IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO 142 OF 2016

BETWEEN

CWM ………..............…………...…..APPELLANT

VERSUS

JPM…………………….....….……..RESPONDENT

(Being an appeal from the entire judgment of the High Court at Nairobi (Ougo J.,) delivered on 5th February, 2016

in

H.C.C.C. No. 52 of 2013 (OS)

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JUDGMENT OF THE COURT

[1] This is an appeal against the judgment of the High Court, wherein CWM (appellant) sued JPM (respondent) for the determination of her share of matrimonial property being Dagoreti/Waithaka/[particulars withheld] and Dagoreti/Waithaka/[particulars withheld] (suit properties). By an originating motion that was filed, pursuant to the provisions of the then **Section 17** of the Married Women's Property Act of England, Article 45 of the Constitution and Division of Matrimonial Properties Act, the appellant specifically sought an order that Dagoreti/Waithaka/[particulars withheld]be divided into two equal portions. The respondent be ordered to transfer one portion to the appellant or in the alternative an order be made for valuation of the two property and the respondent be at liberty to buy off the appellant's share.

[2] The appellant claimed that the suit property was matrimonial property acquired or developed with joint efforts; she made direct or indirect contribution in the development of six temporary houses which were rented and the money earned was used by the respondent in acquiring other properties. The appellant and respondent started cohabiting as husband and wife sometimes in 1965 when they were both teenagers; it is common ground that the appellant was still in class six in primary school when she became pregnant with their first child, while the respondent was in form two in secondary school. The couple moved to live together at the ancestral home of the respondent. They were at first accommodated therein in a house built by the respondent's uncle. The couple subsequently solemnized their marriage under the African Christian and Divorce Act (now repealed) on 18th November, 1971. They were blessed

with 5 children born between the year 1965 to 1979. It is also common ground that sometime in September, 1982 the appellant separated from the respondent and went back to her parents.

[4] The respondent sought dissolution of the marriage and a certificate of decree nisi of the said marriage was issued on 16th September, 1987 by the Resident Magistrate's Court at Nairobi (Sheria House). The appellant however denies any knowledge of the said divorce, but claims the respondent married another woman whom he has shared the matrimonial properties with, to her exclusion despite the fact that she too was a wife and she made contribution to the suit properties. The respondent opposed the suit; he stated, that the suit property was ancestral land, it belonged to his grandfather and in 1978, the land was divided after a succession order was made. The respondent, being one of the heirs, was allocated Dagorreti/Waithaka/[particulars withheld] measuring about 3 acres.

[5] The respondent denied the appellant made any contribution to the development or to the family. He alleged that when the appellant deserted the matrimonial home in 1982, she carted all the household effects but left the children. He went on to state that he single handedly cared for the children, and educated them and it was after 8 years that he decided to get married to AWM. He claimed that all the children with the appellant have been provided for, he gave their son with the appellant 1 acre plot of the suit land, the other acre was transferred to his other son with the current wife. The other acre is where he has developed his home with his wife AWM, part of which is jointly owned and the other portion has two plots that are mortgaged with banks to secure development loans.

[6] The matter fell for hearing before Ougo J., who found the appellant's case lacking in merit and dismissed it with no order as to costs. In so doing the Judge made the following key findings;-

