient matters of law and fact as; the High Court had no jurisdiction to determine issues relating to the use and occupation of, and title to land as **Article 165 (5) (b)** of the Constitution of Kenya; the appellant had sought a determination of her share of matrimonial property in the petition for divorce which was not granted; regurgitating the same claim under an originating summons (O/S) was a review against the divorce judgment; the learned Judge was faulted for awarding the appellant Ksh 2 million, for non-monetary contribution which was not pleaded; moreover the O/S was dismissed.

[8] Further grounds argued were that the learned Judge erred by ordering the appellant to continue occupying the house without paying rent for an indefinite period of time; failing to consider the appellant alone benefited from the said renovations as she restrained the respondent from accessing the suit premises after the renovations were completed; finding the suit premises was a matrimonial home; for failing to consider the appellant was receiving from the respondent a monthly maintenance sum equivalent of Ksh 97,500 while her monthly expenses were Ksh 57,680, in addition she was receiving rent from her own independent rental income from her own house and a share of pension from her former husband. For all those grounds the respondent urged us to dismiss the appeal and allow the cross- appeal by substituting thereto an order dismissing the O/S with costs.

[9] Both firms of **Chepkwony &Associates** representing the appellant and **Kinyua Muyaa & Co** for the respondent filed detailed submissions in support of their respective clients position. When the appeal came up for hearing, they urged the Court to rely on the said submissions and they did not make any highlights. According to counsel for the appellant, her client has lived in Kenya since 2007 in the suit premises which she renovated. The Judge found the suit premises was a matrimonial home and even though it was acquired before marriage, the appellant was entitled to a share thereto for contributing towards the value addition. See the dicta in the case of **Muthembwa –Vs- Muthembwa** Civil Appeal No. 74 of 2001 where it was held that;-

> **"…Property inherited and gifted to one spouse before the marriage, and the property exists in the same condition as it was gifted or inherited, no problems arise. The spouse to whom it was gifted should be allowed to retain it. Problems however arise where the improvements are made using matrimonial resources and then the property ceases to be in its original form and increases in value…"**

[10] Counsel further submitted that the learned Judge failed to consider the principles of law in distributing matrimonial property according the Constitution that provides for equal sharing during and after marriage; this is reinforced by the provisions of **Matrimonial Property Act of 2013** that not only recognizes indirect contribution but also ownership of matrimonial property is described under **Section 7** of the 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] Counsel also referred to the definition of what constitutes contribution towards acquisition of matrimonial property include monetary and non-monetary contribution. The non-monetary contribution includes domestic work, management of the matrimonial home, child care, companionship, management of family business or property and farm work. The provisions of **Section 28 (a) of the Land Registration Act** were also cited which provide for spousal rights over matrimonial property one of the overriding interests that may affect registered land

without being noted on the register. In addition **Section 93(2)** of the said Act states as follows;

> **"If land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership or customary certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered."**

[12] According to counsel for the appellant, the learned Judge failed to appreciate the meaning of indirect contribution and to properly evaluate the evidence in particular, the valuation report showing the enhanced value of the suit property and the very detailed submissions by the appellant. On the cross-appeal, counsel reiterated the submissions in regard to issues of contribution and principles of distribution of matrimonial property. In regard to the issue of jurisdiction, counsel submitted that the learned Judge gave directions that the divorce cause be heard first and the claim for matrimonial property be heard within the O/S. Thus the court had jurisdiction to determine the issue. Counsel urged us to dismiss the cross-appeal and allow the appeal and substitute the order thereto with a declaration that the suit property is owned by the appellant and respondent in equal shares or any other order that this court may deem fit to grant.

[13] On the part of the respondent, counsel reiterated the evidence that the appellant owns her own house in her own name in the UK which is almost of similar value with the suit property. Whereas the suit property belonged to the respondent's father, even before he married the appellant in 1997 and before the Constitution 2010 and the enactment of the Matrimonial Property Act 2013, this aspect disentitled the appellant from any claim. According to the respondent, the applicable law was **Section 17 of the Married Women Property Act, 1882** of England. On assessment of non-monetary contribution which was only supervision towards the renovations, it was the respondent's submission that the appellant admitted that she did not pay any money, the respondent financed the renovations from proceeds of sale of his UK house; out of which Kshs 13 million was deposited by the respondent in the construction account, where the appellant was signatory and after completion there was a balance of about 3 million which the appellant used to buy luxury fishing boats; the appellant was not the only one supervising the renovations as the respondent frequently came out to Kilifi from UK for an aggregate of 301 days within the period of 18 months when the construction was going on; it was common ground that both parties appointed a competent contractor thus, since the appellant did not have any skills in building, the sum of Ksh 2 million for supervising renovations was excessive.

[14] Counsel for the respondent urged us to consider that the house was not being occupied by the appellant as husband and wife; in 2009, the appellant barred the respondent from entering the suit premises; the parties were separated and were living in different jurisdictions, thus, it was erroneous for the learned Judge to find the suit premises was a matrimonial home as the renovations were completed in 2008 and in March, 2009 the respondent left for the UK after which the relationship deteriorated and he was not able to set foot in the suit premises; counsel urged us to dismiss the appeal and allow the cross-appeal with costs.

[15] We have taken time to recapitulate albeit in summary the evidence, submissions and the record of appeal while conscious of our duty when dealing with a first appeal, which entails a re-evaluation and reconsideration of the entire evidence before the trial court; we are also supposed to give it fresh analysis but with the usual caveat that we never saw or heard the witnesses testify and make our own independent conclusions. (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"**

[16] Many issues were raised in the appeal and the cross-appeal, apart from the issue of jurisdiction of the trial court to deal with the suit for division of matrimonial property after it had concluded the divorce cause; all the other core issues revolve on whether the learned Judge erred in awarding the appellant Ksh 2 million being her non-monetary contribution to the suit property; whether it was a matrimonial home and conversely whether the learned Judge should have dismissed the suit.

[17] On jurisdiction, it has been stated time without number that jurisdiction of a court is everything, indeed many authorities have defined it as the foundation and basis that every court or tribunal must establish before embarking on a matter. Where a court or tribunal takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before a court can issue a valid judgment or order. See the case of The **Owners of Motor Vessel 'Lillian "S' " vs Caltex Oil (Kenya) Ltd** [1989] KLR 1. It was emphasized that establishing jurisdiction is a condition precedent to the whole case as set out and mandated by statute or the Constitution. **Nyarangi, J.** (as he then was) had this to say;-

> **"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

[18] The Court of Appeal also emphasised the importance of a court or tribunal establishing its jurisdiction prior to considering the matter before it in **Joseph Njuguna Mwaura and 2 others vs Republic,** Nairobi Criminal Appeal No. 5 of 2008 when it stated that;

> **"It is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice, and that is jurisdiction. The authority of the court is determined by the existence or lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a court will cross before it embarks on its decision making function."**

However, what transpired before the learned Judge was different in the sense that both the divorce cause and the O/S were before the same Judge. The learned Judge separated the two matters by giving directions that they be heard separately which is a common practice in family matters as the grounds for divorce and rights to matrimonial property are distinct as they are also governed by different statutes. Accordingly, this ground of appeal is without merit.

[19] This now takes us to the crux of the appeal; that is, whether the appellant was entitled to a larger share being 50/50 ownership of the suit premises or as cross-appealed by the respondent, the award of Ksh 2 million was excessive. This suit was filed on 30th May, 2015 after the Matrimonial Property Act 2013 was in operation. It is not clear to us why the appellant predicated the suit under the Civil Procedure Act and **Section 17** of the 1882 Married Women's Property Act of England when it had been repealed by the Matrimonial Property Act. In our view, the applicable law was the Matrimonial Property Act of 2013 as the issue for determination was ownership of property in Kenya by parties who were residing in Kenya. Further, in our respectful view, although the appellant's case was slovenly drawn by referring to the wrong provisions of the law that did not affect the substantive claim or its merit as going through the pleadings, one could clearly discern the claim by the appellant. Moreover, nowadays courts overlook procedural technicalities and aim to administer substantive justice in keeping with the overarching objective in the administration of justice, that is to facilitate, a just, expeditious proportionate and affordable resolution of dispute, a court may wish to hear the entire matter and make a determination of all the issues on merit; this does not, of course, mean that the court should countenance shoddiness.

