



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & MURGOR, JJ.A)

CIVIL APPEAL NO. 332 OF 2014

BETWEEN

O K N.....APPELLANT

VERSUS

M P N.....RESPONDENT

(Appeal from a Judgement of the High Court of Kenya at Nairobi (Nyamweya J), dated 13th August, 2014

in

H.C.C.C No. 902 of 2006)

JUDGMENT OF THE COURT

The appellant, (a Kenyan citizen) and the respondent, (a Slovenian national) met at the University of [Particulars withheld] in the former Federal Socialist Republic of Yugoslavia where they were students. The latter was reading for her Masters Degree in Architectural Engineering and the former, a degree in Agronomy. They got married on 12th September 1964 in Yugoslavia. They got married only after the respondent had confirmed from Kenya that the appellant was single. Their union was blessed with three sons born in 1964, 1969 and 1975, respectively. In 1968, the appellant returned to Kenya immediately upon completion of his studies in October 1968. In December, the respondent joined him.

In 1979, the respondent discovered that, contrary to confirmation she had received from Kenya, the appellant was already married to one, C O N, and as such had no capacity to enter into a marriage with her. Consequently, the respondent filed proceedings for the nullification of the marriage in the High Court, **Nullity Cause No. 77 of 1979**. Her marriage to the appellant was accordingly annulled on 15th August 1980 but they continued to live together in their matrimonial home until October 1981 when the appellant moved out.

By an originating summons, the respondent filed a suit in the High Court for various orders as to the ownership and vesting of the two properties acquired during their union, namely L.R No[Particulars

withheld] and L.R No.[Particulars withheld], in Kyuna Nairobi. Both were registered in the parties' joint names.

The parties were in agreement that they opened bank accounts in their joint names where both their incomes were deposited. According to the respondent they did this in the mistaken belief (at least on her part) that their marriage was lawful. She went on to explain that in 1972, she was employed as an architect with [Particulars withheld], which was then developing an estate in Kyuna Nairobi. Being a member of staff and an architect in charge of the project, she was allocated a house on plot number [Particulars withheld] after obtaining permission from the then Permanent Secretary; that on 10th July 1972 she paid Kshs.17, 200/= being 10% of the purchase price from their joint savings account into which she had deposited Kshs.14,947 earned from her employer as gratuity between 27th April 1970 and 26th April 1972 and paid to her in May 1972. The 90% balance of the purchase price was advanced to both parties by Housing Finance Corporation of Kenya (HFCK). She maintained that for 15 years, she alone repaid this loan through her salary as the appellant was at this time unemployed. She outlined her contribution in respect of the properties in 1972 as follows: Kshs.10,000 as savings she made while in Yugoslavia; Kshs.14,947 gratuity; Kshs.11,281 a gift from her mother; and Kshs.4,089 direct deposit. This total amount from her contribution was enough to pay for the deposit towards the purchase of the two suit properties.

It was conceded that in the same year, the appellant was allocated, by the Government of Kenya, [Particulars withheld] and the premium of Kshs. 16,035 was paid from their joint account. The appellant initially registered it in his name. In 1974, both parties applied and obtained a loan from Savings and Loans Company Limited amounting to Kshs.230, 000/=. The property was then registered in their joint names. The respondent contended that she designed the house that was built on this plot thereby contributing to the professional costs of not having to hire an architect. She further arranged for all other professional services of a quantity surveyor and structural engineers which would have constituted 13% of the costs of Kshs. 230,000. In addition to professional input, the respondent contends that she contributed 10% of the construction cost which came from her gratuity. That upon completion of the house, the balance due to the financier was paid through rental income. She further deponed in her affidavit that she contributed 20% of the costs of construction through her professional services leaving a balance of 80% of the total cost of construction and the house having repaid itself for half-life of the mortgage (40%) her actual contribution to the total costs of the house was 60% of the house or its equivalent money's worth although the property is registered in the parties' joint names, the entire rental proceeds go to the appellant.

In 1973, the applicant stated that they moved into the Kyuna house on plot no [Particulars withheld] where they lived as a family until 1981 when the marriage was nullified and the appellant moved out.

