IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 210 OF 2015

P B W.....APPELLANT

AND

J W C.....RESPONDENT

(Appeal from the judgment and decree of the High Court at Nairobi,

(Muchelule, J.) dated 9th July 2015

in

HCCC NO. 59 OF 2011(OS))

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JUDGMENT OF THE COURT

After some 23 years of marriage, first under *Luhya* customary law and subsequently under the ***African Christian Marriage & Divorce Act*** (repealed), the appellant, ***P B W*** and the respondent, ***J W C*** divorced in 2012 pursuant to a decree absolute issued by the ***Chief Magistrate's Court, Nairobi***, in ***Divorce Cause No. 7 of 2010***. On 21st October 2011, the respondent took out in the High Court at Nairobi, an Originating Summons under ***section 17*** of the ***Married Women's Property Act, 1882***of England for a declaration that some seven moveable and immoveable properties (the suit properties) registered in the name of the appellant were owned jointly by the appellant and herself. She also prayed for an injunction to restrain the appellant from selling, transferring or alienating the suit properties, as well as for costs of the summons.

The suit properties that the respondent claimed to be entitled to jointly with the appellant were:

i. ***Plot No. LR No 209/[particulars withheld] Waiyaki Way (matrimonial home);***

ii. ***Title No South Teso/Angomo/[particulars withheld];***

iii. ***Household properties;***

iv. ***Prado Motor Vehicle Reg. No. [particulars withheld] 280W;***

v. ***A van motor vehicle;***

vi. ***A saloon motor vehicle; and***

vii. ***40% shares in [particulars withheld] Security Print Ltd***

The respondent staked her claim to the suit properties on the ground that although they were registered in the name of the appellant, he in fact held the same in trust for her because they were acquired through their joint effort during the subsistence of the marriage.

The appellant contested the summons vide a replying affidavit sworn on 24th November 2011 in which he denied that the respondent had contributed to the acquisition of the suit properties. He further deposed that the Waiyaki Way property, the three motor vehicles and the shares were not matrimonial properties, but instead belonged to a company called ***[particulars withheld] Security Print Ltd (the company)***. According to the appellant, only the [particulars withheld] property was family property.

Muchelule, J. heard evidence from the respondent in support of the summons and that of the appellant and his one witness in opposition to the summons. By the impugned judgement delivered on 9th July 2015, the learned judge found that the suit properties were registered in the name of the company in which the appellant was a director and holder of 40% shares. The court further held that the shares were acquired during the subsistence of the marriage and that the respondent had made non-monetary contribution to their acquisition within the meaning of the ***Matrimonial Property Act, 2013***. He accordingly awarded the respondent 20% of the shares. As regards the [particulars withheld] property, which the appellant admitted to constitute family property, the learned judge found that the appellant had sold it for Kshs 1.6 million in 2013 while the litigation was pending. Estimating its value at the time of judgement to be Kshs 4 million, the learned judge ordered the appellant to pay the respondent half of that value, namely Kshs 2 million. The appellant was also directed to pay costs of the suit.

In the appeal before us the appellant contends that the learned judge erred by ignoring the evidence on record; by holding that the appellant's shares in the company were matrimonial property and awarding the respondent half of the shares; by misapprehending the law on gifted property; by holding that the [particulars withheld] property was valued at Kshs 4 million without any evidence; by making an order against the company which was not a party to the proceedings; and by awarding costs of the suit to the respondent.

At the case management conference the parties elected to canvass the appeal through written submissions, which they subsequently filed and exchanged. Satisfied that they had comprehensively addressed the questions raised in the appeal, on 9th February 2017 they requested us to peruse their submissions and render a judgment on that basis.

In the submissions on behalf of the appellant, ***Mr Mbabu***, learned counsel submitted that the evidence on record established that only the [particulars withheld] property was registered in the name of the appellant, a fact which was readily admitted by the respondent. The company, it was contended, owned all the other properties. Learned counsel further urged that the evidence on record indicates that the appellant was invited to join the company and that he did not making any financial contribution for the purpose. Accordingly the learned judge was faulted for holding that the appellant's shares in the company were matrimonial property whereas no family finances were used in the purchase of the shares.

Since his shares in the company were a gift, the appellant continued, the learned judge erred by failing to apply the principles governing gifted property and by finding that the shares constituted matrimonial property. Relying on ***Muthembwa v. Muthembwa [2002] 1 EA 186***, it was submitted that where a property is gifted to a spouse, the spouse should be allowed to keep it. Still on the shares, the appellant submitted that the order that he transfers 20% of the shares to the respondent was contrary to the position taken in ***DM v. MM [2008] 1 KLR (G&F) 263*** where this Court held that a spouse's claim to shares in a company where she had no beneficial interest was untenable. In the appellant's view, the order to transfer to the respondent 20% of the appellant's shares was made without jurisdiction and without regard to the

Articles of Association of the company.

