RMM v BAM (Civil Appeal 267 of 2011)
[2015] KECA 1013 (KLR) (20 February 2015) (Judgment)

R.M.M v B.A.M [2015] eKLR

Neutral citation: [2015] KECA 1013 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 267 OF 2011

PN WAKI, GBM KARIUKI, PM MWILU, K M'INOTI & AK MURGOR, JJA

FEBRUARY 20, 2015

BETWEEN

RMM ..... APPELLANT

AND

BAM ..... RESPONDENT

Married Women's Property Act, 1882 is applicable to all marriages.

Reported by Teddy Musiga

Family Law *- matrimonial property - division of matrimonial property under Islamic marriages - division of matrimonial property in polygamous unions - whether the Married Women Property Act, 1882 with respect to division of matrimonial property applied only to monogamous unions and not polygamous ones - whether the jurisprudence in Essa v Essa was distinguishable and inapplicable in the circumstances of a polygamous Islamic marriage - Married Women Property Act,1882, section 17 Constitutional Law - application of the Constitution - retrospective application of the Constitution of Kenya, 2010 - constitutional provisions on matrimonial property - where the dispute revolved around matrimonial property - where the dispute originated three (3) years before the promulgation of the Constitution of Kenya, 2010 - whether it was the Constitution of Kenya, 2010 or the Constitution of Kenya (repealed) that applied in a matrimonial property dispute where the case was before the promulgation of the Constitution of Kenya, 2010 - whether the Constitution of Kenya, 2010 could apply retrospectively in matrimonial property disputes.*

Jurisdiction *- jurisdiction of the High Court - jurisdiction of the High Court - jurisdiction of the High Court in determining cases on division of matrimonial property - jurisdiction of the Kadhis' Courts in determining cases on division of matrimonial property acquired in an islamic marriage - whether it was the High Court or the Kadhis' Court which had jurisdiction to determine the matter of distribution of the matrimonial property acquired in an islamic marriage - Kadhis' Courts Act, section 5*

Brief facts

The Court of Appeal in Essa v Essa (1996) EA 53 (Essa case) held that the Married Women's Property Act, 1882 was applicable to all marriages. However, the Trial Court in the instant matter departed from that jurisprudence in the Essa case for three reasons; that it was *obiter* and therefore had no binding value, that the Married Women's Property Act, 1882 was only restricted to monogamous marriages and that it did not apply to polygamous marriages. The Trial Court found it difficult to deal with a dispute over distribution of properties acquired during the subsistence of a Muslim marriage under the Married Women's Property Act, 1882, which envisaged monogamy, while the marriage between the parties in the instant matter was a polygamous one. The Trial Court thus held that the dispute could only be competently handled by a Kadhis' Court under the Mohamedan Marriage, Divorce and Succession Act, Cap 156.

Aggrieved by the decision of the Trial Court, the appellant filed the instant appeal. The appeal, *inter alia,* sought for the instant Court to declare that the Matrimonial Women's Property Act and the Essa case applied to polygamous and monogamous marriages alike, and to Islamic and Non-Islamic marriages alike.

Issues

i. Whether it was the Constitution of Kenya, 2010 or the Constitution of Kenya (repealed) that applied in a matrimonial property dispute where the case was filed before the promulgation of the Constitution of Kenya, 2010.

ii. Whether the Constitution of Kenya, 2010 could apply retrospectively in matrimonial property disputes.

iii. Whether the Married Women's Property Act, 1882 applied to only monogamous marriages and not polygamous marriages.

iv. Whether the jurisprudence in Essa v Essa was distinguishable and inapplicable in the circumstances of a polygamous Islamic marriage.

v. Whether it was the High Court or the Kadhis' Court which had jurisdiction to determine the matter of distribution of the matrimonial property.

Held

1. A Court's jurisdiction flows from either the Constitution or legislation or both. A Court of law could only exercise jurisdiction as conferred by the Constitution or other written law. It could not arrogate itself jurisdiction exceeding that which was conferred upon it by law. Where the Constitution exhaustively provided for the jurisdiction of a court of law, the Court had to operate within the constitutional limits. It could not expand its jurisdiction through judicial craft or innovation. Nor could Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution conferred power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within that authority to prescribe the jurisdiction of such a court or tribunal by state law.

2. A Constitution was not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looked forward and backward, vertically and horizontally, as it sought to reengineer the social order, in quest of its legitimate object of rendering political goods. A Constitution could and embodied retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permitted retrospective application of any of its provisions, a court of law had to pay due regard to the language of the Constitution.

3. The instant suit was filed three years before the promulgation of the Constitution of Kenya, 2010 and all the witnesses, except one had been heard. At the heart of the suit was the right to property which was claimed on both sides. The application of provisions of the Constitution of Kenya, 2010 could affect the vested rights of the parties which accrued before the promulgation of the Constitution of Kenya, 2010. That ruled out its application to the instant matter.

4. The substance of common law, the doctrines of equity and the statutes of general application in force in England on August 12, 1897 would apply only the marital status of the parties in the instant matter was straight forward. If their marriage was purely muslim, and the property in issue was acquired during the currency of

that marriage, the Kadhi's Court would be the most efficacious in handling and determining the dispute. If it was christian or secular, and therefore monogamous, and the property was equally acquired during that marriage, the Married Women's Property Act, 1882 which was a statute of general application, would apply. Aspects of the doctrines of equity could also find application in the matter. But the dispute was not that clear cut, and there lay the problem.

5. The Trial Court found that there was a common law marriage after hearing the evidence. The Trial Court, faced with such complexity, should have opted for the law that best accorded with the Constitution and was protective of the interests of both parties. There was no paucity of such laws and the Kadhis' Courts Act, (Cap 11) was not an impediment as it did not oust the jurisdiction of the High court. Under section 5 of the Kadhis' Courts Act, the High Court had concurrent jurisdiction with the Kadhis' Court to determine questions of muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties professed the muslim religion.