The respondent argued that there being no lawful marriage between her and the appellant, all her earnings and income deposited in the joint account and which constituted her contribution towards the acquisition of the two properties could only be treated as personal income, quite separate and severable from the appellant. The respondent argued that she had been in occupation of the house on plot [Particulars withheld] since the date of filing the suit in the High Court and has financed it fully without any financial assistance from the appellant.

The respondent had prior to filing this suit instituted an action for division of property, **HCCC No. 887 of 1988 (O.S)** under the Married Women Properties Act which was dismissed for want of prosecution. The respondent also stated that though the appellant paid for school fees for their 3 children until completion of secondary school, she paid their university education fees together with their maintenance and upkeep as well as furniture for their house.

The appellant, for his part, responded in a replying affidavit that the respondent was aware of his marital status and the fact that he had 3 children in Kenya. He maintained that he did not misrepresent his marital status or give false information regarding it to the respondent. He stated that the respondent had failed to acknowledge his contribution to the joint account and his contribution towards the purchase of the suit properties. He stated that he assisted the respondent to get employment at the [Particulars withheld] and

denied being aware of the cash deposited by the respondent in 1972. He stated that he was aware that the respondent's father visited them in 1971 and left money for his grandchild equivalent to Kshs.17, 000.

He stated that in July 1969, his services at the [Particulars withheld] were taken over by the [Particulars withheld] where he was employed on a gratuity contract at a salary of 1,916.66 per month. That he successfully applied for a Tutorial Fellowship at the [Particulars withheld], where he lectured as well pursued his PhD studies; that he earned Kshs. 2,975 per month. He was also on a 10% gratuity contract which he earned after 2 years of service and paid into the joint account. He argued that it was not easy to differentiate their money as it was a joint account and that the same account also covered the entire family expenditure. Both he and the respondent shared the responsibility of maintaining their home and the children. He also admitted that he took and repaid a car loan and that the vehicle was for the family whose luxury the respondent also enjoyed.

The appellant stated that their incomes were relatively at par and produced an income tax assessment of their comparative income of their earnings from 1969-1982 as evidence. He also stated that all his income earned from various jobs were enjoyed by the whole family and gave examples of medical benefits, company financed car, electricity, water and telephone bills paid by his employers.

In respect to the house on plot [Particulars withheld] he stated that neither of their individual incomes could meet the HFCK pre-qualification and that they got the loan based on their combined incomes; that the mortgage was deducted from the respondent's salary because it was a condition precedent imposed by the financier that the respondent's employer would be responsible for transferring the monthly loan repayment directly to it. He stated that he had already paid Kshs.15,035 from the joint account to the Department of Lands as legal fees for the plot before the respondent paid Kshs.17,200 as 10% of the purchase price.

In respect to plot No [Particulars withheld], the appellant stated that he had independently applied for the allocation, but subsequently caused the respondent's name to be included in the title. He argued that the respondent designed the house as a joint owner and that professional fees that were paid were due to the Quantity Surveyor and Structural engineer. He obtained a loan from Savings and Loan Company Limited which was advanced in two instalments of Kshs. 180, 000 and 30,000 respectively which were used to finance the construction of the house. He further deponed that he made substantial improvement to the property on the plot which included a two bedroom extension and a perimeter wall at a cost of Kshs. 2,000,000.

The appellant deponed that upon their separation, they mutually agreed by exchange of letters that the house on L.R [Particulars withheld] would remain in the respondent's name while the house on plot [Particulars withheld] in his name. After this, he continued to repay the loan for the house on plot [Particulars withheld] while the respondent repaid the loan for the house on plot [Particulars withheld] in accordance with their mutual agreement. He stated in evidence that contrary to allegations by the respondent, he did not force her to agree to these terms or the signing the letter dated 30/6/1980 in which she surrendered her interest in the property [Particulars withheld]. He denied having been out of employment for the long period contended by the respondent. At the trial, the appellant made it clear that he had no interest in the property on plot [Particulars withheld] which the respondent is currently in occupation of. He also stated that after the nullification of their marriage in 1980, they separated their joint account and that he started to pay for the house on plot [Particulars withheld] from his direct account until 1988 when he finally settled the loan account. He added that at first when he moved out of the house on plot [Particulars withheld] he rented accommodation in Buruburu estate but moved back to the house on plot [Particulars withheld] from 1983 until 2004.

