IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 128 OF 2014

(CORAM: WAKI, AZANGALALA, & KIAGE, JJA)

BETWEEN

P N N .....……..…APPELLANT

AND

Z W N ……...……..……..…….....…..RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Nambuye, J. (as she then was) dated 28th day of September, 2012

in

H. C. C. C. No. 10 of 2004 (O.S.)

****

JUDGMENT OF WAKI, JA

Introduction

1. The matter before us relates to the perennial war between husband and wife over matrimonial property after the collapse of their marriage. It has always been a murky waterway for the courts in this country to navigate since the applicable procedural law was a piece of archaic legislation enacted in England in 1882 and inherited as a statute of general application in this country. That was the ***Married***

Women?s Property Act, 1882, (MWPA). ***Section 17*** of that Act provides in relevant part as follows:

> ***"In any question between husband and wife as to the title to or possession of property, either party .. may apply by summons or otherwise in a summary way to any judge of the High Court of Justice .. and the judge of the High Court may make such orders with respect to the property in dispute, and to the costs of and consequent on the application as he thinks fit".*** (Emphasis added).

It was a piece of legislation the mother country gradually found wanting and made legislative changes in 1967 ***(The Matrimonial Homes Act)***, 1970 ***(The Matrimonial Proceedings and Property Act)*** and 1973

(The Matrimonial Causes Act) in order to bring justice to the shattered matrimonial home. But Kenya soldiered on, painfully groping for an acceptable balance even when jurisprudential precedent dictated otherwise.

2. Indeed, in February 2007, this Court had occasion to state as follows when it rendered itself in the case of ***Peter Mburu Echaria vs Priscillah Njeri Echaria [2007] eKLR*:**

> ***"In enacting the 1967, 1970 and 1973 Acts, Britain brought justice to the shattered matrimonial home. Surely our Kenyan spouses are not the product of a lesser god and so should have their fate decided on precedents set by the House of Lords which are at best of persuasive value! Those precedents, as shown above, are of little value in Britain itself and we think the British Parliament was simply moving in tandem with the times. Human rights issues, and in particular women?s rights issues, took centre stage on the global theatre from the 1960?s. There were, for example, International Covenants on "Civil & Political Rights" and "Economic, Social and Cultural Rights" which were adopted in 1966 and came into force in 1976; the "Convention on the Elimination of All Forms of Discrimination against Women" (CEDAW) which came into force in 1981; and the "African Charter on Human & Peoples Rights" which was adopted in 1981. Kenya has ratified all those international instruments and they therefore provide a source of law which, in appropriate cases, the courts in this country may tap from."***

3. The opportune moment for change came during negotiations on the new Constitution which was promulgated in August 2010, three years after the *Echaria case*. The people of Kenya in a referendum decided to expressly pronounce themselves on the institution of family in *Article 45* as *"the natural and fundamental unit of society and the necessary basis of social order"* which must enjoy the *"recognition and protection of the state"*.

As relates to marriage, ***Article 45 (3)*** provides as follows:

> ***"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."***

4. One of the earliest opportunities to interpret the provisions of ***Article 45 (3)*** came one year after the promulgation in the case of ***Agnes Nanjala William -vs- Jacob Petrus Nicolas Vander Goes, (Civil Appeal No. 127 of 2011),*** where this Court stated as follows:-

> ***"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."***

5. Parliament indeed rose to the occasion two years after that decision and enacted ***The Matrimonial Property Act, 2013*** which received assent on 24th December, 2013, and commenced on 16th January, 2014. ***Section 7*** provides:

> ***"Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved."***

Contribution is defined by ***Section 2*** to mean monetary and non-monetary contribution. Non-monetary contribution 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***

"Family business" means any business which -

> ***a. is run for the benefit of the family by both spouses or either spouse; and***
>
> ***b. generates income or other resources wholly or part of which are for the benefit of the family;"***

6. A combination of the above provisions of the **Constitution 2010** and the **Matrimonial Property Act 2013**, has settled the law on matrimonial property and charted a clear vision for the future. The only debatable consequence is whether those provisions have confined previous decisions to the archives. One school of thought espoused by this Court is that at least they render the ***Echaria case*** obsolete. That was the view taken by this court in the case of ***V W N v. F N [2014] eKLR*** decided in October 2014 when it rejected an application for leave to appeal to the Supreme Court for determination of the following issues, amongst others:

> "***Whether Article 45 (3) of the Constitution applies in matters filed before the promulgation of the Constitution and not yet determined; the extent to which Article 45 (3) of the Constitution applies vis-à-vis the principles enunciated in the case of Peter Mburu Echaria v. Priscilla Njeri Echaria, (2007) eKLR regarding matters filed after promulgation of the Constitution..."***