6. The High Court would have concurrent jurisdiction. It would have examined the provisions of the Constitution relating to discrimination and found the definition of it in section 82(3) of the Constitution of Kenya (Repealed), which barred discrimination on descriptions of sex. The Court would have examined the relevant clauses in international treaties and conventions which Kenya had ratified and which the Courts had declared were applicable in resolving any ambiguities.

7. The progressive provisions of the Constitution of Kenya (Repealed) and the jurisprudence on the application of international treaties and conventions were vindicated by the Constitution of Kenya, 2010, especially in articles 2 and 45 thereof, and the Matrimonial Property Act, 2013, which had declared the cessation of the application of the Married Women's Property Act, 1882. The constitutional provisions and the jurisprudence that went with it were germane for discussion in the instant matter and could only have been effectively discussed under the forum of the Married Women's Property Act, 1882. The Trial Court erred in principle in failing to apply such laws and in declining the jurisdiction to determine the suit.

8. It was not time to overrule Essa v Essa [1996] EA53 *(*Essa case). The *Essa* case was ignored by the Trial Court for three reasons: a. that it was *obiter* and therefore had no binding value; b. that it does not apply to polygamous marriages; and c. that the Married Women's Property Act, 1882 was restricted to monogamous marriages. The instant Court did not subscribe to those conclusions. There was nothing *obiter* about the pronouncement made by the Court of Appeal. The parties before it were both muslim, which allowed polygamy, and were disputing about matrimonial property.

9. One of the main purposes of the Married Women's Property Act, 1882 was to make it fully possible for the property rights of the parties to the marriage to be kept entirely separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All that negated any idea that section 17 of Married Women Property Act, 1882 was signed for the purpose of enabling the Court to pass property rights from one spouse to the other. In a question as to the title to property, the question for the Court to determine was "whose is this?" and not "to whom shall this be given?"

10. The Married Women's Property Act, 1882 was an Act of general application and applied to muslims as it did to non-muslims in Kenya. The Act did not define marriage and therefore section 17 of Married Women's Property Act, 1882 was about the question 'as to the title or possession of property', the nature of the marriage notwithstanding.

11. Section 17 of the Married Women's Property Act, 1882 gave the courts discretion to grant appropriate remedies upon ascertainment of the respective beneficial interest in a disputed property.

Appeal allowed.

Orders

i. The matter to be remitted back to the High Court for hearing and determination of the application.

ii. The re-hearing and determination of the matter to be before any judge of the High Court other than the one that heard and determined the initial application in the High Court.

iii. The re-hearing to happen within 6 months from the date of the instant judgment.

iv. Costs of the Appeal to be borne by the Respondent.

v. Costs in the High Court to abide the final outcome of the suit.

Citations

East Africa

1. *Abdulkadir, Amina O v Ravindra N Shah alias Raveen Mohammed Narshi Civil Case No 258 of2005 - (Mentioned)*
2. *Echaria v Echaria* [2007] 1 KLR 469 - (Mentioned)
3. *Essa vs Essa* [1996] EA 53 - (Explained)
4. *FWM v MK* Environment and Land Case No 14 of 2012 (OS) - (Mentioned)
5. *In Re the Matter of Zipporah Wambui Mathara* [2010] 2 KLR 440 - (Mentioned)
6. *Karanja v Karanja* [1976] KLR 307 - (Mentioned)
7. *Kivuitu v Kivuitu* [1991] KLR 248; [1991] 2 KAR 241 - (Mentioned)
8. *Macharia, David Njoroge v Republic* Criminal Appeal No 497 of 2007 - (Mentioned)
9. *Macharia, & another v Kenya Commercial Bank Limited & 2 others [2012] 3 KLR 199 - (Followed)*
10. *Nderitu, Tabita Wangeci v Simon Nderitu Kariuki* Civil Appeal No 203 of 1997 - (Mentioned)
11. *NNS v SAM* Civil Suit No 23 of 2001 - (Mentioned)
12. *NWK v JKM & another* Environment and Land Case No 497 of 2007 - (Explained)
13. *Rono, Mary v Jane Rono & another* Civil Miscellaneous Application No 437 of 2001 - (Explained)
14. *Selle v Associated Motor Boat Co* [1968] EA 123 - (Mentioned)
15. *Wanjiku, Beatrice & another v Attorney General & another Petition* No 19 of 2011 - (Mentioned)

United Kingdom

Pettit v Pettit [1969] UKHL 5; [1969] 2 All ER 385; [1970] AC 777 - (Followed)

Texts and Journals

Mackay, JPH., (Lord of Clashfern) et al (Eds)(2009) *Halsbury's Laws of England* London:Lexis Nexis 5th Edn Vol 72 para 280Statutes

East Africa

1. Civil Procedure Act (cap 21) sections 3A, 63 - (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 36 rule 7 - (Interpreted)
3. Constitution of Kenya (Repealed) sections 3(1); 66(1) - (Interpreted)
4. Constitution of Kenya, 2010 articles 2(5)(6); 27,28,40,45(3) - (Interpreted)
5. Judicature Act (cap 8) section 3(3) - (Interpreted)
6. Kadhis' Courts Act, (cap 11) In general - (Cited)
7. Married Women's Property Act, 1882, [INDIA] section 17 - (Interpreted)
8. Matrimonial Property Act, 2013 (Act No 49 of 2013) In general - (Cited)
9. Mohammedan Marriage and Divorce and Registration (cap 155) In general - (Interpreted)

International Instruments and Covenants

1. African (Banjul) Charter on Human and Peoples Rights (ACHPR), 1981
2. Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), 1979
3. International Covenant on Civil and Political Rights (ICCPR), 1966
4. International Covenant on Economic, Social and Cultural Rights, (ICESCR), 1966

5. Universal Declaration of Human Rights (UDHR), 1948

JUDGMENT

Introduction

1. The main issue in this appeal is the same old vexed question of how property which has been acquired during the subsistence of a valid marriage should be dealt with following the dissolution of the marriage. The added dimension in the case before us is which law is applicable in that process. Many decisions have, of course, been made by this Court in various matrimonial causes, but this matter was placed before a bench of five Judges of Appeal because, we are told, the High Court has questioned and departed from the decision of this Court in *Essa v Essa* [1996] EA 53, and the Respondent wishes to persuade us that this Court should follow suit and depart from its own decision. For reasons which will become obvious later in this judgment, we shall not delve into a deep analysis of the facts and circumstances surrounding the case, but will say enough to satisfy ourselves on the issue placed before us for adjudication.