> "**It is not in dispute that the applicant fell pregnant while still in primary school and had to move into the respondent's home in the house provided by his uncle and he was later bequeathed the said land by his grandfather. It is on this said land that it is alleged that the applicant contributed towards the construction of 6 rooms which they rented out. The respondent refutes this claim stating that the applicant was never employed. The applicant however could not adduce any evidence to support that she was working as a nursery school teacher or at the Ministry of Health Kikuyu to have contributed towards the improvement of the said inherited property and as such she does not acquire any beneficial interest in the said parcel of land. From her own testimony, she only attaches her contribution to the 6 rooms that were built on the said road reserve the same are no longer there and the respondent in his testimony stated that in 2001 he subdivided the said parcel of land and gifted portions to his children with the applicant. The remainder is what he has used as security for loans and has developed with his 2nd wife. That being the case, I find that the applicant is not entitled to share in the said developed property and the respondent should retain the remaining portion of land that he has developed with his 2nd wife. On this am guided by the findings in the case of Echaria Vs Echaria Civil Appeal No. 95 of 2001, which in adopting the holding in the case of White Vs White 2001 ALL ELR held;**
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> **"Hitherto, the courts approaches have been that only those properties acquired during the subsistence of the marriage through the joint contribution, directly or otherwise, if the spouses would be subject to an order under the said section. But in certain instances as in the present case…such property is pooled with other property the couple may have and is developed by joint efforts. The property then ceases to be in its original form and increases in value. Where the property exists in the same condition as at the time it was gifted or inherited no problems arise. The spouse to whom it was gifted should be allowed to retain it"**
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> **The respondent has stated that the applicant had also inherited a plot at Kawangware while they were still married, a claim that the applicant did not refute, I find it is only fair and just that the applicant should be satisfied with that one as the respondent had not laid any claims on it. I therefore decline to grant the prayers sought by the applicant; her case is dismissed. Each party to bear its costs."**

[7] The above conclusion is what has provoked the instant appeal that is predicated on some eleven grounds of appeal. To avoid obvious repetition, and in line with the provisions of ***Rule 86(1)*** of the **Court of Appeal Rules** which stipulates in mandatory terms thus;

> **"A Memorandum of Appeal shall set forth <u>concisely</u> and under distinct heads, <u>without argument or</u> <u>narrative</u> the grounds of objection to the decision appealed against, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make." (**Emphasis added)

We hereby summarize the issues that fall for determination which in our view are two fold; that is, whether the suit premises was matrimonial property within the meaning of the Matrimonial Properties Act 2013 and whether the appellant proved her case of beneficial ownership or entitlement of the suit properties on a balance of probabilities.

[8] Both counsel for the appellant and respondent filed written submissions which they adopted in their entirety during the plenary hearing. According to Mr. Mathenge, learned counsel for the appellant, the suit property was part of his client's matrimonial property that was acquired or inherited during her marriage. Counsel cited the provisions of **Sections 6** and **9** of the Matrimonial Properties Act (hereinafter referred to as the '*Act'*) which defines what constitutes matrimonial property as property acquired during the subsistence of a marriage and a property acquired by one of the spouses during the subsistence of marriage in which case the other spouse can acquire an interest in the property by contributing towards its improvement respectively. Article 45 of the Constitution was also cited to reinforce the argument that parties to a marriage are entitled to equal rights during marriage and at the dissolution of the marriage. The appellant's claim was based on the fact that she made contribution towards the building of 6 rental rooms within the suit land within the period of 18 years that the marriage with the respondent subsisted and also contributed to the well-being of the family that transited from a grass thatched mud house to a timber house by the time she was chased away by the respondent.

[9] The learned trial Judge was faulted for holding the appellant failed to produce evidence of monetary contribution whereas the provisions of the Act supersedes the authority in **<u>Echaria v Echaria</u>** (supra) that is now bad law. Counsel for the appellant went on to submit that under **Section 2** of the Act, contribution to acquisition of matrimonial property has a broad definition that includes (a) work and management of the matrimonial home; (b) child care; (c) companionship (d) management of family business or property; and (e) farm work. For the period of 18 years when the marriage subsisted, the appellant was involved in all the aforesaid aspects of the family and the Judge was wrong to dismiss her claim.

[10] Moreover, the learned Judge failed to distinguish the facts in the instant appeal which were markedly different from the **<u>Muthembwa vs Muthembwa</u>** Civil Appeal No. 74 of 2011. In this case, the property had been given as a gift to the husband before marriage whereas in the instant case, the suit land was gifted to the respondent in 1978 when the marriage was in subsistence. The appellant contributed towards the construction of temporary *'mabati'* rooms that were rented out. The Judge also ignored the appellant's unchallenged evidence that when she started cohabiting with the respondent, they were living in a small grass thatched house and by the time the respondent was chased away, the family was living in a wooden house which clearly demonstrated the appellant had made contribution towards the improvement of the suit property. Counsel for the appellant also cited a number of decisions by this Court on what constitutes contribution towards the acquisition of matrimonial properties; **<u>Echaria vs</u>** **<u>Echaria</u>** (supra) **<u>Muthembwa vs Muthembwa</u>** (supra) **<u>FWM v MK</u>** [2014] e KLR; **<u>Kivuitu vs Kivuitu</u>** [1991] KLR; **<u>Tabitha Nderitu vs Simon Nderitu</u>** [1998] e KLR among others. These decisions navigated the unchartered area of law that is division of matrimonial property that remained unlegislated until the promulgation of the Constitution 2010, the enactment of the Matrimonial Properties Act among other enactments of the law to protect families.