7. The Court had this to say:

> "***The provisions of Sections 2, 6 and 7 of the Matrimonial Property Act, 2013 breathe life into the rights provided in Article 45 (3). The Matrimonial Property Act recognizes that both monetary and non monetary contribution should be taken into account in determining contribution. In light of Article 45 (3) and Section 2 of the Matrimonial Property Act which define contribution to mean monetary and non monetary contribution, Echaria [supra] is no longer good law."***

8. Another school of thought espoused in the case of ***PWK v JKG [2015] eKLR*** is that the ***Echaria case*** is not dead. The Court stated thus:

> ***"We think that this is an appropriate case where, subject to what we shall say hereafter, a distribution of 50:50 would have been appropriate. This would not be on account of any compelling legal principle that spouses must share equally in matrimonial property but rather, as was succinctly put by a five-judge bench of this Court in ECHARIA -VS- ECHARIA (Supra) "Where the disputed property is not so 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 the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim "Equality or equity" while heading the caution of Lord Pearson in GISSING –VS-GISSING [1970] 2 All ER 780] at page 788 paragraph c that:***

„No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions otherwise than by way of advancement, by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one quarter, I do not think it is helpful or right for the court to feel obliged to award either one half-or nothing?."

We are of the respectful view that the principles restated by ECHARIA VS. ECHARIA are good law and contribution as the basis for distribution of matrimonial property remains valid".

9. Those views may well have been justifiable within the special circumstances of the cases in which they were pronounced. Speaking for myself, I would find little, if any, utility in applying the ***Echaria case*** post the provisions of the ***Constitution*** and the ***Matrimonial Property Act*** examined above. The former is loud on equality while the latter has an expansive definition of "contribution". As stated earlier, those provisions lay a new basis for the future which will generate its own jurisprudence.

10. The ***Echaria case*** had, of course, considered and strictly applied pre-1970 English precedents on the interpretation of ***Section 17*** of the ***Matrimonial Property Act 1882.*** After analyzing English authorities, this Court stated in part as follows:

"***It is clear from those cases that when dealing with disputes between husband and wife over property the court applies the general principles of law applicable in property disputes in all courts between all parties irrespective of the fact that they are married. Those principles as Lord Diplock said in Pettitt are those of English law of trusts. The House of Lords specifically decided so in Gissing vs. Gissing. According to the English law of trusts it is only through the wife?s financial contribution, direct or indirect towards the acquisition of the property registered in the name of her husband that entitles her to a beneficial interest in the property."***

11. The Court also examined local decisions and came to the following conclusion:-

"In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this Court, the court has invariably given the wife an equal share (see Essa vs. Essa (supra); Nderitu vs. Nderitu, Civil Appeal No. 203 of 1997 (unreported), Kamore vs. Kamore (supra); Muthembwa vs. Muthembwa, Civil Appeal No. 74 of 2001 and Mereka vs. Mereka, Civil Appeal No. 236 of 2001 (unreported). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of each case and independently assessed the wife?s contribution as equal to that of the husband."

12. The matter before us was filed in the High Court on ***22nd April, 2004***, long before the promulgation of the ***Constitution 2010*** and the ***Matrimonial Property Act***, ***2013***. For some reason, however, it was not concluded until ***28th September 2012*** when the Judgment was delivered. This was after the Constitution had become operational, but before the enactment of the ***Matrimonial Property Act***. The overarching issue that arises, as I see it, is whether the matter is governed by the ***Constitution 2010*** or the principles stated in the ***Echaria case***. I must now turn to the facts of the case and the appeal before us as I seek to answer that question as well as other issues raised by the parties.

The dispute and findings of the High Court.

13. The husband, **P N N** (P) is the appellant and was represented before us, as he was in the High Court, by learned counsel **Mr. Onesmus Githinji**, assisted by **Mr. Ian Mworia.** The wife is **Z W N** (Z) who was represented by learned counsel **Mrs. Judy Thongori** in both courts**.**

14. P and Z were married under the ***African Christian Marriage and Divorce Act,*** (Cap 151, now repealed) in 1961. We are told P is now aged 80 and Z 78 years. At the time of their marriage they were both gainfully employed; P as a [particulars withheld] with the Ministry of [particulars withheld] earning Sh.350 per month, Z as a [particulars withheld] earning Sh.270. Subsequently they respectively earned promotions and salary increments until their retirement in 1990 when they continued to earn pensions. The marriage appears to have enjoyed considerable bliss too as they had between them seven children whom they educated and brought up to adulthood. One is an Advocate of the High Court of Kenya. They also made sizable investments in real and moveable property. But all that was before 1987 when the marriage hit the rocks and P left the matrimonial home for several years, returning briefly in 1999 only to leave again in 2001 to cohabit with another woman, one **M G**. Z asserts the woman was his mistress with whom they have a son, while P insists she is merely a business partner who had taken care of his mother and should thus be treated well. For all intents and purposes, the marriage had come to an end and was only valid on paper. P had even filed divorce proceedings at some point but withdrew them.

15. In her Originating Summons dated 22nd April, 2004, Z sought a declaration that P held the following properties registered in his name in trust for her:-

> ***"a) NYAHURURU/GILGIL WEST/ [particulars withheld] approximately 20 Ha.***
>
> ***b) BAHATI/KABATINI BLOCK [particulars withheld] approximately 0.65 Ha.***
>
> ***c) BAHATI/KABATNI BLOCK [particulars withheld] approximately 0.065 Ha.***
>
> ***d) DONHOLM L.R. NO. NAIROBI/BLOCK [particulars withheld].***
>
> ***e) BAHATI/KABATINI L.R. NO. [particulars withheld]. AND WITH SHOP DEVELOPMENTS THEREIN KNOWN AS [particulars withheld]."***

She sought an order that the trust be terminated and the properties be apportioned between them as the court deems fit and just.

16. It was Z's case that those properties were acquired jointly during coverture and she had contributed directly and indirectly towards its acquisition and development. P resisted those claims on the basis that he was the registered proprietor of the properties which he solely acquired and developed. He denied voluntarily leaving the matrimonial home instead blaming Z for harassment and cruelty towards him and his old parents who later died.

17. No oral evidence was tendered in the suit before the High Court, the parties choosing to file affidavits in support of their respective cases. The evidence on record was thus not tested in cross examination. Pending the hearing a temporary injunction was issued on 22nd July 2004 restraining P from selling, alienating or charging the suit properties. Two of the properties were nevertheless transferred to the joint ownership of P and M G shortly before the injunction was issued. Z filed ten lengthy affidavits from herself and two witnesses to support her assertion that she contributed financially and in kind towards the acquisition and development of the suit properties. She also filed lengthy submissions through learned counsel. For his part, P filed lengthy affidavits of his own as well as written submissions.

18. In a lengthy but analytical judgment, the trial Judge **(Nambuye J.)** evaluated the evidence on the acquisition of each of the disputed properties, considered and applied the ***Constitution 2010*** and other relevant international instruments ratified by Kenya, and made findings of fact before issuing the following final declarations and orders which may be summarized:-

> **"1. The property listed as "<u>Bahati/Kabatini LR. No. [particulars withheld] and</u> <u>with shop developments therein</u>" (particulars withheld) is not matrimonial property.**
>
> **2. Property number <u>Nyandarua/Gilgil West/[particulars withheld]</u> (Tumaini farm) approximately 20 ha is matrimonial property and is shared equally between Z W N and P N**

N.

3. Z who has been residing on this property will retain the portion where the matrimonial house is whereas P is to retain all other developments on the portion adjudged to be his half share.

4. Property known as LR. No. Nairobi/Block [particulars withheld](Doonholm property) is matrimonial property. It is to be valued and then sold, and the proceeds be shared out equally between Z and P.

In the alternative, either Z or P is at liberty to buy out the share entitlement of the other should they deem it fit to do so.

5. No orders are made with regard to distribution of the income generated by the Doonholm property as there are no audited accounts to prove the same.

In the alternative, Z is at liberty to establish the income by way of rental proceeds from the said property by way of audited accounts and then seek appropriate orders for half of the said income either in these proceedings or in other proceedings if she deems fit to do so.

6. Land parcels number Bahati/Kabatini Block [particulars withheld] (Kabatini [particulars withheld]) and Bahati/Kabatini Block [particulars withheld] (Kabatini [particulars withheld]) which are currently registered in the joint names of P and one M G N qualify to be adjudged matrimonial properties because:

- **they were acquired and developed during the subsistence of the marriage;**
- **Z registered caveats against them to protect her share but was persuaded by P to remove the caveats as consideration for reconciliation which Z did in good faith.**

- **the registration in the joint names of P and one M G was effected during the pendence of these proceedings and was aimed at defeating Z's claim;**

- **There is no cross petition from P to have these two properties struck out of the list of the disputed matrimonial properties;**

- **M G did not swear any affidavit to confirm P's claim on acquisition of the properties.**

6. Z is entitled to half share beneficial interest in plot [particulars withheld] and plot [particulars withheld].

7. Kabatini [particulars withheld] and [particulars withheld] shall be valued and sold, and the resulting proceeds be shared equally between Z and P.

In the alternative, P to be at liberty to buy out the beneficial interest of Z in the said property in monetary terms.

In further alternative, Z's beneficial interest in the two properties be off set against P's half share entitlement of the Tumaini farm.

8. Each party to bear its own costs.

9. Liberty to apply, if need be."

The appeal and submissions of counsel.

19. Seven grounds of appeal were laid out to challenge those findings and they too may be summarized:

The learned Judge erred in law and fact by:

1. finding and holding that Z had made direct and indirect contribution towards the acquisition of any of the properties in question.

2. shifting the burden of proof from Z to P.

3. failing to hold and find that Z had not proved her case to the required standard.