2. The appellant is R M M (M) represented before us by learned counsel Mr. Gikandi, instructed by M/s Gikandi & Company Advocates, while the respondent is B A M (B), represented before us, as he was in the High Court , by learned counsel, Mr. Abed Omar instructed by M/s. Balala Abed & Company Advocates. Both counsel addressed us orally in court but the appellant's counsel filed written submissions in addition.

3. In this judgment we shall use the terminology "Muslim marriage". "Islamic marriage" or "Mohamedan marriage" interchangeably to connote any marriage contracted in accordance with and recognized as valid by Mohammedan law.

The pleadings and evidence.

4. M went before the High Court in Mombasa on 12th June, 2007 and took out an Originating Summons under Section 17 of the *Married Women's Property Act 1882*, Section 3 of the *Judicature Act*, Order 36 Rule 7 of the *Civil Procedure Rules*, and Section 3A and 63 of the *Civil Procedure Act*, seeking determination of the following issues:-

    1. Is the Plaintiff entitled to declaration that the Houses erected on the following Plots: - Plot No [particulars withheld]/1/M.N Maweni Kongowea, Plot No [particulars withheld] M.N off New Malindi, Plot No [particulars withheld] Sir Ali Street Mwembe Tayari, Plot No [particulars withheld] / II/M.N Old Malindi Road, Plot No [particulars withheld] /II M.N Old Malindi Road, Plot No [particulars withheld] /II/M.N Old Malindi Road, Plot Number [particulars withheld] /II/M.N Old Malindi Road, Plot No [particulars withheld] /II/M.N Old Malindi Road, Plot No [particulars withheld] /I/M.N Old Malindi Road, Plot No [particulras withheld] /I/M.N Old Malindi Road, Plot No [particulars withheld] /I/M.N Old Malindi Road at Soko Mjinga, Plot No [particulars withheld] /18 Kwashibu Road Mwembe Tayari, Plot No [particulars withheld] /17 Mwembe Tayari, Plot No [particulars withheld] / II/M.N at Mlaleo off Old Malindi Road, Plot No [particulars withheld] /37 Nehru Road, (hereinafter "the suit properties") are owned by the Plaintiff and the Defendant jointly?

    2. Should an Order [be made] that the suit properties be sold and the net proceeds be divided equally between the Plaintiff and the Defendant?

3. An order that the Defendant herein do (sic) pay to the Plaintiff with effect from the date of their separation, in 1996, half the sum being the assessed rental income of the said premises jointly owned, by the parties such as they would attract and which properties have been exclusively used by the Defendant and or have been in is exclusive possession.

4. An Order restraining the Defendant from disposing off any of the suit properties until this suit is determined.

5. That further and in the alternative, and in the event that Title and ownership in any of the suit properties has already been transferred to the favour of any third party, an order that the Defendant does account for the proceeds there from and the same be divided between the Plaintiff and Respondent equally.

6. That the Defendant does render account for the rents received from the suit properties for the period 1996 to-date and the Plaintiff be paid 50% thereof.

7. That the costs of this suit be awarded to the Plaintiff."

5. In her supporting affidavit, Mueni narrates how she met and married Brek in 1972 under Kamba customs before she became a Muslim and adopted the name W. They regularized the marriage before a Kadhi under Islamic law in 1995. She narrates when the two children of the marriage were born between 1972 and 1996, and how her marriage to B broke down and they separated leading to a formal divorce in 2007. B thereafter entered into new marriages while she reverted to her original Catholic religion and name R. She also gives the history of their businesses and how, during coverture they acquired the property sought to be distributed and how B secretly took and disposed of some of that property.

6. B responded in a replying affidavit denying that they were married in 1972 but asserting that they were married under Islamic Law of Marriage and Divorce in 1995 which marriage was registered in 1999. There was no Kamba customary marriage as alleged and the two children were born through casual sexual encounters out of wedlock in 1976 and 1985. He nevertheless recognized them as his daughters and took care of them. B further asserted that he only cohabited with M for one year after their marriage before the Kadhi in 1995 and separated in 1996 until their formal divorce before the Kadhi's Court in 2007. For that reason, he swears, there was no property acquired by both of them during their marriage which could be shared out. In any event many of the listed properties either belong to third parties or are already sold and cannot be traced.

7. The matter was heard before Maureen Odero J. when the two parties testified and were cross examined at length. They each called three witnesses who were also cross examined. In the course of submissions, learned counsel, Mr. Abed invited the Court to find that the holding in the *Essa Case* (*supra*) that the *Married Women's Property Act 1882*, applied to both Muslims and non-muslims was made in *obiter dicta* and was also per incuriam. That is because the Court did not consider Section 66 of the old *Constitution* which was relevant at the time, or Section 3(1) of the *Judicature Act* which set up the Kadhis' Courts with jurisdiction where both parties were Muslims. A spirited, but unsuccsessful defence of the *Essa Case* and its relevance up to date was made by Mr. Mabeya, Advocate (as he then was) representing Mueni.

Findings of the trial court.