The learned Judge considered all the foregoing evidence and submissions and framed five issues for her determination as follows:

“i. What is the applicable law on the property rights of the parties herein who were in a marriage that has been declared null and void.

ii. Whether joint tenancy of the appellant and respondent over L.R No. [Particulars withheld] and L.R No. [Particulars withheld] has been converted into a tenancy in common.

iii. Whether the doctrine of proprietary estoppel applied to L.R No. [Particulars withheld] and [Particulars withheld] which was held by the parties as joint tenants.

iv. What are the respective shares of the parties in to L.R No. [Particulars withheld] and L.R No. [Particulars withheld].

v. Whether the appellant was entitled to the reliefs sought.”

On the issue of the applicable law regarding property rights of parties whose marriage has been nullified, the learned Judge noted that under **section 28** of the repealed Matrimonial Causes Act the court had the power to decide on distribution of property upon annulment of a marriage; that upon pronouncing a decree for divorce or nullity, the court could inquire into the existence of ante-nuptial or post-nuptial agreements made by parties and to make such orders with reference to the application of the whole or any part settled either for the benefit of the children or for that of the parties.

The learned Judge further noted that:

“... section 98(2) of the Marriage Act which commenced operation on 28th May 2014 and pursuant to which the Matrimonial Causes Act was repealed, states that proceedings commenced under any written law shall so far as practicable, be continued in accordance with the provisions of the Marriage Act 2014. However the Marriage Act of 2014 has no provisions on the settlement of property acquired by parties to a dissolved or annulled marriage. The law on such settlement of property is now provided by the Matrimonial Property Act.

...the Matrimonial Property Act of 2013 has no saving provisions on actions commenced under previous legal regimes that applied to settlement of property upon dissolution and or nullification of marriage, and provides for the cessation of the application of the Married Women Property Act that previously applied to determine matrimonial property rights.”

The learned Judge therefore applied **section 23(3)** of the Interpretation and General Provisions Act and held that pursuant to those provisions the court was deemed to have a discretion under **section 28** of the repealed Matrimonial Causes Act to decide upon the distribution of property. She noted that the applicable law in the case was that parties to a null and void marriage are deemed not to have been spouses but cohabitees and that the law applicable to property rights of parties whose marriage has been nullified is the same law that is applicable to cohabitees. She expressed herself as follows;

“The ordinary principles of property law normally apply to determine the rights of such cohabitees, although special rules have evolved in this regard with regard to the property used by cohabitees as the family home. The application of ordinary property law principles requires, firstly the establishment of legal ownership if any, and then secondly, the determination of any equitable or beneficial ownership in the property that is in dispute. For the establishment of legal ownership, this Court must have recourse to the legal documents of title held by the parties and the applicable statutory law to those titles.”

She held that in the present case, the parties are registered as joint tenants of the two suit properties and that the legal effect of a joint tenancy is that each party is presumed to hold both the legal and beneficial interest in the property in equal shares in the event of severance of the joint tenancy.

The learned Judge found no dispute that the family home during the cohabitation was [Particulars withheld] where parties lived until their marriage was annulled in 1981. With regard to **L.R No** [Particulars withheld] she was of the view that:

“..... the presumption of an equal beneficial interest will apply unless displaced and the onus in this respect is on the applicant. However with respect to L.R No [Particulars withheld] it is possible for a presumption of a resulting trust and of a tenancy in common arising from unequal contributions to apply to the said property as it was not the family home.”

In arriving at this decision, the learned Judge was guided by her earlier finding that the parties were only cohabitants registered as joint owners. She relied on the English cases of **Bull V Bull** (1995) 1 QB 234; **Stack V Dowden** (2007) 2 A.C 432 and **Jones V Kernott** (2011) 3 WLR 1121.

On the second issue of proprietary estoppel, while the appellant relied on the doctrine of proprietary estoppel to argue that the parties had agreed on how to divide their assets and proceeded to put into motion the process of division in accordance with their written agreement, the learned Judge held that the facts in the suit did not lend themselves to the application of proprietary estoppel as laid down in **Taylor's Fashions Ltd V Liverpool Victoria Trustees Co. Ltd**, (1982) 1 Q.B and **Cobbe V Yeoman's Row Management Ltd** (2008) 1 WLR 1752, since the suit properties were already registered in both the names of the parties and both of them already had an interest in the same. In answer to this question, the learned Judge said;

“The issue in dispute is their respective shares of that interest, which can only be determined by a different set of principles of law, and not the doctrine of proprietary estoppel. In addition the respondent has not shown what detriment he suffered as a result of the applicant's representation if any which is another essential element for proprietary estoppel to apply”

On the issue of the respective shares of the parties to the suit properties, parties relied on two dealings to indicate their common intention and respective shares as regards the family home which was [Particulars withheld]. The respondent relied on the fact that the said property was paid for solely by her from her income and a gift from her parents as well as her professional input in designing the house on LR. No. [Particulars withheld]. The appellant relied on the two letters written by the parties indicating the intention of the parties, whereby the respondent was to be solely entitled to LR. No. [Particulars withheld] and the appellant would be the sole owner of LR. No.[Particulars withheld]. Other than that he also insisted that he made substantial contribution to the purchase and development of the two properties, through direct financial and indirect contribution.

The learned Judge demonstrated that different principles applied to the two properties as one constituted a matrimonial home. She noted that the agreement by parties in the letters would be of limited relevance as they related to sharing of the properties as between [Particulars withheld] and [Particulars withheld] yet the applicable principles of law dictate that the parties' share to each property be considered separately as seen in **Jones V Kernott** (supra) and **Stack V Dowden** (supra). The said letters could only be used as evidence of intention to sever the joint tenancy and could not have conferred legal interest in the absence of a registered transfer.

As regards [Particulars withheld], the learned Judge found that there was a presumption of an equal beneficial interest between both parties and it was upon the appellant to prove the said presumption did not apply. That the respondent displaced the presumption by bringing evidence of her substantive contribution to the acquisition of LR [Particulars withheld]. The learned Judge noted that the only payments made for the joint account was 10% of the purchase price of Kshs. 17,000 and the amount of Kshs. 16,000 for the purchase of the plot. These payments and the corresponding share in [Particulars withheld] was to be shared equally by both parties. She concluded that;

“..In the circumstances it is only fair that the Applicant gets a substantial share of L.R [Particulars withheld], as she paid 90% of the purchase price, in addition her share made from the payments from the joint account. This Court also notes that the Applicant and the children from her cohabitation with the Respondent continued to reside in L.R [Particulars withheld] after the nullification of her marriage, and the Applicant continued to meet the expenses for the family in this respect, This raises the inference of an intention that the

Applicant would get the beneficial interest in [Particulars withheld]. This Court therefore finds the Applicant's share in [Particulars withheld] to be 95% while the Respondent's share is 5%."

As regards L.R [Particulars withheld], the learned Judge found evidence of equal contributions by both parties towards its development. That the deposit came from the joint account and the balance of the purchase price was paid by a loan of Kshs. 210,000 from Savings and Loans Co. Ltd whose repayment was serviced by way of rental payments from the said property. She observed that although the respondent claimed to have made more substantive contribution to the account there was no evidence to support the claim. The learned Judge therefore came to the conclusion that there was presumption of the equality of sharing of the joint funds hence no resulting trust could arise. Accordingly, she ordered that L.R [Particulars withheld] be shared equally on a 50/50 basis.

Having generally found in favour of the respondent, the learned Judge ordered that;

"1. the property known as L.R No. [Particulars withheld] registered in the name of the appellant and the respondent as joint tenants be co-owned by both of them with the former holding 95% and the latter 5% of its share.

2. the registrar of titles to rectify the register, cancel the existing title and issue a new title with respect to L.R No, [Particulars withheld] to reflect the shareholding as explained above.

3. the property known as L.R [Particulars withheld] in Kyuna estate Nairobi registered in the joint names of the applicant and the respondent to be co-owned by the parties as tenants in common in equal shares.

4. the registrar of titles shall rectify the register, cancel the existing title and issue a new title with respect to L.R No. [Particulars withheld] to reflect the foregoing."

The learned Judge finally directed that parties would bear their own respective costs of the suit.

This appeal is a challenge of that decision. It has raised 23 grounds, which were however condensed into four in the submissions before us by Mr. Ogola, learned counsel for the appellant.

He urged us, first to find that the judgment was against the spirit and letter of the law and breached the spirit of indefeasibility of title under **section 24** of the Land Registration Act and Article 40 of the Constitution. He contended that the learned Judge ought to have found that the two suit properties were jointly owned by the parties and therefore there was no basis for holding that the appellant's beneficial interest in [Particulars withheld] was only 5% and the respondent's was 95%. Similarly, the learned Judge erred in directing the 50/50 sharing of [Particulars withheld]. Counsel argued that the proper and just order ought to have been that each party should keep the respective property in their occupation.

On the second ground, learned counsel submitted that the learned Judge committed an error on the parties' contributions to the two properties. Instead of taking into consideration the gift given to both parties and deposited in their joint account which was utilized in the payment of [Particulars withheld], the learned Judge erroneously found that the respondent paid both the deposit and mortgage for 15 years; that the learned Judge also ignored the fact that it was a term of the letter of offer that the payment would not be from the joint account but from the respondent's salary.

On the third ground, counsel submitted that the learned Judge failed to appreciate the parties' intention clearly expressed in the two letters alluded to earlier.

Finally Counsel contended that, since there was no legislation on the question of distribution of property on annulment of a marriage in the circumstances of this case, the judgement was likely to bring uncertainty in the property rights.

For these reasons, the appellant has urged us to allow the appeal with costs; that the impugned judgement

be set aside; and that we order that the parties do share their properties according to their respective letters of 30th June 1980 and 1st October 1979.

The respondent, on the other hand, has urged us to uphold the decision of the learned Judge, which she described as fair and correct; that the learned Judge properly found that although the two properties were registered in the parties' joint names, the respondent had proved that their contributions towards LR. No. [Particulars withheld] were not the same; that she was entitled to more shares in it than the appellant; and that there was proof of equal contribution towards LR No. [Particulars withheld]; and that the letters written by the parties regarding the two properties were not capable of determining their beneficial share in them.

This is a first appeal and as such, it is our duty to approach it as if it is a re-trial by re-evaluating the evidence on record in order to come to our own independent conclusion. See **Selle v Associated Motor Boat Co.** [1968] EA 123.

To begin with, the parties' marriage was annulled because the appellant had no capacity to contract one as he had a subsisting marriage. The law in force at the time was firm. First, **section 14** of the repealed Matrimonial Causes Act declared that, among the grounds for decree of nullity included a situation where the former husband or wife of either party was living at the time of the marriage, and the marriage with such previous husband or wife was then in force. The appellant and the respondent purported to enter into a union (at least the respondent) believing it was a marriage when in fact and in law the appellant was incompetent to marry by reason of a subsisting marriage.

A felony of bigamy is committed under **section 171** of the Penal Code if;

“Any person who, having a husband or a wife living, goes through a ceremony of marriage which is void by reasons of it taking place during the life of the husband or wife, is guilty of a felony and is liable to imprisonment for five years; provided that this section shall not extend to any person whose marriage with the husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife if the husband or wife, at the time of the subsequent marriage, has been continually absent from such person for the space of seven years, and had not been heard of by such person as being alive within that time”.

The exception in the proviso is not applicable to the parties herein.

Section 42 of the repealed Marriage Act, similarly outlawed, by imposing an imprisonment term of not more than five years for a marriage between a person previously married and whose marriage had not been dissolved with another.

It follows therefore that the benefits granted to a lawful marriage are not available to cohabitees who are deemed never to have been married at all. As they would say in Latin in the days of old, *nihil fit ex nihilo* (out of nothing, nothing comes). As Lord Denning also famously said in **Macfoy V United Africa Co. Ltd** [1961] 3 All E.R. 1169:

“...if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

Not even the presumption of marriage as understood in law could save the situation because the union was *in limine* nonexistent, contracted without capacity. Such unions present many challenges to those involved and are fraught with legal uncertainties.

There being no marriage between the parties, the two properties cannot be shared in accordance with

family law. They were subject to the repealed Registration of Titles Act (CAP. 281), which, in **section 22(4)** provides that;

“22. (4) (a) When two or more persons are entitled as tenants in common, the registrar shall issue to those persons one certificate of title for the entirety describing them as tenants in common.