4. not giving due weight and consideration to P's documentary and affidavit evidence and explanation as to how he exclusively acquired each of the properties in question.

5. not following or being guided by the Court of Appeal decision in Echaria vs. Echaria [2007] 2 EA 139, especially where it was held that indirect contributions cannot be taken to account for the purpose of considering a spouse's contribution in matrimonial property disputes.

6. holding that Z was entitled to 50% of the properties registered in P's name without firstly determining how much Z had contributed towards the acquisition of the properties, whether directly or indirectly.

7. relying on the provisions of Article 45 (3) of the Constitution of Kenya, 2010 and other international conventions which were not relevant to the dispute between the parties.

20. Learned counsel on both sides chose to urge those grounds by oral submissions and Mr. Githinji reduced them to three by combining ***grounds 1 & 4*** on *„evidential material?*; ***2 & 3*** on *„burden of proof?,* and ***5, 6 & 7*** on *„applicable law.?*

21. On the first ground, counsel submitted that the court was duty bound to examine the monetary contribution made by each party towards the acquisition of the property but did not. If it had done so, it would have found that Z's supporting affidavit was general, while P's was detailed and explanatory and therefore more credible. On the issue of burden of proof, Mr. Githinji referred to the finding made in relation to Kabatini [particulars withheld] and [particulars withheld] on the basis that P had not filed a cross petition /application to have the properties removed from the list of the contentious ones. Apart from that being a shift of burden of proof, submitted counsel, there was no requirement in law for a cross petition to be filed in a matter commenced by Originating Summons.

22. On the applicable law, counsel submitted that the trial court gravely erred when it applied the wrong provisions. In the first place, he argued, ***Section 17*** of the MWPA was never intended to confer proprietary rights from one spouse to another during their marriage. It was only where the marriage had been dissolved that the section could be invoked. In his view, the Originating Summons was incompetent since the parties were still married. Surprisingly, counsel did not cite any authority for such profound statement although the opportunity had been given for filing a list of authorities.

23. Secondly, submitted counsel, the new Constitution and international law instruments were applied in support of equal distribution of the properties without considering the evidence on acquisition. In counsel's view, there was no room for application of the Constitution 2010 or other local legislation enacted after the suit was filed in 2004 because they would not be applicable retroactively. International instruments were also inapplicable because the matter was covered by existing law, that is, ***Section 17*** of MWPA which law has been settled in this country through the ***Echaria case.***

24. In response, Mrs. Thongori submitted that Z did not simply file one general affidavit as contended but ten of them giving details of her direct and indirect contribution towards each of the listed properties. She was not a mere house wife but was gainfully employed and worked until she retired at the same time with P. They even had a joint bank account. Counsel observed that the 50-Acre Tumaini farm was their most prized possession which was bought for Sh.5,000 through a loan from the Settlement Fund Trustees and another Sh.5,300 loan for development and stocking . Subsequently, Z had to take leave of her

employment in order to manage the commercial/agricultural activities on the farm and repay the loan. Proceeds from the farm also bought and developed the Donholm property and the income from that property in turn acquired Kabatini [particulars withheld] and [particulars withheld] and other matrimonial properties. She further observed that the Kabatini properties were irregularly transferred after P beguiled Z with reconciliation and she removed the cautions she had registered against them. It was also transferred contrary to a valid court order restraining alienation before the final determination of the suit. With all that evidence therefore, urged counsel, it cannot be claimed that Z had no proprietory interest in those properties as she had met the standard of proof envisaged in the ***Echaria case***, even if that was the only law applicable. There was no shifting of the burden of proof, but a finding that Z's evidence was not challenged.

25. Mrs. Thongori further defended the trial Judge?s declaration of the proprietary interest of both parties as 50/50 by invoking and applying the principle of equality enshrined in ***Article 45 (3)*** of the ***Constitution*** and other international covenants on human rights which Kenya has ratified. Only the ***Matrimonial Property Act 2013*** was not applicable because it had not been enacted before the case was concluded. But the ***Land Registration Act*** and the ***Land Act 2012*** were in existence and according to counsel, they had positive provisions which could be invoked to inform the judgment of the trial court.

Analysis and Determination

26. I have anxiously considered the grounds of appeal and the submissions of counsel. As it is a first appeal, I am at liberty to delve into matters of fact as well as law and make my own conclusions in such matters. Ordinarily an appellate court would not differ lightly with the findings of fact by the trial judge if they were based on the court?s observation and assessment of the credibility of witnesses, but no witnesses appeared before the court in this matter. I therefore have considerable latitude to make my own conclusions on the affidavit evidence on record. Before I embark on the analysis of evidentiary material, I must advert to the overarching issue of the applicable law alluded to in the introductory part of this judgment and in submissions of counsel.

27. **What was the applicable law?**

This question falls into four categories:

i) Were the three Acts – the ***Land Act 2012*** , the ***Land Registration Act 2012*** and the ***Matrimonial Property Act, 2013*** applicable?

ii) Was ***Section 17*** of the ***Married Women?s Property Act, 1882*** applicable?

iii) Was the ***Constitution 2010*** applicable?

iv) Were the ***Conventions*** and other international instruments ratified by Kenya applicable?

28. There is a straight answer to the first question which is inbuilt in the provisions of the Acts themselves in ***Section 106 (3) (a) of the Land Registration Act*** and

Section 162 (1) of the Land Act.

Section 106 (3) (a) of the ***Land Registration Act*** states as follows:-

"(3) For the avoidance of doubt-

Any rights, liabilities and remedies shall be exercisable and enforceable in accordance with the law that was applicable to the parcel immediately before the registration of the land under this Act;"

Section 162 (1) of the ***Land Act*** states:-

> ***"(1) Unless the contrary is specifically provided in this Act, any Right, interest, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this act".***

As correctly submitted by Mrs. Thongori, the ***Matrimonial Property Act 2013*** was not applicable since it was enacted after the judgment in this case.

29. The foregoing provisions are in consonance with ***Section 23 (3)*** of the ***Interpretation and General Provisions Act*** which safeguards all rights, obligations, liabilities and privileges where legislation is repealed.

It states thus:-

> ***"Where any written Law repeals in whole in part another written Law, then unless a contrary intention appears, the repeal shall not;***
>
> ***a. Revive anything not in force or existing at the time at which the repeal takes effect; or***
>
> ***b. Affects the previous operation of a written Law so repealed or anything duly done or suffered under a written law so repealed; or***
>
> ***c. Affect a right, privilege, obligation or liability acquired, accrued or incurred under a written Law so repealed; or***
>
> ***d. Affect a penalty for forfeiture or punishment incurred in respect of an offence committed against a written Law so repealed."***

It is common ground in this matter that the properties in dispute were registered under the ***Registered Land Act***, ***Cap 300 (now repealed)***. That is therefore the relevant and applicable law, and I so find.

30. The second question was raised by Mr. Githinji but there was no direct response from Mrs. Thongori. I perceive some considerable confusion in the handling of the question by the High Court over the years, and it seems there has been no authoritative pronouncement from this Court. Does the Section apply to dissolved marriages only as contended by Mr. Githinji?

31. Ringera, J (as he then was) in ***He Zhuo Ying -vs- Qiuwen Ren, Mombasa HCCC No. 128 of 1994 (OS)*** thought the Section applied only to existing marriages when he stated:

> ***"Notwithstanding the cases of I vs. I (1971) EA 278, Karanja –vs-Karanja (1976) KLR 306 and Essa –vs– Essa (supra) all of which involved divorced husbands and wives, the English Act does not apply to couples in respect of whose marriage a decree absolute has been issued."***

32. Elsewhere, several High Court Judges have latched on one sentence in the decision of this Court ***(Kwach/Shah/Okubasu, JJ.A)*** in ***Peter Ndungu Njenga vs Sophia Watiri Ndungu [2000] eKLR*** stating thus:

> ***"The learned Judge had no jurisdiction to alienate suit lands between spouses during their life-time or unbroken coverture and he ought to have dismissed the suit."***

On that basis, it has been consistently held that ***Section 17*** does not apply to subsisting marriages. I suspect that is where Mr. Githinji was coming from.

33. In my view, the above finding by this court was taken out of context. Significantly, the case before the High Court was not based on ***Section 17 MWPA*** but was a normal suit pleading an implied and resulting trust. It is trite law that the intention of the parties to create a trust must be clearly determined before a

trust is implied. But the High Court Judge ***(Hayanga, J.)*** altered the nature of the suit and treated it as a claim under ***section 17***. That is why the appellate Court on review stated:

> ***"It was an error apparent on the face of the record when the learned Judge proceeded to treat a claim made under an implied or resulting trust as a claim made under section 17. It was also an error apparent on the face of the record when the learned Judge proceeded to divide the suit lands as if he was dealing with a succession cause when the appellant is still alive…It was also an error apparent on the face of the record when the learned Judge said that although there was no evidence of customary law relating to division of properties amongst spouses (there can be none when the spouses are alive) he was obliged to make a finding based on section 17 aforesaid."***

34. The correct position, in my view, was given in the English case of ***Hichens vs Hichens (1945) 1 ALL ER 787*** where a similar question arose. In that case, a pronouncement of *decree nisi* was made in a divorce suit filed by the wife against her husband. Before the decree was made absolute, the husband applied to the judge and invoked ***section 17*** of the ***Married Women?s Property Act*** for summary determination of questions concerning certain property. An order was accordingly made directing the registrar to hold an inquiry and to report back to the judge. Before the registrar had made the report, the marriage between the parties was dissolved by a decree absolute. The registrar thereupon refused to continue the inquiry on the ground that, after the decree absolute, he had no jurisdiction to proceed with the matter. The husband applied to the judge who made an order that the inquiry should proceed. The wife appealed against the order, contending that the court had no jurisdiction to try questions under ***section 17,*** since the marriage was dissolved; in other words, according to the wife, a dispute under section 17 could only be contested between a married couple.