8. After considering the pleadings and the evidence placed on record, the trial court made findings of fact, which have not been challenged, that there was no marriage under Kamba customary law between M and B between 1972 and 1995, as pleaded by M. There was, nevertheless, a long period of cohabitation

between 1972 and 1995 supporting a presumption of marriage and therefore M was the common law wife of B over that period. It further found that the two solemnized a Muslim marriage in 1995 and registered it in 1999 but it broke down and was formally dissolved before the Kadhi's Court in 2007. During that period, the two were governed by Islamic law. As to which law then applied to distribution of matrimonial property acquired during coverture, the court declared that it was the Islamic law, and therefore held that the Originating Summons was not properly before the court. The suit was dismissed and the prayers sought were not considered on their merits.

9. In declining to exercise jurisdiction over the matter, the trial court reasoned as follows:-

> "I have already found that a marriage did exist between the Plaintiff and the defendant – the question is under which system of law was this marriage contracted. There was no proof of a customary marriage between the two. What existed was a presumption of marriage. However when commencing her union with the defendant the Plaintiff was fully aware that he was a Muslim and therefore was subject to Islamic law. It is equally important to note that when the couple decided to solemnise their marriage they did so under Islamic law and not under the *Marriage Act*. The *Married Women Property Act* was passed in the United Kingdom in the year 1882. In Christendom from where this Act originated a marriage is presumed to be a union of one wife to one woman to the exclusion of all others i.e it is deemed to be monogamous in nature. No doubt this is why the *Married Women's Properties (sic) Act 1882* refers to a husband and wife not wives. This definition is captured by law in S.2 of the *Matrimonial Causes Act* Cap 152, Laws of Kenya which defines 'Marriage' as:
>
> > "Marriage" means the voluntary union of one man and one woman for life to the exclusion of all others [my emphasis]
>
> On the other hand a marriage under Islamic law is deemed to be a potentially polygamous union. The court takes judicial notice of the fact that Muslim men are permitted to have upto four (4) wives at the same time. Indeed the defendant told [the court] that he has in his lifetime married six (6) wives some of whom he later divorced."

10. The trial Court found it difficult to deal with a dispute over distribution of properties acquired during the subsistence of a Muslim marriage under the *Married Women's Property Act 1882*, which envisages monogamy, while the marriage between the parties here was potentially polygamous and there were in existence other wives of B. The dispute, in the Court's view, could only be competently handled by a Kadhi's Court under the *Mohamedan Marriage Divorce and Succession Act*, Cap 156, Laws of Kenya.

11. The principle laid down in the *Essa Case* was also examined but was distinguished and declared inapplicable. The court reasoned as follows:-

> "I am mindful of the decision in *Essa v Essa* that the Married Women's Property Act is a statue of General application. However I do note that this statement was made obiter as the question of whether or not the Act applies to Muslim couples in an Islamic union was not directly canvassed or addressed in that case. Further the *Essa Case* is distinguishable from this case in that both parties submitted to the resolution of their dispute under the Act. In this case the Defendant has challenged the determination of this dispute under the *Married Women's Property Act 1882*. In addition in the *Essa Case* it would appear that although the parties had contracted an Islamic marriage there is no report of their having been any additional wife or wives other than the Appellant. In other words the union was in effect monogamous as it involved only the Appellant and the Respondent. In those

circumstances it was a straightforward matter to determine the dispute under the *Married Women's Property Act 1882*."

12. In conclusion the court held:-

> "For these reasons I find that the *Married Women's Property Act 1882* which of necessity envisages a monogamous union is not applicable in this case. The Plaintiff ought to have sought relief in the Kadhis Court under Cap 156. For this reason I do dismiss this suit and decline to grant the prayers sought."

The appeal and submissions of counsel.

13. There are eight grounds of appeal which are rather prolix but we shall reproduce them for fuller appreciation of the issues raised, thus:-

    1. The Learned Judge erred in law and in fact in coming to a decision that the *Married Women's Property Act 1882* applies to only monogamous marriages. The said was wrong in that:-

        a. The Learned Judge gave a very technical and narrow interpretation to the *Married Women's Property Act 1882* by holding as the court did, that the said Act applied only to monogamous marriages and could not apply to polygamous marriages.

        b. The Learned Judge failed to hold that the *Constitution* of Kenya places all types of marriages whether monogamous or polygamous, on equal basis. Further, the said decision amounts to a discrimination against polygamous marriages which is, itself, contrary to the *Constitution* of Kenya.

        c. The Learned Judge failed to appreciate that as the *Married Women's Property Act 1882* is a statute of general application as set out in Section 3 of the *Judicature Act*, Cap 8, Laws of Kenya it was hence available for application in the resolution of the dispute between the parties herein.

        d. The Learned Judge allowed technicalities to win over substantial justice and thereby the court failed its overriding objective test.

    2. The Learned Judge erred in law in coming to a decision that the *Married Women's Property Act 1882* is not applicable to a union where the parties are married under the Islamic Law.

    3. The Learned Judge erred in law and in fact in holding that when commencing her union with the Respondent while aware that the Respondent was a Muslim and was, therefore, subject to Islamic Law, and by subsequently solemnizing their marriage under Islamic Law and not under the *Marriage Act*, the Appellant could not bring her suit under the provisions of Section 17 of the *Married Property Act, 1882* yet the *Married Women's Property Act 1882* does not bar its application to marriage celebrated under Islamic Law.

    4. That the Learned Judge erred in fact in failing to make a finding that the properties that are the subject matter of appeal were all acquired between the years 1972 and 1999 when the parties were cohabiting as husband and wife and before the solemnization of the marriage under the Islamic law on 5th August 1999 and without prejudice to Grounds 1, 2 and 3 above that assuming, without admitting, that the *Married Women's Property Act, 882* was not available for application in the relationship existing between the appellant and the respondent the said statute was applicable when the circumstances alluded to herein are taken into account.

5. The Learned Judge erred in law and in fact in failing to find that the dishonesty of the Defendant's witnesses and the evasiveness of the Defendant during their respective examinations should have been frowned upon by the court and as a result the judgment is against the weight of the evidence that was adduced.

6. The Learned Judge erred in placing far too much weight as related to the perceived rights of the Respondent's other wives (who were at any rate not parties before the court) and thereby lost sight of the central issue in dispute which related to the rights of the Appellant and the Respondent over the subject properties. Further, the Learned Judge failed to appreciate that even if the interests of the Respondent's other wives were matters that could properly be taken account of, that the same could still have been done and thereby result in a proper and full determination of the matter.

7. The Learned Judge erred in holding that the dispute between the Appellant and the Respondent should have been resolved through the application of the *Mohammedan Marriage, Divorce and Succession Act*, Cap 156 of the Laws of Kenya when the acquisition of the subject properties occurred when the Appellant and the Respondent were not subject to the said Act.

8. The Learned Judge erred in failing to hold that in the circumstances of the matter there was no conflict between the *Mohammedan Marriage, Divorce and Succession Act*, Cap 156 of the Laws of Kenya with Section 17 of the *Marriage (sic) Women's Property Act, 1882* and that even if there was a conflict, the latter was to be preferred to the former."

14. As stated earlier, the emphasis on those grounds is the finding that Section 17 of the *Married Women's Property Act 1882* was not applicable and that the *Essa Case* was distinguishable and inapplicable in the circumstances of this case.

In his written and oral submissions Mr. Gikandi vehemently and passionately sought to persuade us that M, had worked so hard to acquire property between 1972 and 1999 before entering into a Muslim marriage, and had a legitimate expectation that she had a share in the matrimonial property, but by stroke of the pen, had been deprived of that property because she could not claim under the *Married Women's Property Act 1882*, or any other law. Under the Mohamedan Marriage, Divorce and Succession Act, all matrimonial property would go to B.

15. Mr. Gikandi referred to the finding by the trial court that there was a valid common law marriage between 1972 and 1999 and the finding that all the properties in issue were acquired within that period. In that case, he submitted, Muslim law did not apply and the Kadhi's Court did not have jurisdiction over the property since both parties did not profess the Muslim religion at the time. Only the *Married Women's Property Act 1882* could be invoked, and the court erred by invoking Muslim law to apply to a non-Muslim relationship. Even if, arguendo, there was a conflict of laws and the court was called upon to decide which one to apply, he submitted, the court must employ cannons of interpretation and give reasons for preferring one statute to the other, which the trial court did not do.

16. In his view, the starting point is always the *Constitution* which governs all laws and declares those that are in conflict with it as null and void to the extent of the conflict. According to Mr. Gikandi, the trial court made a grave error in reaching a decision which was contrary to the *Constitution* and was therefore a nullity. He submitted that the current *Constitution* which came into effect on 27th August, 2010 was applicable in this case because, despite the suit having been filed and substantially heard before that date, the judgment was delivered in September, 2011, long after the new *Constitution* took effect. The trial court should therefore have considered the provisions of Article 45(3) of the *Constitution*

which expressly declare equality of rights between parties to a marriage "at the time of the marriage, during the marriage and at the dissolution of the marriage". The Article recognizes that polygamous marriages, including Islamic marriages, and monogamous marriages are equal and the parties to such marriages enjoy equality throughout the marriage even upon dissolution thereof. He also referred to other constitutional provisions relating to the right to own property (Article 40), the right to dignity (Article 28) and the provision relating to equality and freedom from discrimination under Article 27. Article 2(5) & (6) of the *Constitution* which incorporates the general rules of international law as well as treaties and conventions ratified by Kenya as part of the domestic laws of Kenya was also referred to. Such treaties and conventions include, inter alia: the *Universal Declaration of Human Rights* (UDHR), the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Social, Economic and Cultural Rights*, (ICSECR), The *African Charter on Human and Peoples Rights* (ACHPR), and the *Convention on Elimination of All Forms of Discrimination Against Women* (CEDAW). All those conventions contain provisions that outlaw discrimination against women irrespective of their marital status and promote gender equality, especially in the enjoyment of all economic, social and cultural rights, he submitted.

17. Referring to the retired *Constitution*, Mr. Gikandi cited some Sections which protected the rights of women. Where those provisions were deficient, he cited several decisions of Kenyan courts which have applied the provisions of Conventions and Treaties which Kenya has ratified over time. Those decisions include *Mary Rono v Jane Rono & another* [2005] eKLR, *In the matter of Zipporah Wambui Mathara* [2010] eKLR, *Beatrice Wanjiku & another v The Attorney General & another* [2012] eKLR, *David Njoroge Macharia v Republic* [2011] eKLR; amongst others.

In the light of all the relevant Constitutional provisions and case law therefore, Mr. Gikandi submitted, it would not be difficult to make an objective decision between the Mohamedan Marriage, Divorce and Succession Act which permits the man to virtually take away everything that the couple had jointly acquired during their marriage whilst the woman is left holding almost nothing, and the *Married Women's Property Act 1882*, where each party's respective share in the matrimonial property is recognized. The latter, in his view, accords with the ends of justice.

18. Furthermore, he submitted, Section 3(3) of the *Judicature Act* which permits the application of the doctrines of common law and equity, would have been invoked in this matter but was not. The applicable equity doctrines would be "resulting trust" or "constructive trust" as was applied by the court in *N W K v J K M & another* [2013] eKLR. Citing *Halsbury's Laws of England*, 5th Edition Vol. 72 para 280, the Court in that case stated as follows:-

> "Subject to any express declaration of trust, where property is purchased in one party's name but both parties contribute to the purchase price, the other party acquires an interest under a resulting trust proportionate to his or her contribution to the purchase price, or alternatively may make a claim under a constructive trust. On such a claim the first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement or understanding reached between them that the property is to be shared beneficially. This common intention, which has been said to mean a shared intention communicated between them and which must relate to the beneficial ownership of the property can only be based on evidence of express discussion between the parties, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made, it will only be necessary for the party asserting a claim to a beneficial interest against the party entitled to the legal state

to show that he or she had acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or propriety estoppels."……

"A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.

The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive.

Where the evidence is that the matter was not discussed at all, the Court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage installment, will readily justify the inference necessary to the creation of a constructive trust."

19. He also cited *Godfrey Githere v George Kagia & 4 others* [2008] eKLR which adopted the definition of "constructive trust" from *Equity and the Law of Trusts* by Philip H. Pettit, 4th Edition Page 46, thus -

> "... a constructive trust is one imposed by a Court of equity regardless of the intention of the owner of the property. "In *Hussy v Palmer* [1972] 3 ALL ER 744, Lord Denning held that a constructive trust; "Is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the Court can enable an aggrieved party to obtain restitution."

20. Finally, Mr. Gikandi argued that the *Married Women's Property Act 1882* was a statute of general application which has previously been applied to monogamous and polygamous marriages, customary marriages and Mohamedan marriages, in many cases including but not limited to:

1. *Essa v Essa* [1995] LLR 384 (CAK)
2. *Tabita Wangeci Nderitu v Simon Nderitu Kariuki* [1998] eKLR
3. *Kivuitu v Kivuitu* [1991] KAR 241
4. *Karanja v Karanja* [1976] KLR 307.
5. *Neema Nungari Salim v Salim Ali Molla* [2006] eKLR

21. In his view, it was erroneous for the trial court to depart from the previous decisions of the Court of Appeal which were binding on it under the doctrine of stare decisis. The Essa decision in particular was ahead of its time since it is now in consonant with the provisions of our *Constitution* 2010 and the various international Conventions and treaties to which Kenya is a party. It underscores the equal treatment of parties to any marriage, be it Muslim, Christian, traditional or under any other faith. In

support of those submissions, he cited the High Court case of *FWM v MK* [2014] eKLR where an identical submission on the *Essa Case* was made by Mr. Balala, Advocate but was overruled by that court. He also cited the case of *Karanja v Karanja* [2008] 1 KLR 171 reiterating that the *Married Women's Property Act 1882* applied to any person whether married under customary law or not.

22. In response to those submissions, learned counsel Mr. Omar did not have any written submissions, but he equally vehemently sought to persuade us that the appellant had invoked the wrong jurisdiction and therefore the trial court did not shut the door of justice. In his view, the provisions of the current *Constitution* were not applicable in this matter since the old *Constitution* was there when the suit was filed. Under Section 66(1) of that *Constitution*, the Kadhi's Courts were established for "determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion". As found by the trial court, M and B were married under common law before M converted to the Muslim faith and the marriage was converted to a Muslim one. They also divorced under Muslim law. From all perceptions therefore, the two had entered into the domain of Muslim law which governed their affairs, including the fate of the property acquired during their marriage, whenever that was, and it did not matter that she had converted back to Christianity after divorce. Section 3(1) of the *Judicature Act* provides for the mode of exercise of jurisdiction by all courts and the primacy of the *Constitution* is spelt out followed by written laws, even before statutes of general application are considered. In his view therefore, the *Married Women's Property Act 1882* was not applicable in this case. In any event, he observed, the Act dealt with monogamous marriages while in this case there was evidence that Brek had six other wives, although he had divorced some.

23. As to the *Essa Case* which declared that the *Married Women's Property Act 1882* was applicable to all marriages, Mr. Omar submitted that the trial court was right to distinguish and not follow it for the reasons stated, and he urged us to overrule the *Essa Case* as a five-judge bench.

Analysis and determination.

24. Ordinarily, following the principles laid down in *Selle v Associated Motor Boat Co.* [1968] EA 123, this Court, in a first appeal, should analyse and re-assess the evidence on record and reach its own conclusions in the matter, by way of a retrial. But the case before the High Court was not decided on the merits. Other than examining the facts and determining whether M and B were married and the nature of that marriage, the trial court went no further after declining its jurisdiction in favour of the Kadhi's Court. No factual issues arise from the finding made on the validity of the marriage between M and B between 1972 and 1999. We must therefore confine our determination of the appeal to the twin legal issues as to whether the trial court is shown demonstrably to have acted on wrong principles in determining the applicable law and whether we must overrule the *Essa Case*.

What is the applicable law?

25. At the root of the issue is whether it was the High Court or the Kadhi's Court which has jurisdiction to determine the matter of distribution of the matrimonial property. As was stated by the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR:

> "A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.... The issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.....Where the

Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within this authority to prescribe the jurisdiction of such a court or tribunal by state law."

26. The first consideration therefore is, which *Constitution* applies even before we come to ordinary legislation? It was argued by Mr. Gikandi that the provisions of the new *Constitution* 2010 are applicable to the issues raised in this matter simply because the new *Constitution* was in place when the judgment of the High Court was delivered. Mr. Omar on the other hand argues that the matter is governed by the *Constitution* because it was filed and substantially heard before the promulgation of the new *Constitution*.

27. The issue of retroactive or retrospective legislation and *Constitution* was discussed by the Supreme Court in the *Samuel Kamau Macharia case* (*supra*), where the Court stated in relevant parts, thus:-

"*Black's Law Dictionary* (6th Edition) to which we have been referred, defines retrospective law as:

> "A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred."
>
> ... "As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (*Halsbury's Laws of England*, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it:
>
> (i) is in the nature of a bill of attainder;
>
> (ii) impairs the obligation under contracts;
>
> (iii) divests vested rights; or
>
> (iv) is constitutionally forbidden."

..."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*." (Emphasis added).

28. The suit before the High Court was filed three years before the promulgation of the *Constitution* 2010 and all the witnesses, except one had been heard. At the heart of the suit is the right to property which is claimed on both sides. We are asked to apply various Articles of the new *Constitution* because they come out strongly in favour of protecting the right to property, freedom from discrimination and gender equality. In line with the Supreme Court decision above, we think the application of those provisions may well affect the vested rights of the parties which accrued before the promulgation of the new *Constitution*. That would rule out its application to the matter before us, and, for that reason, we uphold Mr. Omar's submissions in that regard. Our reference to the *Constitution* henceforth will refer to the *Constitution*.

29. The mode of exercise of the jurisdiction of courts is provided in Section 3(1) of the *Judicature Act*, which states as follows:-

> "The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with—
>
> a. the *Constitution*;
>
> b. subject thereto all other written laws, including the Acts of Parliament of the United kingdom cited in Part I of the schedule to this Act, modified in accordance with Part II of that schedule;
>
> c. subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date;
>
> Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary." (Emphasis added).

30. There would be no difficulty in construing and applying those provisions, if only the marital status of the parties herein was straightforward. If their marriage was purely Muslim, and the property in issue was acquired during the currency of that marriage, the Kadhi's Court would be the most efficacious in handling and determining the dispute. If it was Christian or secular, and therefore monogamous, and the property was equally acquired during that marriage, the *Married Women's Property Act 1882* which is a statute of general application, would apply. Aspects of the doctrines of equity may also find application in the matter. But the dispute is not that clear cut, and therein lies the problem.

31. Mr. Gikandi argues, quite forcefully, that for 27 years between 1972 and 1999, M and B lived in a non-Muslim union and all the property in dispute was acquired during that period. Muslim law did not apply to that union and it cannot apply to determine the dispute over the property. The parties also divorced in 2007 and Mueni reverted back to her Christian religion. The Kadhi's Court would therefore have no jurisdiction over her.

On the other hand, Mr. Omar argues, equally forcefully, that the marital union the two had before they married under Mohammedan law in 1999 was converted and subsequently subsumed into the Muslim marriage they entered into. It continued to be a Muslim union, governed by Muslim law until it was dissolved under the same law. The matter of any property acquired during the currency of their

union since 1972 must therefore be subjected to Muslim law before a Kadhi's Court. According to him, the conversion of the first marriage was a complete game changer.

32. Was there a fusion of the two different marriages or were they mutually exclusive? We have examined the marriage certificate issued to the parties on their marriage before the Kadhi on 5th August, 1999. It states that the wife W M (R M M) was a "Virgin" when they married on 24th May 1995. For all intends and purposes, it was a new marriage and not a conversion of an existing marriage. There was no intention to convert an existing marriage. It is the trial court which found there was a common law marriage after hearing the evidence. We think on our part, that the trial court, faced with such complexity, should have opted for the law that best accords with the *Constitution* and was protective of the interests of both parties. There was no paucity of such laws and the *Kadhis' Courts Act*, Cap 11 was not an impediment as it did not oust the jurisdiction of the High court. It provides in Section 5 on Jurisdiction as follows:-

> "5. A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it." (Emphasis added)

33. The High Court would have concurrent jurisdiction. It would have examined the provisions of the old *Constitution* relating to discrimination and found the definition of it in Section 82(3) thus:-

> "In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed, or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description." (Emphasis added)

34. The reference to "or sex" was a late inclusion, in 1997, after strong jurisprudential winds started blowing all over the world championing gender equality. The court would have examined the relevant clauses in international treaties and conventions which Kenya had ratified and which our courts had declared were applicable in resolving any ambiguities. In the case of *Rono v Rono* (*supra*) the court stated in part:-

> "As a member of the international community, Kenya subscribes to international customary laws and has ratified various international covenants and treaties. In particular, it subscribes to the International Bill of Rights, which is the *Universal Declaration of Human Rights* (1948) and two international human rights covenants: the *Covenant on Economic, Social and Cultural Rights* and the *Covenant on Civil and Political Rights* (both adopted by the UN General Assembly in 1966). In 1984 it also ratified, without reservations, the *Convention on the Elimination of All Forms of Discrimination Against Women*, in short, "CEDAW". Article 1 thereof defines discrimination against women as: -
>
> > "Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and

> women, of human rights and fundamental freedoms in the political, economic, social cultural, civil or any other field."

In the African context, Kenya subscribes to the *African Charter of Human and Peoples' Rights*, otherwise known as the Banjul Charter (1981), which it ratified in 1992 without reservations. In Article 18, the Charter enjoins member States, inter alia, to: -

> ".....ensure the elimination of every discrimination against women and also ensure the protection of rights of the woman and the child as stipulated in international declarations and conventions."

35. The progressive provisions of the *Constitution* and the jurisprudence on the application of international treaties and conventions were vindicated by the current *Constitution* 2010, especially in Articles 2 and 45, and the new *Matrimonial Property Act*, 2013, which has declared the cessation of the application of the *Married Women's Property Act 1882*. The Constitutional provisions and the jurisprudence that went with it were, in our view, germane for discussion in this matter and could only have been effectively discussed under the forum of the *Married Women's Property Act 1882* which was invoked in the pleadings. We therefore find that the trial court erred in principle in failing to apply such laws and in declining the jurisdiction to determine the suit.

Is it time to overrule the *Essa Case*?

36. We think not.

In the first place, this is not the first time the issue was raised. It was raised in identical terms, apparently by the same Firm of Advocates, before Maraga J. (as he then was) in 2006 in the case of *Amina O. Abdulkadir v Ravindra N. Shah alias Raveen Mohammed Narshi* [2006] eKLR, thus:

> "Mr. Balala urged me to ignore the Court of Appeal decision in *Essa v Essa* (1996) EA 53 as the holding that the English Act applies to Muslims was not only obiter but also per incuriam. He said the court's jurisdiction to apply the English Act to Muslims was not challenged in that case as it is here. He contended that if the application of the English Act to the Muslims had been an issue in that case the court could have reached a different conclusion".

37. The learned judge resolved the issue as follows:-

> "I am unable to agree with Mr. Balala that the Court of Appeal decision in *Essa v Essa* (supra) is obiter. The claim in that case, as is the claim in this originating summons, was brought under Order 36 Rules 1 and 12 of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Act*, Section 28 of the *Matrimonial Causes Act* and Section 17 of the English Act. The Court of Appeal applied the principles enunciated by the English House of Lords' decision in Pettit v Pettit (970) AC 777, which was itself a decision based on section 17 of the English Act, and held that the English Act also applied to Muslims. I cannot therefore accept Mr. Balala's argument that the application of the English Act was not an issue in that case."

We do not know whether there was an appeal against that decision, but we think it was based on sound reasoning.

38. In this matter, the *Essa Case* was ignored by the trial court (Odero J.) for three reasons: that it was obiter and therefore had no binding value; that it does not apply to polygamous marriages; and that the *Married Women's Property Act 1882* was restricted to monogamous marriages. With respect, we do

not subscribe to those conclusions. There was nothing obiter about the pronouncement made by the Court of Appeal. The parties before it were both Muslim, which allows polygamy, and were disputing about matrimonial property. The Originating summons pleaded Section 17 of the *Married Women's Property Act 1882*. In the leading judgment, Omolo, JA, with whom Lakha, JA (a Muslim by faith, we might add!) agreed, quoted Lord Morris of Borthy-Guest in *Pettit v Pettit* [1970] AC 777, stating thus:-

> ".....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 entirely 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 signed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to the title to property, the question for the court was whose is this? and not "to whom shall this be given?"

Omolo JA then agreed with the Law Lord and added that "the *Married Women's Property Act 1882* was an Act of general application and applies to Muslims as it does to non-Muslims in Kenya". Several decisions have since faithfully followed that decision. The Act does not define marriage and, as stated in the authorities, Section 17 is about the question "as to the Title or possession of property" the nature of the marriage notwithstanding.

39. The Court of Appeal in *Echaria v Echaria* (2007) eKLR (five-judge bench) gave a detailed account and history of the application of Section 17 in Kenya, and noted that the said section gives the courts discretion to grant appropriate remedies upon ascertainment of the respective beneficial interest in a disputed property. It stated in part:-

> "The *Married Women's Property Act 1882* is, of course, an Act of general application in Kenya (see *I v I* [1971] EA 278; *Karanja v Karanja* [1976] KLR 307. Section 17 of the 1882 Act under which the originating summons was brought provides in the relevant part:
>
> > "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 disputes, and to the costs of and consequent on the application as he thinks fit". (emphasis ours).
> >
> > ...."
> >
> > "..All the Law Lords were in agreement, that disputes between husband and wife as to title to or possession of property brought under section 17 of 1882 Act must be decided by applying settled law to the facts as may be established just as courts do in ordinary suits between other parties who are not so married. The opinion of Lord Upjohn at page 989 paragraph E, F, G comprehensively and more lucidly states the law thus:
> >
> > > "In my view, section 17 is a purely procedural section which confers upon the judge in relation to questions of title no greater discretion than he would have in the proceedings began in any Division of the High Court or in county court in relation to the property in dispute, for it must be remembered that apart altogether from section 17, husband and wife could sue one another even before the 1882 Act over questions of property, so that, in my opinion, section 17 now disappears from the scene and the rights of the parties must be

> judged on the general principle applicable in any court of law when considering questions of title to property, and though the parties are husband and wife, questions must be decided by principles of law applicable to the settlement of claims between those not so related while making full allowances in view of that relationship.
>
> In the first place, the beneficial ownership of property in question must depend upon the agreement of parties determined at the time of acquisition. If the property in question is land there must be some lease or conveyance which shows how it was acquired. If that document declares not merely in whom the beneficial title is to rest that necessarily concludes the question of title as between the spouses for all time and in the absence of fraud or mistake at the time of transaction, the parties cannot go behind it at any time thereafter even on death or the break-up of the marriage".

Later at page 991 paragraph H, Lord Upjohn proceeded, thus:

> "But where both spouses contributed to the acquisition of property, then my own view (of course in the absence of evidence) is that they intended to be joint beneficial owners, that is so whether the purchase be in the joint names or in the name of one. This is a result of an application of resulting trust".....

Lastly, Lord Upjohn said relying on *Rimmer v Rimmer* [1953] 1 QB 63 that whether the spouses contributing to the purchase should be considered to be equal owners or in some other proportions must depend on the circumstances of each case."

40. We have said enough, we think, to satisfy ourselves that on the two issues raised before us, the trial court was in error. As stated earlier, the law applicable at the time the suit was filed was capable of disposing of the matter but was not applied. The architecture of the current law on the matter has, of course, drastically altered the landscape of matrimonial property disputes, but that is for the future.

Disposition

41. We allow the appeal and set aside the judgment and decree of the High Court. We further order that the matter be remitted back to the High court for hearing and determination of the Originating Summons filed before that court in accordance with the law. The re-hearing of the matter shall be before any Judge of the High Court other than Maureen Odero J. Considering the lapse of time since the taking out of the Originating Summons in 2007, we direct that the Originating Summons be heard expeditiously but in any event within six (6) months of this judgment. The costs of this appeal shall be borne by the respondent but the costs of the High Court shall abide the final outcome of the suit.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2015

P.N. WAKI

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

Explanatory note on delay:

This judgment was due for delivery on 7th November, 2014 but for several reasons, it was not possible to do so. First was the pressure and priority given to Election Petition judgments which had Constitutional deadlines. The attention of the parties was drawn to this possibility of delay. Second, in the month of November, 2014, the presiding Judge, with the authority of the Hon. The Chief Justice proceeded on annual leave and engaged in official duties as President of the Residual Special Court for Sierra Leone, which took him outside the country throughout the month. Barely two days after his return to Kenya on 30th November, 2014, his father who had been hospitalized passed on, and he was allowed to concentrate on funeral arrangements until the end of term. The Judgment, among others, was prepared during the Christmas vacation and is delivered at the first opportunity in the new year.

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

DEPUTY REGISTRAR