Turning to the [particulars withheld] property, the appellant faulted the learned judge for holding, without evidence, that the reason why the appellant sold it was to put it beyond the reach of the respondent and for assigning the property a value of Kshs 4 million without the benefit of a valuation report.

For the respondent ***Mr. Wafula,*** learned counsel, opposed the appeal, contending that it was wholly lacking in merit. Counsel submitted, on the authority of ***Muthembwa v. Muthembwa (supra)*** and ***DM v. MM, CA No 236 of 2001***, that in a dispute on matrimonial property, the court has jurisdiction to determine the respective rights of the parties to shares in a company that are registered in the name of one spouse and to declare that one spouse holds shares in trust to another spouse.

As regards the submission by the appellant that the learned judge erred in application of the law on gifts, the respondent submitted that the issue of any of the properties constituting a gift was not pleaded and was not an issue before the trial court. Accordingly, it was submitted that the appellant should not be allowed to raise the issue for the first time in this Court. That notwithstanding, the respondent submitted, the appellant acquired property in form of shares during the subsistence of the marriage and the same was properly treated as matrimonial property.

Regarding the [particulars withheld] property, the respondent submitted that it was approximately 6.6 hectares or 16 acres and that the respondent learnt of its sale only during the cross-examination of the appellant. The sale, it was contended, took place while litigation over the property was pending; was in violation of the doctrine of *lis pendens* and was calculated to frustrate the respondent. It was further submitted that having acted illegally and in disregard of the law, the appellant cannot be allowed to rely on his illegal actions to seek a remedy from the court. In the alternative, it was urged, if the appellant was unhappy with the value placed by the learned judge on the property, he should feel free to transfer 8 acres to her.

Next the respondent submitted that there was a distinction between shares owned by a shareholder in a company, which are the property of the shareholder and assets of a company, which are the property of the company. In this case, it was submitted, the dispute was on the shares held by the appellant in the company rather than on the assets of the company. The respondent relied on the judgement of this Court in ***Daniel Toroitich arap Moi v. Mwangi Stephen Mureithi & Another, CA. No. 240 of 2011*** in support of the distinction.

Lastly, regarding the contention that the learned judge had erred in awarding costs to the respondent, it was submitted that costs follow the event and are in the discretion of the court, the exercise of which this Court will not interfere with unless it was wrongly exercised. It was submitted that the appellant had not presented anything to demonstrate wrong exercise of discretion.

We have carefully considered the record of appeal, the judgment of the High Court, the grounds of appeal, submissions by the respective parties, the authorities cited and the law. As this is a first appeal, we are obliged to re-evaluate the evidence and come to our own independent conclusion, but nevertheless always bearing in mind that as regards the findings of fact, we do not have the advantage that the trial court had of hearing and seeing the three witnesses as they testified. Accordingly, we shall be slow to differ with the trial court in that respect, unless we are satisfied that taken as a whole, no reasonable tribunal would have reached the conclusion of the trial court on the basis of the evidence on record. (See ***Ramji Ratna & Co. Ltd. v. Wood Products (K) Ltd. CA No. 117 of 2001).***

The summons leading to this appeal was filed on 21st October 2011 under the Married Women's Property Act, 1882, which was a statute of general application in Kenya (See ***I v. I [1971] EA 278*** and ***Karanja v. Karanja [1976-80] 1 KLR 389)***. During the pendency of the summons, Parliament enacted the Matrimonial Property Act, 2013 which came into effect on 16th January 2014. By section 19 of that Act, the Married Women's Property Act ceased to apply in Kenya.

When the summons was heard and determined on 9th July 2015 therefore, the Matrimonial Property Act

was in force.

Before we consider the merit of the appeal, it is important to highlight a few provisions of the Matrimonial Property Act that are relevant to this appeal. ***Section* 6** Act defines "***matrimonial property"*** to mean:

a. the matrimonial home or homes;

b. household goods and effects in the matrimonial home or homes; or

c. any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

By dint of ***section 7*** ownership of matrimonial property is vested 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. On the other hand ***section 2*** defines ***"contribution"*** to mean monetary and non-monetary contribution and includes domestic work and management of the matrimonial home; child-care; companionship and management of family business or property. (See ***VWN v. FN, CA No. Sup 3 of 2014). Section14 (a)*** of the Act is also relevant to this appeal. Under that provision, where matrimonial property is acquired during marriage in the name of one spouse, there is a rebuttable presumption that the property is held in trust for the other spouse.

Turning to the merit of the appeal, the learned judge found that save for the [particulars withheld] property which was registered in the name of the appellant at the time he sold it, and the 40% shares in the company, all the other properties claimed by the respondent, namely the Westlands property and the three motor vehicles, were owned by the company. We have carefully perused the record and the judgment and we are satisfied that the learned judge awarded the respondent only 20% of the appellant's shares in the company which he found to be held in trust for her by the appellant and did not award to her any property that was registered in the name of the company. This is how the learned judge expressed himself:

> ***"The Court of Appeal in M. v. M...construed the jurisdiction of the court under section 17 of the 1881 Act as extending to shares in limited liability companies owned by the parties while making it clear that the court has no jurisdiction to distribute properties registered in the name of the company in which the spouses are shareholders."***

That indeed is what this Court emphasized in ***DM v. MM (supra)***, when it stated:

> ***"The law is now correctly stated in the Muthembwa case (supra). If there are disputes between husband and wife as to their respective rights to shares in a company registered in the name of one spouse, then, the court like, in the case of any other property in dispute between husband and wife has power to ascertain the respective beneficial rights of husband and wife to the disputed shares. It can declare, like the learned CA did in this case, that one spouse holds a certain number of shares in trust for the other spouse. What the court cannot do under section 17 of the 1882 Act, like in respect of all other properties, is to order the transfer of the legal title to property or in other words to pass proprietary interest from one spouse to the other...Had the learned CA ordered that the allotment of shares in the register of the company be varied and the wife be registered as proprietor of a half of the share registered in the name of the husband then it could be said that he exceeded his jurisdiction under section 17 of the 1882 Act."***

> And in ***Mbugua v. Mbugua [2001] 2 EA 445, Visram J. (as he Then was)*** stated thus:

> ***"In my view, shares being the property of a husband, are subject to an application under section 17 of the Act. It is only the property of the company which is not subject to an application under section 17 of the Act..."***

Accordingly, there is no basis in this case for the appellant's contention that the learned judge erred by awarding the respondent property of the company. In our view, the gravamen of this appeal is whether the learned judge erred by awarding the respondent 20% of the appellant's 40% shares in the company.

The evidence on record shows that after the marriage the respondent was in employment until 1997 when she stopped working, to focus on taking care of the appellant and the six children of the marriage. Under cross-examination the appellant stated:

> ***"I stayed with the petitioner (respondent) for about 20 years. She delivered 6 children. I am proud of the 6 children. Petitioner contributed to the children. She would cook for me and take care of the children."***

It is common ground that the appellant acquired his 40% shares in the company during the subsistence of the marriage when the respondent was busy looking after him and the children. In our view, by remaining home looking after the children and the appellant while the latter was working and acquiring the shares, the appellant was contributing indirectly to the acquisition of the shares within the meaning of the Matrimonial Property Act.

By dint of section 14 (a) of the Act, therefore once it was established that the shares in the company were acquired during the subsistence of the marriage and registered in the name of the appellant, there was a rebuttable presumption that the appellant held them in trust for the respondent. In a bid to rebut the presumption, the appellant claims that he was merely invited to be a director of the company and never made any financial payment for the shares.

We agree with the respondent that the fact of the 40% shares being a gift to the appellant without any financial contribution on his part was never pleaded nor did the appellant lead any evidence on the matter. In fact, the appellant never addressed the issue in his evidence at all save for a fleeting and innocuous answer in cross-examination when he stated: ***"I was invited to the company as director but did not make any financial contribution."*** The learned judge, who saw and heard the parties as they testified, did not believe the appellant's claim under cross-examination that he was gifted the shares. As was stated in ***Muthembwa v. Muthembwa (supra),*** the issue of whether a party has made a contribution to the acquisition of the suit properties is a question of fact. The trial court having found that the appellant had made an indirect contribution to the acquisition of the shares, we must respect that finding in the absence of proof of misdirection on the part of the court. The appellant simply failed to rebut the presumption that he held the 40% of the shares in the company in trust for the respondent.

Turning to the [particulars withheld] property, the appellant readily conceded that it was matrimonial property and that he sold and transferred it to a third party for Kshs 1.6 million during the pendency of the summons. The evidence on record indicates that prior to the sale, the respondent had planted in it 100,000 eucalyptus trees. Ideally the learned judge should have sought a valuation report, but given the peculiar circumstances of this appeal, his dilemma is readily apparent. Firstly the appellant sold the property during the pendency of the summons, clearly for the purposes of defeating the respondent's claim thereto.

Secondly, he did not disclose the fact that he had sold the property; the respondent only learnt of the sale during cross-examination of the appellant. Thirdly by selling the property the appellant had deliberately put it beyond the reach of the respondent, such that valuation of the same was impractical. In those circumstance, much as we agree that ideally the learned judge should have relied on a valuation report, the appellant had, by his deliberate action made it impossible to obtain a valuation report. It therefore cannot fall from his mouth to claim that the learned judge erred by failing to call for a valuation report.

The appellant did not address the issue of costs in his submissions. In any event, costs being in the discretion of the trial court, this Court will not interfere with its exercise of discretion unless it is shown that the decision is clearly wrong because the court misdirected itself or acted on matters it should not have acted on or because it failed to take into consideration matters which it should have taken into consideration and in doing so, arrived at a wrong decision. (See ***Mbogo & Another v. Shah (1968) EA 93).*** We have not seen anything, which would justify interference with the exercise of discretion by the

learned judge.

We have ultimately come to the conclusion that this appeal is wholly bereft of merit and the same is hereby dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Nairobi this 24th day of March, 2017

ASIKE-MAKHANDIA

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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