35. It was held by the English Court of Appeal, that since the Court had the power, at the time when the marriage still subsisted, to direct an inquiry under the Provisions of the ***Married Women?s Property Acts 17,*** such an inquiry must proceed, notwithstanding the dissolution of the marriage by a decree absolute; but the court on receiving the report of the registrar, might take into account the fact that there had been a dissolution of the marriage by a decree absolute. See also ***Fribance vs. Fribance (1955) 3 ALL ER 789.***

36. An inquiry may thus be made under ***Section 17*** and declarations may be issued, the subsistence of the marriage notwithstanding. As stated by Lord Morris of Borthy-Guest in ***Pettit v. Pettit [1970] AC 777:-***

> ***"One of the main purposes of the Act of 1882 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this in my view negatives any idea that Section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to title to property, the question for the court was whose is this? And not to whom shall this be given?"***

The purpose of the Section is not to defeat rights but to provide a machinery for ascertaining rights and once ascertained, then the register would be changed to take account of them.

37. In this case, as earlier observed, the marriage between P and Z had virtually come to an end but subsisted on paper. P had already moved in with another woman and transferred part of the disputed property to her. The parties had to come to terms with the reality that they were no longer going to share or enjoy joint ownership of whatever property they may have previously owned and therefore the wisdom in putting their house in order. I would answer the second question in the positive.

38. **The third question is on the Constitution**.

It cannot be gainsaid that the people of Kenya in promulgating a new Constitution in 2010 intended a fundamental transformation of society. A society imbued with values like respect for human rights and human dignity, equality, equity, respect for the rule of law; non-discrimination ***(Article 10);*** a society that recognizes and protects the family as the fundamental unit of society and honors entitlement of spouses to

equal rights at, during and after marriage ***(Article 45);*** a society that upholds the supremacy of the Constitution which incorporates the general rules of international law and Conventions ratified by Kenya as part of our law ***(Article 2).*** The issue is whether those provisions and aspirations were retrospective in effect.

39. The answer seems to emanate from ***Section 2*** of the ***Interpretation and General Provisions Act*** which exempts the Constitution from its application since it is "*not a written law for the purposes of this Act,"* as well as ***Section 7 (1)*** of the 6th schedule of the ***Constitution 2010*** which provides:-

> ***"All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications, and exceptions necessary to bring it into conformity with this constitution".*** (Emphasis added)

Should ***Section 17*** be construed as directed above? Put another way, should the principles of equality espoused in the Constitution 2010 be brought to bear in the interpretation and application of ***Section 17***, ***MWPA*** in a case, as this one, which was filed before the promulgation?

40. The answer that commends itself to me was given by the Supreme Court in the case of ***Samuel Kamau Macharia and Another vs Kenya Commercial Bank Ltd & 2 Others, [2012] eKLR*** when it rendered itself thus:

> ***"At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution".***

41. It seems to me that each case must be examined on its own facts particularly where retrospectivity would affect accrued rights. Generally, however, the Constitution ought to be given a broad and purposive interpretation that enhances the protection of fundamental rights and freedoms. The right to equality, for example, is inherent and indefeasible to all human beings. It would therefore matter not that the cause of action accrued before the current constitutional dispensation. In sum, I do not fault the High Court in this matter for seeking guidance of the Constitution 2010 and the Covenants which Kenya has ratified to inform its application of ***Section 17***, ***MWPA***.

42. That leads me to the last major complaint by the appellant that the trial court did not evaluate the evidential material on record. I have carefully re-examined the record and the impugned judgment but I find no merit in that complaint. There was ample evidence on record to prove on a balance of probability that ***Tumaini farm*** was the first property bought by the couple in 1965 and it became the „incubator?, so to speak, from where the couple?s subsequent purchases were nurtured. Whereas the loan for the purchase of the said property was procured in the name of P, the same was repaid from a combination of P's and Z's salaries and proceeds from the farm over a period of 10 years.

43. The appellant and the respondent jointly held A/C No [particulars withheld] at Kenya Commercial Bank (KCB) in which the proceeds from the commercial activities of the farm were banked. Efforts by P to shake off this fact were effectively rebutted by the affidavit of ***David Waweru Njuguna*** sworn on 9th December, 2008 in support of Z. The said affidavit also confirmed that Z had more than a passing interest in the management and operations of Tumaini farm. The trouble taken by her to repay the loan confirmed her clear proprietary interest in the property.