[11] This appeal was opposed; Mr. Kimani, learned counsel for the respondent supported the impugned judgement in his written submissions which he adopted wholly. He reiterated the evidence that was before the trial court which was undisputed that the appellant and respondent lived together on parcel No. [particulars withheld] belonging to the respondent's grandfather and in a house provided by the

respondent's uncle. The respondent inherited parcel No. 404 measuring about 3 acres from his grandfather in 1978. He subdivided it in 2001 into 5 plots, gifted 1 acre to their son with the appellant, 1 acre to his son with the current wife and was left with one acre which he divided in to three plots No's [particulars withheld]. Indeed, the plot the appellant is claiming is jointly registered between the respondent and his current wife. According to counsel for the respondent, **Section 7** of the Act protects also the interest of the respondent's current spouse who has registered interest over the suit plot. His current wife was not made a party to the present proceedings therefore there was no way she could have been dispossessed of her interest in the suit property. Parcel No [particulars withheld] was also charged to a bank to secure a development loan which evidence was not challenged.

[12] Counsel went on to submit that the evidence adduced before the trial court was clear that the parties established their home on parcel No. [particulars withheld] and thereafter at plot No [particulars withheld] which no longer exists. Even the structures that were constructed during the subsistence of the marriage were demolished by the local authority as they fell on the road reserve. Moreover, the appellant failed to provide any evidence of monetary contribution to the development of the said structures which no longer exist on the ground and the appellant was hard pressed to identify in which portion the matrimonial house she occupied was built. Finally, counsel hammered the point that the appellant left the matrimonial home in 1982 and filed suit in 2013 which was after a passage of 31 years since cohabitation ceased. It was therefore unreasonable for the appellant to wait for 31 years and file a claim which would have been statute barred under the ordinary civil law.

[13] This is a first appeal and that being so, we are mandated to reconsider the entire evidence before the trial court and give it fresh analysis but with the usual caveat that we never saw or heard the witnesses testify. (See the case of **Selle vs.** **Associated Motor Boat Company** **(1968)** E.A. 123 at page 126, where the Court of Appeal held:-

> **"…….. this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect…"** See ***Jivanji vs. Sanyo Electrical Company Ltd.*** ***(2003) KLR 425".***

[14] As stated above, the two issues for determination are whether the suit property was matrimonial property and if so, whether the appellant was entitled to the declarations sought. Both the Constitution and the statute law, herein before referred to protects family property and underpins the principles of fairness and non-discrimination of a spouse who has made contribution in the manner provided for in the Act. **Article 45 (1) (3)** of the Constitution which states:

> **"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."**

The Matrimonial Property Act makes the following definitions of what constitutes "**contribution"** to mean **"monetary and non-monetary contributions and includes-**

> **(a) Domestic work and management of the matrimonial home;**
>
> **(b) Child care;**
>
> **(c) Companionship**
>
> **(d) Management of family business or property; and**
>
> **(e) Farm work."**
>
> **…**