[20] That said, the Constitution and the statute law, herein before referred to as the **Matrimonial Properties 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."**

[21] 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."**

[22] However, even under the old regime, 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. See the case of;- **Muthembwa Vs. Muthembwa** (supra)

> **"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."**

[23] The appellant's claim was that she made non-monetary contribution towards the renovation of the suit premises for which the learned Judge awarded her Ksh 2 million. In doing so, the learned Judge considered the definition of what constitutes matrimonial home under the Act as premises occupied by the spouses. The respondent made heavy weather of the said conclusion arguing that the appellant came to Kenya in 2007; within that time, the suit premises was under renovation and although he was himself resident in the UK, he used to come over to Kilifi often but immediately the renovations were over, there were misunderstanding and he was barred by the appellant from accessing the suit premises therefore because they never quite occupied it as spouses, then it cannot be termed as matrimonial home. We think this argument by the respondent is like splitting hairs or what one would call approbating and reprobating. This is for the simple reason, that the respondent is the one who brought the appellant to the suit premises and allowed her to stay in one room while renovations were being undertaken in the main house. They were married from 1997 although they came to Kenya in 2007 and the marriage broke down in

2009, we agree with the learned Judge the suit premises fitted the description of a matrimonial home.

[24] What proportion or share should the appellant be awarded? It is common ground that the suit premises was inherited by the respondent and just like the learned trial Judge, we appreciate no case is like another and each must be considered on its own merit while bearing in mind the peculiarities, circumstances and the principles of fairness and human worth in each case. Just like the old saying goes, '*no one should reap where they did not plant and none should reap more than they planted'*. That is a basic tenet of equity which follows the law. For instance in this case, there are peculiar circumstances such that the appellant has her own property in the UK where she draws rent; this property is not being brought into one basket; when the suit premises was under renovation, the respondent took care of the entire costs and there was a balance of about Ksh 3 million that remained in the account and was spent on the appellant's account to purchase a motor vehicle and fishing boat. The appellant used to receive a stipend of about Ksh 95,000 per month for her up keep; since the property was renovated and from 2009, the appellant was barred by the respondent from accessing it, thereby benefiting from it while the respondent had to look for alternative accommodation, this is almost a period of 7 years when the appellant has been in exclusive possession of the suit premises. Since 2007, when the appellant came to Kenya, it would appear the relationship lasted under 2 years when the house was under renovation; this is important while considering the other aspect of non-monetary contribution is *inter alia* companionship and domestic work.

[25] Taking all the above factors that are born out of evidence into consideration, we agree with the learned Judge that the appellant's contribution to the matrimonial home was through supervision of the renovations. There was very little in terms of companionship and domestic work as the relationship went sour within less than 2 years of coming to Kenya; the couple did not have children together therefore there was no child care, they also did not have a family business or farm. We have revisited the question as to whether the appellant is entitled to share 50/50 of the suit property. We agree with the learned Judge that it would not have been a fair share given the suit premises was inherited by the respondent from his ancestors; the appellant has been in occupation of the suit premises from 2007 by excluding the respondent; the contribution by the appellant towards the improvement and enhancement of the value of the suit premises was minimal. We however find the award of Ksh 2 million was inordinately low, in view of the circumstances of the value of the suit premises and the fact that the appellant was not merely an employee when she supervised the renovations but a wife.

[26] In arriving at the sum of Ksh 2 million, the Judge gave the whole matter an entirely commercial approach that the appellant was supervising the renovations and therefore awarded her the said sum. Although that was exactly what the appellant did, we are of the view that she did the supervision as a spouse (not as an employee). It is also clear from evidence that she made certain sacrifices like staying in a small room while the main house was under repair. At the same time, she provided the respondent companionship albeit short lived and wherever he was, in the UK while the house was being renovated, he knew the project was under the trusted watch of his wife. He also trusted the wife with a colossal sum of money for the construction work. Another fundamental aspect that was not considered by the learned Judge was the fact that the appellant who had lived in the area of Kilifi for close to 10 years may wish to establish another home in the same area or even if she were to return to her native England, she would have something to show for the years spent in Kenya (especially the two years spent in Kenya while married to the respondent). It is for those reasons we find the Judge erred in the assessment of compensation to award the appellant for her in direct contribution to the value of the matrimonial property.

[28] We think we have demonstrated why a sum of Ksh 2 million is inordinately low in the circumstances of the parties and the evidence that was before court. Accordingly, having come to the above conclusion, it goes without saying the cross–appeal by the respondent is without merit. The appeal partially succeeds; we set aside the judgment of the trial Judge and substitute the award of Ksh 2 million with an order that the appellant be paid by the respondent a sum of Ksh 3 million being an assessment of her contribution to the value of suit property. We make no order as to costs; this being a family matter, we do not wish to set these parties against each other anymore, each party shall bear their own costs in this appeal.

Dated and delivered at Mombasa this 8th 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