44. Furthermore, the proceeds from Tumaini farm were instrumental in the purchase of the Donholm property. There is admission from P that he was away from home most of the time leaving Z on the farm to take care of the children and the matrimonial house. P's contention, without tangible proof, was that he had employed workers on the farm, but this does not take away Z's managerial role. The affidavit of ***Josephine Wambui*** sworn on 9th December, 2008 confirmed her industry and diligence when it came to running the farm. Z swore, and it was not controverted, that she requested for leave from her [particulars withheld] job in order to manage the farm effectively between 1st January, 1966 and 28th February, 1967.

45. Indeed, P donated a power of attorney dated 26th May, 1969 for Z to step into his shoes and do anything and everything that he could do in his own name as the registered proprietor of Tumaini farm. She also had the power to execute all such instruments and to do such acts, matters, and things as were necessary and/ or expedient to carry out those powers. P never challenged this document at any stage of the trial. There is sufficient basis therefore to accept the evidence that Z exercised those powers for the benefit of P and the entire family by generating the wealth and proceeds that acquired subsequent properties.

46. It is evident from the record that whenever P lagged behind in mortgage repayments for the Donholm property, he would always resort to the joint account where proceeds from the farm were banked to settle the same. In all probability the property Kabatini [particulars withheld], which P contends was allocated to him in 1977 after buying shares from one Paul Muiru Njoroge in Ndeffo Ltd, was similarly purchased from funds substantially sourced from Tumaini farm, as contended by Z. But a compelling case was put forward by P that Kabatini [particulars withheld] was a joint purchase between him and M G who was not a party to these proceedings after they sold their jointly owned property in Nairobi. More on this later.

47. Generally, P's case hinges primarily on the fact that he was the sole registered proprietor of the properties in dispute. He sought refuge in the provisions of ***Sections 27*** and ***28*** of the ***Registered Land Act Cap 300*** (now repealed) to buttress his position. He also documented his own financial contribution towards acquisition of the various properties and contended that there was no direct financial contribution from Z towards the purchases or any entitlement to any legal or beneficial interest in the properties. In my assessment, Z had proved both direct and indirect contribution towards the purchase of the properties in dispute, even under the ***Echaria case*** standards, and the High Court was right in making that finding. I reject the contention that the suit was purely decided under the provisions of the new Constitution and international covenants. I also find no compelling reason to interfere with the wide discretion donated under ***Section 17*** to make declarations and orders in relation to the properties adjudged to be matrimonial properties, save for one qualification in relation to ***Kabatini [particulars withheld]*** and ***[particulars withheld].***

48. There is evidence that the two properties have since the 23rd June, 2004 been held in the joint names of P and one M G. The finding by the High Court was that the transfer to the joint names was of no consequence since it was vitiated by the circumstances listed in paragraph 18 of this judgment. While I respect those findings, especially the protection of the authority and dignity of the court which was seized of the matter of those properties but P had no qualms in transferring them, the pendency of the suit notwithstanding, there is still an equal if not overriding consideration; that of condemning a party without a hearing. It is a principle of natural justice which all courts must jealously protect. The co-proprietor of the two plots was neither joined in the suit nor called to testify or make any presentation. It would not be right therefore to divest her of her interest in those properties without giving her a hearing.

49. For the reasons given above, I would dismiss the appeal save for the claim relating to ***Kabatini [particulars withheld]*** and ***Kabatini [particulars withheld]*** which is allowed and the orders relating thereto set aside. The issues relating to the said properties may be unraveled in a separate litigation, if the parties so choose. As the appellant has been successful in part, he will pay ¾ of the costs of the appeal.

As Azangalala, JA agrees the orders in this appeal shall be as stated above.

Dated and delivered in Nairobi this 3rd day of March, 2017.

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF KIAGE, JA

I have had the advantage of reading in draft the judgment of my brother Waki J.A and, whereas I agree with the result, as a matter of principle I need to express myself albeit very briefly, on an issue or two.

First, while I take cognizance of the marital equality ethos captured in **Article 45 (3)** of the Constitution, I am unpersuaded that the provision commands a 50:50 partitioning of matrimonial property upon the dissolution of a marriage. The text is plain enough;

"45(3) Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage." (My emphasis)

To my mind, all that the Constitution declares is that marriage is a partnership of equals. No spouse is superior to the other. In those few words all forms of gender superiority-whether taking the form of open or subtle chauvinism, misogyny, violence, exploitation or the like have no place. They restate essentially the equal dignity and right of men and women within the marriage compact. It is not a case of master and servant. One is not to ride rough shod over the rights of the other. One is not to be a mere appendage cowered into silence by the sheer might of the other flowing only from that other's gender. The provision gives equal voice and is meant to actualize the voluntariness of marriage and to hold inviolate the liberty of the marital space. So in decision making; from what shall be had for dinner to how many children (if any) shall be borne, to where the family shall reside or invest-all the way to who shall have custody of children and who shall keep what in the unfortunate event of marital breakdown, the parties are equal in the eyes of the law.

Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.

The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts. I would repeat what we said in ***FRANCIS NJOROGE vs. VIRGINIA WANJIKU NJOROGE,*** Nairobi Civil Appeal No. 179 of 2009;

> **" … a division of the property must be decided after weighing the peculiar circumstances of**

each case. As was stated by the Court of Appeal of Singapore in LOCK YENG FUN v CHUA HOCK CHYE [2007] SGCA 33;

*'It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and, by its very nature cannot be – e precise mathematical exercise'***."**

I think that it would be surreal to suppose that the Constitution somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say the Constitution gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words "50 per cent."

Thus it is that the Constitution, thankfully, does not say equal rights "including half of the property." And it is no accident that when Parliament enacted the Matrimonial Property Act, 2013, it knew better than to simply declare that property shall be shared on a 50:50 basis. Rather, if set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.

Section 7 of the Act states;

"Subject to section 6(3), ownership of matrimonial property vests in the spouses according to contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved."

Our new constitutional dispensation is no safe haven for those spouses who will not pull their weight. It cannot be an avenue to early riches by men who would rather reap from rich women or women who see in monied men an adieu to poverty. What the Matrimonial Property Act has done is recognize at **Section 2** that contribution towards acquisition of property takes both monetary and non-monetary forms which essentially opens the field of contribution to both spouses without distinction on the basis of remunerative employment, especially so in an urban setting. Non-monetary contribution is defined as including;

(a) Domestic work and management of the matrimonial home

(b) Child care

(c) Companionship

(d) Management and family business or property, and

(e) Farm work

So elaborate is the statute that it goes on to define family business as one that;

"(a) is run for the benefit of the family by both spouses or either spouse; and

(b) generates income or other reasons wholly or apart of which are for the benefit of the family."

I have gone into all this detail to demonstrate my firm conviction that both from a practical stand-point and from the statute law now ruling, (though admittedly was not in force when the learned Judge rendered the impugned judgment) neither the Constitution nor general law imposes, compels or lionizes the doctrine or 50:50 sharing or division of matrimonial property.

I will also comment briefly on ***ECHARIA vs. ECHARIA*** **[2007]** eKLR. In view of my stated understanding of what **Section 45(3)** means and what it does not mean, I do not see that taken in context, the analytical approach taken by the five-Judge bench in deciding that case, together with their appreciation of the law on matrimonial property rights leading to the conclusion that division must be based on actual quantifiable contribution was amiss. Holding as I do that contribution must be proved and assessed, I do not find that the central thrust of **ECHARIA** is violative of the marital equality principle of **Article 45(3**). I would therefore eschew any bold pronouncement that it is no longer good law and should be interred.

What has changed, from my point of view, is the narrow conception of contribution espoused by **ECHARIA** in that it went as far only as recognizing indirect contribution which had essentially to be viewed in money or monetary equivalent leaving out such unquantifiable as child care and companionship which fall under non-monetary contribution which is now expressly recognized under the Matrimonial Property Act.

In sum, I do think that it would be unrealistic to presume that marriage *per se always* engenders a blissful, convivial and idyllic existence of mutual support and synergistic exploits. I suppose it does in many marriages. It is true, however, that the marital state may sometimes be a trap where creativity is by slow degrees chilled out of existence and parties may feel entombed in sterility. A spouse may be so uncooperative, so wasteful, so distant, so all-over that he or she has hardly provided the warmth of companionship on the basis of which it might be said they made a non-monetary contribution to matrimonial property. In such instance it may well be that the one spouse achieved all they did and acquired not because, but rather in spite of their lazy, selfish, wasteful, wayward, drunken or draining mate.

In such circumstances, an assessment of the inauspicious party's non-monetary contribution may well turn out to be in the negative, the account in debit. No fifty-fifty philosophy would grant such a party any right to property acquired without their contribution and notwithstanding their negation or diminution of the efforts towards its acquisition.

In the end it does work out justly and fairly enough in that assessment may turn out 50:50 or as in the case of ***NJOROGE vs. NJOROGE*** (supra) 70:30 in favour of the man. There is no reason why the math may not be in favour of the wife if that is what the evidence turns up. In many cases in fact, percentages never feature as the Court only ascertains who between the spouses owns which property. It is always a process of determination, not redistribution of property. And each case must ultimately depend on its own peculiar circumstances, arriving at appropriate percentages.

Having said my bit and while acknowledging that this debate may yet endure, I agree that this appeal should be disposed of along the lines proposed by Waki, JA.

Dated and delivered at Nairobi this 3rd day of March, 2017.

P.O. KIAGE

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JUDGE OF APPEAL

THE JUDGMENT OF F. AZANGALAL, J.A.

I have had the advantage of reading in draft the judgment of ***Waki, J.A.*** I agree with his reasoning and conclusions and have nothing useful to add.

Dated and delivered at Nairobi this 3rd day of March, 2017.

F. AZANGALALA

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JUDGE OF APPEAL