(b) Notwithstanding the provisions of paragraph (a), the registrar may, in his discretion and on payment of the prescribed fee, issue a separate certificate to each such person for his undivided share”.

In the dispute before us, there was one certificate in respect of each property, signifying the parties’ common understanding that they owned them together. The sanctity of those titles was guaranteed by **section 23** which stipulated that:

“23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”.

Where a property is registered, in the joint names of the parties, there is normally a presumption that each party made equal contribution towards its acquisition (See Kivuitu -v- Kivuitu, [1991] KLR 248. The presumption is however, rebuttable by either party showing that their contributions were not equal. **Section 22(4)** of the Registration of Titles Act recognizes tenancy in common. It is generally accepted that in a common tenancy, if property is registered in joint names, then no tenant is entitled to any separate share in the property and, any disposition of such property may be made only by all the joint tenants; on the death of a joint tenant, that tenant’s interest would vest in the surviving tenant or tenants jointly; or each joint tenant may transfer their interest *inter vivo* to all the other tenants but to no other person. Tenancy in common, in the circumstances of this dispute, means that the appellant and the respondent each holds a 50% undivided share in both properties.

At the time of annulment of their union, the parties had cohabited for about 17 years and had 3 children born in 1964, 1969 and 1975, respectively. In the course of that cohabitation, the parties acquired the two suit properties which were registered in their joint names. L.R No. [Particulars withheld] was used by the parties as their matrimonial home while LR. No. [Particulars withheld] was rented out. These two properties were at the heart of the dispute before the court below. After the decision of that court awarding equal share of L.R No. [Particulars withheld] to the parties, the dispute in this appeal has narrowed to the award of 95:5 sharing ratio in respect of LR. No.[Particulars withheld] in favour of the respondent. Before us therefore, the issue presented is the extent of beneficial interest of the parties in respect of that property. This conclusion is buttressed by the appellant’s own testimony and submissions filed on his behalf in this Court. He said;

“We are not contending (sic) the move of one property going to Mrs. Nginja- LR No. [Particulars withheld]I confirm that I have no interest in L.R No. [Particulars withheld]”

In the submissions, it was emphasized that parties had expressly agreed to retain the respective properties and it was in error for the learned Judge to interfere with that understanding. It was urged that she ought to have found equal entitlement in both properties, which in turn would have translated to the terms agreed upon by the parties.

The respondent, for her part, through counsel, Mr. Miller, similarly confirmed that her claim was limited to LR No. [Particulars withheld] which the appellant wanted to retain. There is no challenge on the order of 50:50 ratio of entitlement of **LR No. [Particulars withheld]**.

Before the court below, the respondent insisted that she was entitled to both properties 100%. From our assessment of the respondent's evidence, the main reasons why she has insisted all along on having both properties was her view that she single-handedly made the contribution of funds and other resources in the acquisition of the properties. First, she insisted that it was through her efforts and by virtue of her employment that her employer allocated to her L.R No. [Particulars withheld]; that she received a gift of U.S \$ 1600 (translating to Kshs. 11,202 at the time) from her father in 1972 which she deposited in the joint account. She also stated that she invested her gratuities in the two properties; that she gave an irrevocable authority from her employer that the loan would be re-paid; and that she earned a monthly salary of Kshs. 1,700 in 1968/69 more than the appellant's monthly salary of Kshs.1,000; that, being an architect, she personally drew the architectural design of the house on LR No. [Particulars withheld] thus saving the family architectural design fees; and that in respect to L.R No. [Particulars withheld], the mortgage payment was deducted directly from her salary. Regarding the two letters severing the two properties, the respondent alleged that she wrote her letter through threats and pressure from the appellant.

We note first that both parties were highly educated persons with the respondent holding a masters degree in architecture and the appellant masters degree in agronomy. Their transactions and dealings must be seen from that perspective.

The learned Judge in determining, first, the applicable law on property rights in the circumstances of the parties noted that by the provisions of **section 28** of the repealed Matrimonial Causes Act, which was in force at the time the proceedings were commenced, conferred on the court the power to decide on the distribution of property upon annulment of a marriage; that the Marriage Act, 2014 which repealed the Matrimonial Causes Act directs that proceedings commenced under the latter be continued in accordance with the former; that the Marriage Act, 2014 has no provision on the settlement of property in an annulled marriage; that the Act has no saving provision on causes commenced under the repealed law on the settlement of property upon annulment of a marriage. The learned Judge then resorted to and applied **section 23(3)** of the Interpretation and General Provisions Act to hold that she had the discretion under **section 28** of the repealed Matrimonial Causes Act to distribute the property in an annulled marriage.

Section 23(3) of the Interpretation and General Provisions Act is to the effect that, where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed. Pursuant to this, the learned Judge was of the view that in the circumstances of the case, ordinary principles of property law would apply as the parties were not married and were in fact only cohabitantes. Appreciating that the parties were joint owners of the two properties, the learned Judge found in evidence that the parties' made equal contributions with regard to L.R No. [Particulars withheld] which they were ordered to share in the ratio of 50:50 while the respondent's contribution in LR No. [Particulars withheld] was higher, hence the award to her of 95% and the appellant 5%. In coming to that conclusion, the learned Judge relied on the respondent's evidence that she contributed her gratuity of Kshs. 11,462, a gift from her mother amounting to Kshs. 11,202, her professional input in designing the house and the contribution of savings she made while in Yugoslavia of Kshs. 10,000.

The learned Judge weighed that evidence against what in her opinion was the appellant's only contribution of Kshs. 10,432/50 from his gratuity and with that she made the impugned decision.

For our part, we find uncontroverted and overwhelming evidence, that upon their return to Kenya in 1979, the parties opened and operated a savings and current bank accounts in their joint names until 1982. It is apparent from their conduct that it was by a deliberate design to have a joint account to cater for their family needs such as payment of school fees for their children and investment; that they had agreed to buy assets together; and that in accordance with that objective they acquired the two properties together and registered them in their joint names; that save for a period of three months when the appellant was unemployed, both

remained in full time employment. The manner in which the parties commingled their income in the joint account we do not think they were able to say what portion in the account belonged to who. When they applied for a vacant plot and a house and were lucky to get both, payments came from the joint account without specifying whose portion would be withdrawn. There was evidence that the parties' respective salaries went into the joint accounts without fail.

There was also evidence that the appellant, for his part, also used his gratuity to purchase the only family car. His averment, that by his intervention through a relative and friend, one J D O O, the respondent secured her promotion to occupy the position of Provincial Architect, was not controverted; that through the same J D O O, he was once again instrumental in the respondent's employment with the [Particulars withheld] as an architect; that when he traveled to Mexico on a Food and Agricultural Organization (FAO) scholarship for a diploma, all his earnings continued to be paid into the joint account; that as a tutorial fellow at the [Particulars withheld] he earned Kshs. 2,975 which also went into that account; that as the respondent paid a deposit of Kshs.17,200, the appellant himself paid Kshs. 15,035 to the Department of Land as legal fees. The two payments were drawn from the joint account.

It was condition precedent that the advance to be extended by Housing Finance Company of Kenya would not exceed two to two and a half times of the overall annual income of the parties. None of the parties could meet this condition alone. They were only able to do so by pooling their incomes together.

Regarding LR No. [Particulars withheld], from a letter dated 23rd February, 1972 it is apparent that the application to the Commissioner of Lands for allocation of the plot was made by the appellant alone. The initial grant of 1st October, 1973 was in the name of the appellant alone. By an entry of 19th September, 1974 the appellant transferred to the respondent out **"...of the natural love and affection for my wife, MAJDA POVODEN NG'INJA"** his interest in the property to hold with him as joint tenants.

The appellant's evidence that he personally obtained a loan from Savings and Loan Company Limited which was advanced in two instalments of Kshs. 180, 000 and 30,000 respectively towards the construction of the house on LR No. [Particulars withheld] was never rebutted. He also contended, without being contradicted that he made substantial improvement to the tune of Kshs. 2,000,000. There were benefits extended to him by his employer which the whole family enjoyed. He gave examples of medical benefits, company financed car, electricity, water and telephone bills paid by his employers.

In addition to the foregoing, it is apparent to us that, upon their separation, the parties mutually agreed to retain a property each. By a letter dated 1st October, 1979 the appellant advised the General Manager, Housing Finance Company of Kenya Limited that he wished to transfer his entire share of No. [Particulars withheld] to the respondent to wholly and solely own. Eight months later, on 30th June, 1980 the respondent also wrote to the General Manager, Savings and Loans Limited saying, in part;

"I, Majda Povoden Nginja, a co-owner, with Mr. Ondiek Kabonyo Nginja, of LR No. [Particulars withheld] - Kyuna Estate, wish to and willingly and without any pressure request for permission to transfer all my part ownership of the above plot and house to Mr. Ondiek Kabonyo Nginja, so that the said Mr. Ondiek Kabonyo Nginja becomes the sole and the only owner of the whole plot and house situated on LR [Particulars withheld] -Kyuna Estate".
(Our emphasis).

That, we have no doubt was a voluntary and conscientious decision. The choice of words leave no scrap of doubt in our mind as to the intention expressed therein. We cannot accept the belated averment that the respondent was coerced by the appellant into writing the letter. In any case, the nature of the alleged pressure was not disclosed or proved. The respondent herself admitted that when she subsequently filed H.C.C.C. No. 887 of 1988(OS), before instituting the action which has given rise to the impugned decision, she never alluded to the alleged pressure. We, of course bear in mind that the two letters *per se* were incapable of transferring the parties' interests in the properties, but we hold that they were indicative of their intentions.

Pursuant to that understanding, the appellant moved to LR No. [Particulars withheld] in 1983 while the

respondent retained No. 209/7890. The parties continued individually to repay the respective loans on the properties. Later the appellant moved out and leased LR No. [Particulars withheld]. Between 1980 and 1983, though the respondent was aware that he was in receipt of the rent from the property but did not protest, obviously because of the understanding.

Granted in 1968/69 the respondent's income was slightly higher than that of the appellant, this was not so from 1974 onwards, when the latter's earnings rose. It continued to be paid into the joint account. Before the parties separated, the rental income from LR. [Particulars withheld] was also deposited into that account.

From the totality of the foregoing analysis, we do not find the basis of the learned Judge's conclusion that the respondent paid 90% of the purchase price for L.R [Particulars withheld] in addition to her share made from the payments from the joint account. We also cannot see how the learned Judge could arrive at the conclusion that in respect of LR No. [Particulars withheld] the parties contributions were equal but in LR. [Particulars withheld] the appellant's was only 5% and the respondent's 95%.

Because, as we have observed before the funds from each party's income were commingled in one account, it was certainly not easy for them to specifically say with precision what portion in the accounts constituted whose deposit for the period of their union. In view of this difficulty, the learned Judge ought to have considered all the aspects of the union, the conduct and intentions of the parties when they opened bank accounts in their joint names and how the funds from those accounts were utilized throughout the subsistence of the union. Had she done so, she would have upheld the intention of the parties by respecting their own voluntary arrangement expressed in the two letters which they themselves had complied with. Each occupied one property and separately studiously and fully repaid the loan in respect thereof.

In determining the beneficial interest of cohabitees who are registered as joint owners of a property, it is the duty of the court to, first ascertain the parties' actual shared intentions whether expressed or inferred from their conduct and secondly, it must determine what, in all the circumstances is a fair sharing of what they acquired in the course of the union. See **Stack V Dowden** (supra) and **Jones V Kernott, Gissing V Gissing** (1971) AC 866.

Bearing in mind all we have said regarding the background of the union, the parties intentions and the law, we say in conclusion that the parties set out to live as husband and wife but for the discovery, at least by the respondent, that the appellant lacked capacity. All they did together while labouring under that mistake pointed to a clear intention of joint investment and joint ownership without assigning any portion to any one of them. The learned Judge therefore erred in making disproportionate apportionment that went against the parties' wishes. She had no or no sufficient basis for the award she made.

Accordingly, we allow this appeal and set aside the judgment dated 13th August, 2014 and order that parties do share the two properties in terms of their letters dated, respectively, 1st October, 1979 and 30th June, 1980 with the inevitable result that the appellant shall retain **L.R** [Particulars withheld] while the respondent will continue her occupation of **L.R** [Particulars withheld]. They will facilitate the transfers to comply with this order, failing which the Registrar of this Court will execute all documents on behalf of any party who fails to comply, in order to give full effect to this order.

We make no orders as to costs.

Dated and delivered at Nairobi this 28th Day of July, 2017.

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR