



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: KOOME, OUKO & M'INOTI JJ.A)**

**CIVIL APPEAL NO 88 OF 2015**

**BETWEEN**

**MICHAEL KINYUA .....APPELLANT**

**VERSUS**

**ANNA GOMBANI KALUME.....RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Malindi (C.W. Meoli J.) dated 9<sup>th</sup> July 2015*

*in*

*High Court Civil Suit No 19 of 2011 (OS)*

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**JUDGMENT OF THE COURT**

**[1]** This is an appeal against the judgment of the High Court dated 9<sup>th</sup> July 2015, in which the learned Judge ordered three properties which she found to be matrimonial properties to be shared between Michael Kinyua (the appellant) and Anna Gombani Kalume (the respondent) in the following terms;

1. All that unregistered parcel of land measuring 50 ft by 100 ft situated at Kilifi Town near Kilifi G. K. Prison, Kilifi on which is built a permanent residential house comprising three bedrooms, kitchen and toilet, a two roomed commercial building and an incomplete residential house comprising three bedrooms kitchen and toilet be awarded to the respondent.
2. All that unregistered parcel of land measuring 50 ft by 100 ft situated at Kilifi Town near Kilifi G. K. Prison Kilifi on which is built a permanent residential house comprising four bedrooms and toilet be awarded to the respondent.
3. The parcel of land measuring 25ft by 100 ft situated in Siakago to be shared equally by the appellant and the respondent or in the alternative be valued so that should the appellant desire to keep all of it, the respondent can be compensated accordingly for her share.

**[2]** Being aggrieved by the said orders, the appellant filed the instant appeal raising three grounds of appeal. The appellant contends that the learned Judge erred in law and fact for failing:-

(i) To properly evaluate the evidence

(ii) To direct for the valuation of the property to ascertain the value thereof before ordering distribution

(iii) After finding that there was equal contribution in the acquisition of the property, to order the same to be shared equally

[3] The brief background of the matter is that, on or about 1993, the appellant started cohabiting with the respondent as husband and wife within Kilifi town. They subsequently solemnized their marriage on 30<sup>th</sup> April 2002 under the Marriage Act Cap 150 (now repealed). They were blessed with two issues. The marriage did not last as it was dissolved and a certificate of decree nisi was issued by the High Court in Malindi on 3<sup>rd</sup> March 2011 in Divorce Cause No. 3 of 2010. Soon after the said decree, the respondent filed a suit for determination of her share of properties that were acquired during the marriage. The suit was instituted by way of an originating summons dated 17<sup>th</sup> March 2011 which was amended by an order made on 20<sup>th</sup> May 2013. The respondent also sought a declaration regarding a motor vehicle registration No KWG 301 Daihatsu Charade, 2 motor cycles, registration Nos. KMCG 681W BAJAJ and KMCI 822 X Bajaj Yamaha and 2 market stalls at Makima Location in Siakago District of Embu County.

[4] The suit was supported by the affidavit of the respondent who deposed that she was at the time employed as a field worker by the Kenya Medical Research Institute at Kilifi, while the appellant was at the time self-employed running his own shop. The respondent stated that all the 6 properties listed in the suit that she sought to be declared jointly owned were acquired during coverture. She also contended that the appellant had sold a plot measuring 100ft by 100ft in Bofa area, Kilifi, without consulting her and utilized all the money, thereby denying her a share thereto. Further, the appellant took away the motor vehicle to unknown place and the respondent was apprehensive that she stood a risk of being evicted from the matrimonial home following threats by the appellant. The respondent further contended that she took several loans from her place of work, and others co-operative society. She annexed several loan applications. The proceeds of the said loans were used to acquire and develop the matrimonial properties. The respondent therefore filed the suit seeking determination and an order that she be awarded a full share of the said properties, while the respondent should be deemed to have benefited from the proceeds of the plot the appellant sold in Bofa area, the motor vehicle and the plot in Siakago.

[5] On the part of the appellant, he opposed the suit, by terming the request by the respondent misplaced. He contended that he was a broker by profession, and the property at Bofa in Kilifi, and the motorcycles were his own independent properties which he purchased and sold in the normal course of business. He alleged that the proceeds were used to develop the matrimonial home. As regards the motor vehicle, he stated that it was in a state of disrepair, so he sold it as scrap metal for a paltry sum of Ksh 5,000/= which sum went to settle college fees for one of the issues of the marriage; the motor cycle Yamaha was bought after he separated from the respondent and after the decree nisi had issued; he denied there was another motorcycle KMCI 882X. The appellant further claimed he had purchased and transferred the Siakago property to his father as a gift. He also claimed the 2 market stalls in Siakago were sold and the proceeds were used to develop the matrimonial home. Lastly the appellant denied that the proceeds of various loans that were taken by the respondent were utilized in the development of the matrimonial home. According to the appellant the respondent used all her resources to pay school fees for their children and towards the welfare of her own family. He denied the appellant made any contribution towards development of the matrimonial home.

[6] The matter was heard by Meoli J., by each party giving oral evidence. Upon considering the evidence the learned trial Judge summed it up as follows in the pertinent portion of the judgment:-

**“If I understood the plaintiff’s position, it is that the defendant has already received what is due to him in the form of disposed properties and should be content to take whatever remains in Siakago properties while she keeps the Kilifi properties for herself. This would have been easy to uphold had there been evidence to show that indeed the proceeds of their properties sold during coverture were used solely by the defendant for his purposes. There is no such**

**proof forthcoming from the plaintiff.**

**On the part of the defendant, he too would have the court believe that all the documented loans taken by the plaintiff during coverture were applied to her own schemes and for the benefit of her relatives, save for Kshs 180,000/=. Equally, he too produced no evidence to controvert the assertions by the plaintiff that the loan proceeds were ploughed into matrimonial enterprises. From his description, the defendant's business started small but grew over time. He did not produce any records from the said business to prove that the income generated therefrom could solely support the purchase of immovable properties, substantial developments as well as cater for all the family need as he stated.**

**In the circumstances of this case, I think items 1 & 2 remained the matrimonial properties in Kilifi at the time of the dissolution of the marriage. Equally, there is no credible evidence that the undisputed Siakago plot was purchased on behalf of the respondent's father. It is unlikely that as at 2000 when on the parties' own accounts they were trying to create a home for themselves, they could spare over Kshs. 15,000/= to purchase a plot for the respondent's father up country, as a gift. This plot has not been disposed of and forms part of the matrimonial property alongside the two plots in Kilifi. I am willing to give the respondent the benefit of doubt regarding the market stalls for purposes of this matter the matrimonial properties to be taken into account are numbers 1, 2, and 6 in the Originating Summons. It is also my finding that the parties contributed equally to the acquisition of the said properties.”**

[7] Both firms of **Muli & Ole Kina Advocates** representing the appellant and **J.K. Mwarandu Advocate** for the respondent filled detailed submissions in support of their respective client's position. When the appeal came up for hearing, they urged the Court to rely on the said submissions. Counsel for the appellant discussed at considerable length the provisions of **Article 45 (3)** of the Constitution which provides that parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at dissolution of the marriage. Thus, both the appellant and respondent were entitled to share the properties equally 50:50. Counsel also made reference to the provisions of Matrimonial Property Act of 2013, which recognizes both direct and indirect contributions made by spouses towards the acquisition of matrimonial property. Counsel nonetheless stated the provisions of the Act were not applicable to this appeal which was filed in 2011.

[8] Counsel for the appellant went on to argue that both the Constitution and the Matrimonial Properties Act do not apply to the present case. Their argument is that since the disputed properties were acquired before the promulgation of the 2010 Constitution, those principles of equality cannot be applied retroactively to resolve this dispute although they recognize the suit was filed in March 2011. In this regard, counsel cited this Court's decision in the case of **Peter Mburu Echaria V Priscila Njeri Echaria** Civil Appeal No. 75 of 2001, 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*.”**

[9] Counsel for the appellant also faulted the learned trial Judge for failing to evaluate the evidence and especially to consider the loans purportedly taken by the respondent in July 2000 for Kshs. 40,000/= was for development, and the loan taken in June 2007 was to pay school fees; the Judge also ignored the evidence by way of an agreement produced in court to show the plot in Siakago was purchased at Kshs. 15,500/= for the appellant's father as a gift by the couple. According to the appellant there was clear disparity regarding the market values of the two properties in Kilifi as one was fully developed while the one apportioned to the appellant was not as developed. The learned Judge having found there was equal contribution in the acquisition of the matrimonial property, it should have been shared equally between the appellant and respondent after subjecting it to a valuation.

[10] Counsel for the respondent as expected supported the judgment of the trial Judge which he submitted was based on sound evidence that recognized the contributions made by each spouse towards the acquisition of all the six properties that were listed for determination. The learned Judge took into account the fact that the appellant sold three properties listed for distribution. The respondent was salaried and in addition she borrowed several loans and the learned Judge was satisfied a substantial portion of the proceeds of the said loans were applied towards the acquisition or development of the matrimonial properties. On the issue of equal distribution, counsel submitted, there was no evidence put before the Judge to show the property awarded to the respondent was of a higher value than the one that was awarded to the respondent. The Judge took into consideration the fact that the respondent was in occupation of the matrimonial home together with the issues of the marriage. The respondent had also not benefitted from the proceeds of the sale of other properties that were sold by the appellant which were also part of the matrimonial properties.

[11] Having regard to the grounds of appeal, the evidence before the trial court and the submissions, the single issue that we discern for our determination is whether the learned Judge erred by ordering distribution of the three properties in the manner she did. We are also conscious this is a first appeal and that being so, our primary role is to re-evaluate the evidence and come to our own conclusions, albeit with the usual caution that we did not hear or see the witnesses as they testified. Consequently, we may only interfere with the findings of the trial Judge if the judge failed to take into account particular circumstances or based his or her impression on demeanour of witnesses which was inconsistent with the evidence. **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.”**

[12] It is common ground that the six properties that were listed in the Originating Summons were acquired during the subsistence of the marriage. The appellant seems to agree, the properties should be shared equally while recognizing the principle of equality that is enshrined under Article 45 (3) of the Constitution and also in the case of **Agnes Nanjala William vs Jacob Petrus Nicholas Vander Goes** Civil Appeal No. 127 of 2011 where this Court stated;

**“Article 45 (3) of the Constitution provides that 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. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However pursuant to Article 68 Parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home. Although this is yet to happen, we hope that in the fullness of time Parliament will rise to the occasion and enact such a law. Such law will no doubt direct a court when or after granting a decree of annulment, divorce or separation; order a division between the parties of any assets acquired by them during the coverture. Pending such enactment, we are nonetheless of the considered view that the Bill of Rights in our Constitution can be invoked to meet the exigencies of the day.”**

[13] We agree with submissions by counsel for the appellant that the body of family law has developed exponentially since the Constitution 2010. The Matrimonial Property Act 2013 was enacted with the commencement date of 16<sup>th</sup> January 2014. It defines what constitutes non-monetary contribution by spouses in a marriage. We are, for obvious reasons, that this matter was filled in 2011, not dealing with the provisions of the Matrimonial Properties Act. Moreover as stated above, there is consensus the properties should be shared equally between the appellant and the respondent. The properties are three plots, two plots in Kilifi which are equal in size and another in Siakago which the appellant contends was purchased during coverture but as a gift to his father.

[14] One of the plots in Kilifi is the matrimonial home, the evidence on record, which the trial Judge also took into account was that the appellant left the matrimonial home and by the time the respondent filed for divorce and division of matrimonial property, he was not residing in the matrimonial home. It was the respondent and the two issues of the marriage who were in occupation. We are not persuaded the learned Judge erred by allocating this property to the respondent for reasons that she was in occupation, although the issues of marriage are perhaps of the age of majority as they did not feature much in the proceedings. It was convenient in the circumstances not to order the respondent to vacate the matrimonial home with the children. The appellant had already vacated and moved elsewhere, therefore we agree with the trial Judge that it was only fair and just to allocate the matrimonial home to the respondent who was already in occupation.

[15] Did the Judge fail to evaluate the evidence and to apply the principles of equality that are underpinned by the Constitution? The appellant's contention is that the Judge should have ordered the properties be valued and each party be given the priority to buy out the other, failing which the property should be sold and the money shared. Regarding this argument, it is obvious to us the appellant is oblivious or has ignored the fact that he admitted having sold the motor vehicle, the two market stalls in Siakago and the plot at Bofa area in Kilifi. These were matrimonial properties. Therefore even if the matrimonial home may have a slightly higher value than the plot allocated to the appellant, the Judge took that into consideration that the appellant disposed of some matrimonial assets and did not share the proceeds. As regards the Siakago plot, it was also common ground that it was acquired during coverture and was therefore a matrimonial property. The Judge who heard the evidence disbelieved the evidence by the appellant that the plot was purchased for his father. Moreover, even though the appellant may have contemplated it to be a gift to his father, the same had not crystallized. We also hasten to add that nothing stops the appellant from buying off the respondent so that he can pass the same plot as a gift to his father as he was given the first option.

[16] In conclusion, we think we have said enough to demonstrate that this appeal lacks merit and it is hereby dismissed. This being a family matter, we are reluctant to order costs as we do not wish to set these parties against each other anymore. We therefore make no order as to costs.

**Dated and delivered at Mombasa this 17<sup>th</sup> day of February, 2017**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**