Further ownership of matrimonial property is described under **Section 7** of the Matrimonial Property Act

as;-

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

[14] It is opportune to mention that before the promulgation of the Constitution 2010, and the enactment of the above Family Laws, suits filed by women claiming a determination of their shares of properties acquired during marriage were filed under **Section 17** of the Married Women Property Act of England. Firstly, **Section 3** of the Matrimonial Causes Act gave jurisdiction to the High Court, and secondly, such jurisdiction was to be exercised in accordance with the procedures applied in matrimonial proceedings in the High Court of Justice in England. As far back as 1970, the High Court of Kenya in Nairobi (Trevelyn, J) decided such a dispute in the case of **<u>I. v I.</u>** [1971] EALR 278. The dispute was between a husband and wife both of European origin. They were contesting how to divide the proceeds of a sale of a matrimonial house they had bought while in England. It was held in that case that **section 17** of MWPA of 1882 was a statute of general application in Kenya. The test to apply was also set out in the said case; first of all, a party invoking the said provisions had to establish whether a statute was applicable in England on 12th August, 1897 when Kenya was declared an English Colony. **Section 17** of MWPA merely provided that;-

> **"In any question between husband and wife as to the title to or possession of property, either of them may apply for an order to the High Court or a County Court and the Judge; may make such order with respect to the property in dispute…as he may think fit.**"

[15] One of the earliest substantive judgment by a Kenyan woman married under the African customary law that was reported is **<u>Karanja v Karanja</u>** [1976] KLR 307. The case of **IV I** (supra), was heavily relied on. The case involved a dispute over a 42 acre farm in Karen, three properties in Kangemi, one in Lavington and another in Jamuhuri Estate which the wife sought that they be declared joint properties or in the alternative an order on respective ownership be made. The issues that were determined was whether the properties were acquired by joint venture; whether there was an implied trust, and generally the right of women to hold property under Kikuyu customary Law. Simpson J., held;-

> **"Kikuyu customary law has changed radically since the days when land belonged to the tribe and section 17 of the Married Women's Property Act 1882 of England together with the English authorities decided thereunder is applicable to an African husband and wife in Kenya where both are in salaried employment and contribution to household expenses and the education of the children. The fact that property acquired after marriage is put into the name of the husband alone and that the husband has evinced no intention that his wife should share in the property does not necessarily exclude the imputation of a trust or preclude the wife in appropriate circumstances from obtaining a declaration that the property acquired by virtue of a joint venture is held on trust for them both."**

The court proceeded to determine the amount of financial contribution made by the wife towards the acquisition of the matrimonial property and found the entire estate was worth about Kenya shillings 900,000/=. The judge held the wife's contribution was one third, the husband was ordered to pay the wife a sum of Kenya shillings 300,000/- or to transfer two properties namely Jamuhuri and Lavington houses which were worth almost the said amount of money.

[16] The principles set out in the **<u>Karanja</u>** case were applied in many other subsequent decisions. It was however an uphill task as sometimes due to problems associated in the interpretation and application of a foreign statute that had been repealed even in England, it gave judges a great latitude or discretion to determine the share to award to a woman as they deemed fit. Some judges expressed bias against women who had resolved to seeking property; and viewed them as a threat to status quo, see **Kuloba J.,** in **<u>Nderitu v Nderitu</u>** HCCC No 2133 of 1992 (OS). This Court had to review many of the decisions and it often lamented the state of lack of laws governing property rights within marriage. This Court kept on urging the Law Reform Commission, the Attorney General, Parliament and whoever cared to read those decisions, that time was overdue for reforms. It was pointed out time without a number that **section 17** of

the MWPA was repealed in 1970 in England. That notwithstanding, the jurisprudence of judge made laws grew tremendously and guided this area of law as demonstrated by the body of cases that were determined by the Superior courts that underscored a wife's contribution to properties acquired within marriage was an actionable right, through the application of **section 17** of MWPA or by invoking the law of trusts.

[17] Some of these cases were cited in this appeal and we need not repeat them save to state that the inclusion of equal rights between parties in a marriage in the Constitution and under statute law was aimed at eliminating discrimination against women. Parties are of equal worth and human dignity, whatever their station in life. To the issue before us, it is obvious the appellant having been married for 18 years made some contribution to the family of the respondent at the time of such coverture. In our view, that contribution, be it domestic work and management of the matrimonial home, child care; or companionship falls within the definition of contribution under the Act.

[18] We, however, find a fundamental problem with the appellant's claim which was the inordinate delay in pursuing the same. The appellant ceased cohabitation with the respondent in 1982 and filed the suit in 2013, which is after 31 years. No wonder the appellant had difficulties to adduce evidence of contribution or to identify the particular plot where her matrimonial home was built because the whole subject matter had changed. Meanwhile, what she referred to as matrimonial properties albeit inherited and what she was supposed to prove was her contribution towards the value additions had completely changed hands. It was common ground the suit property was inherited by the respondent from his grandfather. The appellant's claim was in regard to her contribution in the development of a matrimonial home, which she claims they upgraded from a grass thatched mud house to a timber structure and some 6 rooms constructed with *mabati* for rental. Nonetheless, these properties did not exists any more, tracing their values after so many years was not possible.

[19] The respondent's evidence which was not at all challenged was that since the appellant left him in 1982, he single handedly brought up the 5 children of the marriage, educated all of them and bequeathed each one of them a piece of property with his son and the respondent getting the lion share being one acre of what the appellant inherited from his grandfather. The other acre was bequeathed to the respondent's son with his current wife and the remaining acre is subdivided in to three plots [particulars withheld]. Indeed, the plot the appellant is claiming is jointly registered between the respondent and his current wife. All this has happened in the last 31 years when the appellant slept on her rights.

[20] In our view, the Judge appreciated the guiding principles that guide the Court on when dis-entitling a party a relief. These are *inter alia* undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained about or waiver to the right to object may result in the court declining to grant the relief. Other considerations, of course, include a consideration of whether granting the remedy would result in a futile exercise or whether there would be practical problems, including the effect to third parties who deal with the land in question would be affected by the orders given. See Halsbury's Laws of England 4th Edn Vol. 1 (1) para 12 page 270. There is no doubt granting the orders in the manner sought by the appellant would have affected other parties namely the respondent's current wife and the banks that have mortgaged two of the plots.

[21] Undue delay on the part of the appellant also had a huge legal implication. See a persuasive Indian case of **Tukaram Kana Joshi & Other –vs- M.L.D.C & Others** Civil Appeal No 7780 of 2012. That case involved poor and illiterate farmers whose land was acquired for industrial development but the proceedings were taken after the statutory period had lapsed. In resolving that dispute that had taken the appellants more than a century to litigate their ownership interests, the Court posited as follows in a pertinent portion of the said judgment;-

> **"No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of lashes. Discretion must be exercised judiciously and reasonably. In the event that the claim made by the applicant is legally sustainable, delay should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest**

> **cannot be sustained on the sole ground of lashes. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in the injustice being done, because of non-deliberate delay. The court should not harm innocent parties if their rights have in fact emerged, by delay on the part of the petitioners…"**

[22] We see no injustice vested upon the appellant who sat on her rights for 31 years. On the other hand, the respondent brought up their 5 children and gifted each one of them with a landed property. It was also not disputed that the appellant inherited a piece of land from her parents; more importantly the said inordinate delay was not explained at all. We must on the onset state that civil litigation has a shelf life under the Limitation of Actions Act, although a claim under the Matrimonial Properties Act is not particularly defined as a civil claim, in our view it is a claim in land which should fall within the ambit of **Section** 7 of the Limitation of Actions Act. It cannot also be in public interest that a party can sleep on their rights and wake up one day after 30 years to pursue a claim in land. By the time the appellant in this matter woke up from her slumber, much water had gone under the bridge, it was impossible for the trial court, just as it is for us to trace and give a monetary value to the improvements she made to the respondent's land where she claimed to have contributed to building timber and *mabati* structure. Had she filed suit immediately, perhaps it would have been possible to trace her contribution.

[23] The appellant claimed that she was not aware the respondent had filed and obtained divorce. Nonetheless, she had remained separated from the appellant and nothing stopped her from seeking the same declarations under the old regime of laws or filing for the same divorce herself if she felt it was necessary for her to pursue a claim over matrimonial properties.

We think we have said enough to demonstrate this appeal lacks merit. We hereby order it dismissed and each party to bear their own costs, this being a family matter.

Dated and delivered at Nairobi this 6th Day of October, 2017.

ALNASHIR VISRAM

………………….……

JUDGE OF APPEAL

W. KARANJA

………………………….

JUDGE OF APPEAL

M. K. KOOME

…………….…………..

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR