IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, GATEMBU & J. MOHAMMED, JJA)

CIVIL APPEAL NO. 226 OF 2012

BETWEEN

D E N…….....APPELLANT

AND

P N N …….….....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Karanja, J) Dated 19th July, 2012

in

H.C.C.C. No. 20 of 2011

****

JUDGMENT OF THE COURT

Introduction.

The appellant herein ***D E N*** (the appellant) filed an originating summons under section 17 of the Married Womens' Property Act in Nairobi HCCC No.20of 2011 dated the 27th day of April, 2011, directed against ***P N N*** *(*the respondent***).** The reliefs sought were as follows:-

> ***1. It be declared that the properties (movable and immovable) acquired by the joint funds and efforts of the appellant and the respondent being the following properties:***
>
> "(a) ***That all that parcel of Land known as House No.[particulars withheld] High View Estate Phase 11 L.R No. Nairobi Block [particulars withheld] be sold and the proceeds from the sale be shared equally amongst the petitioner and respondent.***
>
> ***b. That all that parcel of land known as LR. No. Nyandarua/Oljoro orok Salient / [particulars withheld] be disposed off and the proceeds from the sale be shared equally amongst the Petitioner and the Respondent.***
>
> ***c. That Motor Vehicle Registration Number [particulars withheld] make Nissan Saloon do remain the Property of the petitioner.***

2. ***That this Honourable Court be pleased to order the division of the said property in the manner proposed by the applicant herein above.***

3. ***That this Honourable court be pleased to grant such further or other reliefs as may deem just in the circumstances.***

4. ***That the respondent be condemned to pay costs of this application and incidental thereto."***

FACTS.

The originating summons was grounded on the grounds deposed in the supporting affidavit by the appellant that him and the respondent were formally married under the African Christian Marriage and divorce Act Cap 151 of the Laws of Kenya on the 29th day of December, 1990; the said marriage was formally brought to an end on the 30th day of December, 2010; the above mentioned properties had been acquired during the subsistence of the now dissolved marriage; it was only proper that the mentioned properties be sold with the exception of the mentioned motor vehicle which was to remain the property of the appellant, and proceeds resulting from such sales to be shared equally between the appellant and the respondent.

Valuation reports of the two main properties together with copies of their respective titles were annexed to the affidavit in support of the originating summons. According to the valuation reports Title No. Nairobi Block ***[particulars withheld]*** House No***.[particulars withheld]*** High View Phase II Estate had a value then of **Kshs.8, 000,000.00.** The copy of the title annexed bore the names of the appellant and the respondent. This property had been charged to Barclays Bank of Kenya Limited to secure a loan facility of **Kshs. 1,000,000.00**. The chargee's rights under **section 83 and 84** of the Registered Land Act had been reserved.

The second property, Title number Nyandarua/Oljoro orok Salient/ ***[particulars withheld]*** located at Kasiku Shopping centre on the outskirts of Nyandarua District, was valued at **Kshs.1, 250,000.00.** as at 30th day of March, 2011**.** The copy of the Title document exhibited indicates that the title was held in the joint names of the appellant and the respondent.

The respondent filed her response to the originating summons by way of a replying affidavit deposed on the 26th day of July, 2011 asserting that all the subject properties were acquired through her sole efforts and not the joint efforts as had been deposed to by the appellant; she had been an employee of Barclays Bank for eleven (11) years prior to her marriage to the appellant; she earned a salary from her employer; it is against the security of her earnings with her then employer that she secured a staff home loan and purchased property Title No. Nairobi Block [particulars withheld] house No. [particulars withheld] High View Estate which subsequently became the matrimonial home; she has solely been meeting the mortgage installments repayments on the suit property. Further that she also took a further loan of **Kshs. 1,000,000.00** for purposes of making improvements on the suit property. This second loan was still outstanding as at the time of her retirement from her employment in the year 2000; she had continued to solely service the said loan and a portion of about **Kshs.898, 089.85** was still outstanding as at the time the appellant moved to Court to initiate the litigation culminating in this appeal. she and the issues of the marriage reside on this property.

Turning to the Nyandarua/Oljoro orok Salient/ ***[particulars withheld]*** property, the respondent deposed that the proceeds used to acquire this property were part of the staff loan she had obtained from her employer to purchase the Nairobi property. The other property was the motor vehicle ***[particulars withheld]***, Nissan. This was awarded to the appellant. There is no cross appeal against that award. There is therefore no need for us to revisit arguments relating to its ownership.

Turning generally to the financial contribution of the appellant towards the acquisition of the subject properties in particular and the family expenses in general, the sum total of the respondents contention was that the appellant contributed nothing substantial. The lions share of the purchase price and the familys' upkeep expenses were largely shouldered by the respondent. The respondent annexed bank

statements evidencing loan re-payments for the years 2004 and 2010; payments made out to amazing Tours & Travel; an affidavit the appellant had allegedly deposed intending to divest his share of the ownership in the Nairobi Property in favour of the respondent but later changed his mind.

In response to the respondent's deposition, the appellant filed a further affidavit deposed on the 3rd day of August, 2011 and filed on the 5th day of August, 2011. In it, the appellant countered the respondent's deposition in summary deposing that he has been a good family man; a provider, participated fully in the loan repayments right from the acquisition of the subject loan. He exhibited documents showing that he had been making deposits into bank accounts number ***[particulars withheld]*** and ***[particulars withheld]*** from which the loan for the purchase of the matrimonial home were serviced. He denied the respondent's assertion that she and the issues of the marriage reside in the Nairobi property and for this reason they would be prejudiced if it were to be sold. To the appellant two of the issues are adults while the other two are away in boarding school. As for the Nyandarua property, the appellant maintained that he took a loan of **Kshs. 350,000.00** which was applied towards the purchase of this property.

GROUNDS OF APPEAL.

Parties elected to proceed by way of written submission resulting in the judgment of ***Karanja, J*** (as she then was) of 19th July, 2012. The appellant was aggrieved by that judgment and he has appealed to this Court citing five (5) grounds of appeal. These reads:-

"(1) That the Honourable Judge of the superior Court erred in law by ordering alteration of title to land in contradiction of order 21 rule 6 of the Civil Procedure Rules 2010.

(2) That the Honourable Judge erred in fact by finding that the respondent and the issues are occupying the matrimonial home whilst the evidence presented by both parties indicated otherwise.

3. ***That the Honourable Judge of the Superior Court erred in both the law and fact in finding that the respondent had custody of the children.***

4. ***That the Honourable judge of the superior Court erred by failing to exhaustively scrutinize the pleadings and annextures thereto.***

That the Honourable Judge of the superior court erred by basing her finding on extraneous issues that do not involve matrimonial property.

In consequence thereof, the appellant sought from this Court orders that:

a. ***That the judgment herein be set aside and the Honourable court orders equal division of the matrimonial property.***

b. ***That the appellant do have the costs of the Appeal.***

SUBMISSION ON APPEAL.

On the day fixed for the hearing of the appeal, only the appellant and his learned counsel ***Mr. C.N. Kihara*** attended court. The court being satisfied that the respondent and her counsel on record had due notice of the hearing date allowed the Appellant to proceed *exparte*. In a brief submission to Court, ***Mr. Kihara*** urged us to allow the appeal on the grounds that it was not in dispute that parties had legally married and divorced as at the time of the initiation of the litigation giving rise to this appeal; the Nairobi and Nyahururu properties were registered in the joint names of the parties with no specification of the mode of share holding endorsed against the titles; what was in dispute was the share contribution of either party towards the acquisition of the suit properties; this court should believe both the depositions and the documents annexed to those depositions by the appellant as demonstrating joint contribution of both parties towards the purchase of the suit properties; the Court was urged to find that the appellant had

sufficiently rebutted the respondents assertion of sole contribution towards the purchase of the suit properties. For this reason argued ***Mr. Kihara*** the learned trial judge fell into an error when she misapprehended the facts and misapplied the applicable principles of law to the division of matrimonial property and therefore arrived at a wrong conclusion, borne out by the fact that it was not shown how the learned Judges' figure of **Kshs. 1,000,000.00** compensation to the appellant by the respondent had been arrived at as it was not borne out by the depositions of either party or the documents relied upon by either side.

CASE LAW CITED ON APPEAL.

On case law, the appellant referred us to the decision in the case of ***Karanja versus Karanja [1976] KLR 307*** for the proposition that the absence of an agreement or intention that the contributing spouses share beneficially in the property does not exclude the imputation of such an intention as this would depend on the law of trusts which does not make any distinction between direct and indirect contribution. The decision in the case of ***Kivuitu versus Kivuitu [1991] KLR 248*** for the proposition that registration of property in the joint names of husband and wife means that each party owns an undivided equal share therein. The decision in the case of ***Nderitu versus Nderitu [1995-1998] 1EA 235 (CAK)*** for the proposition that for a wife (spouse) to succeed in a claim over matrimonial property she only needed to show that she was married to the husband at the time of lodging her claim; (ii) that the property was acquired during the subsistence of the marriage and that she had contributed either directly or indirectly to the acquisition of the subject property.

THE COURT'S MANDATE.

This is a first appeal. Our mandate is as set out in **Article 164(3)** of the Constitution of Kenya 2010, **Section 78** of the Civil Procedure Act, Cap 21 Laws of Kenya, **section 3** of the Appellate Jurisdiction Act Cap 9 Laws of Kenya and **Rule 29(1)** of this Court's Rules. It is to re-appraise the facts before us and draw inferences of fact.

See also the decision in the case of ***Selle and another versus Associated Motor Boat Company Limited & 2 others [1968] EA 123*** wherein, it was observed inter alia thus:-

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular, this Court is not bound necessarily to allow the trial Judge's findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probability materially to estimate the evidence or if the impression based on the demeanor of the witness is inconsistent with the evidence in the case generally"***

DETERMINATION.

The appellants grounds of appeal can be clustered into the following:-

1. *Whether the learned trial Judge's judgment contravened the provisions of order 21 rule 6 of the civil procedure Rules 2010, and if so what consequences flow from such a contravention?*

2. *Whether the learned trial Judge fell into an error when she made a finding that the respondent and the issues of the marriage were living in the matrimonial home?*

3. *Whether the learned trial judge took into consideration extraneous matters foreign to matrimonial property proceedings when determining issues in controversy before her?*

4. *What order commends itself to us in the disposal of this appeal?*

Determination of issue No.1.

Order 21 rule 6 of the Civil Procedure Rules provides:-

> ***"Where there is a prayer for a judgment, the grant of which would result in some alteration to the title of land registered under any written law concerning the registration of title to land, a certified copy of the title shall be produced to the court before any such judgment is delivered."***

The requirement in this provision appears to be mandatory by reason of the use of the word "shall". It is also correct that the learned trial Judge did not call for certified copies of the two subject titles before a pronouncing the judgment. We however find that this default in the peculiar circumstances of the litigation did not operate to vitiate the judgment under review.

Our reason for finding so are that, the respondent did not contest the authenticity of copies of the title documents exhibited by the appellant to his originating summon which is sufficient proof that both parties accepted the authenticity of copies exhibited.

The learned trial Judge did not only take note of these but also authenticity when she inter alia observed thus:-

> ***"He has annexed the copies of the title deeds and lease certificate for the two properties which show that the same were are registered in their joint names as joint proprietors."***

We believe that the mischief intended to be served by this rule was to prevent a court of law from making orders in vain by reason of such orders being made with regard to non existent land. We find that since both parties agreed to proceed on the basis of the affidavits and to make submissions thereon and did not controvert the existence of the actual properties and the authenticity of the title documents, it is safe for us to rule that failure to exhibit or call for a certified copy of the two subject titles did not in any way operate to vitiate the pronouncement of the judgment. We dismiss this complaint.

Determination of Issue No.2.

With regard as to who was living in the matrimonial home, we find that the appellant's affidavit in support of the originating summons made no mention of the status of the issues of the marriage. It is the respondent who brought out the issue of the issues of the marriage in her depositions in paragraphs 10, 19, 20,21,25,26 and 29 of the replying affidavit.

> "***Paragraph 10 that I utilized my earnings to contribute directly to the purchase of the property in question and also to feed, clothe , pay all conservancy, bills and provide all daily necessities of the children of the marriage.***
>
> ***Paragraph 19: that I purchased the said house for the issues of the children who have lived in the said house from birth and know not any other home.***
>
> ***Paragraph 20. That I have been granted custody of the children and selling the house would prejudice the children.***
>
> ***Paragraph 21. That I have continued to provide for the children single handedly even after the divorce.***
>
> ***Paragraph 25 that through the order dated 30th December, 2010 I was given the custody of the children.***
>
> ***Paragraph 26. That prejudice will be caused to the welfare of the children if the matrimonial house No.[particulars withheld] High view Estate Phase II L.R. No. Nairobi Block [particulars***

withheld] is sold as the children will have no place to live.

Paragraph 29. That it behoved the petitioner to prove his contribution in the acquisition of the matrimonial property, rather than argue that the property be sold. It is clear from his averments that he does not care about the welfare of the issues of the marriag*e *and that he was merely in the marriage to see what he could gain from it.

In response, the appellant had this to say in paragraphs 25,26,32,33,34,38.

"Paragraph 25. That two of the issues of the marriage are adults, the last two are minors in a boarding school and currently residing with the mother or me during the vacation.

Paragraph 26. That it is not true that the respondent is single handedly providing for the children as alleged. Indeed I have medical insurance policy for all the children. Attached hereto are letters in confirmation of the same.

Paragraph 32. That the custody of the children as granted by the children's court is with me and indeed the divorce court did not have jurisdiction to give custody to the respondent knowing well that custody had been granted to me by the childrens' court. Attached is a copy of the order of custody granted to me marked as DER 14."

Paragraph 33. That as per the valuation report of the parcel of land number Nairobi Block [particulars withheld], the same is worth 8,000,000 and once the proceeds of sale are realized I intend to purchase a house and in any event no prejudice shall be caused to the children since they are currently residing with the respondent and spent most of their time in the boarding school and they can still reside with me.

Paragraph 34. That further the issue before the honourable court is in regard to the matrimonial property not the children of whom two of them are adults.

Paragraph 38. That on issue of children I attached and mark as "Den 15". Copies of school fees receipts paid by me, electricity bills and water bills paid by me in proof of the fact that I was maintaining my family."

In response to the above competing averments the learned trial Judge made the following observations:-

"***In this case I note that there are children who are involved and who are still depended on the respondent. According to the petitioner in his further affidavit, two of the issues of the marriage are adults and the other two are minors. He has not told us whether the adults are living independently from the respondent. He has however conceded that there are two in boarding school and when the schools close, they live with the respondent. His contention is that, even if the matrimonial home is sold, they shall not be inconvenienced as they spent most of the time in boarding school. I must say I find that averment in extreme bad taste as it is an overt admission on the part of the petitioner that he does not care where his own children will stay when they are away from school."***

Was the learned trial Judge in error when she made the above observations? Our response is in the negative. The appellant in his further affidavit as set out above acknowledged that the respondent and the issues of the marriage were living in the matrimonial home at the material time save for the mention that two of the issues of the marriage were adults while the remaining two were minors who were in boarding school. As opined by the learned trial Judge, the appellant was non committal about the status of the adult children as he did not indicate whether these were independent though still staying with the respondent. We see no reason to depart from the stand taken by the learned Judge given the material placed before her. We therefore find nothing on the record to counter the respondents assertion that the adult children were still living in the matrimonial home.

As for the minor issues of the marriage, we find sufficient admission in the appellants deposition that these indeed needed the support of both parents; that these had an option to stay with either parent and since the appellant deposed that indeed the respondent was the one staying in the matrimonial home, we have no doubt that this is where the respondent lived with the minor issues of the marriage during their school holidays. On the basis of the above reasoning, we find no fault in the learned trial Judge's finding that the respondent and the issues of the marriage were living in the matrimonial home. We therefore find no merit in this complaint. It is also accordingly dismissed.

Determination of issue number 3.

Regarding the complaint that the learned trial Judge based her findings on extraneous issues, we understand the appellant to be saying that the Court was wrong to consider the fact of issues of the marriage living in the matrimonial home) as a major consideration when she declined to accede to the appellants request that the matrimonial property should be sold and proceeds shared. This is what the learned Judge observed:-

> ***"In determining the distribution of this property thereof, I cannot close my mind to the fact that there are children in this matter who also call for the protection of this court as repository of justice. The court has to determine this matter while being fully consciously of the best interests of the said children. They are entitled to shelter to food education etc."***
>
> ***....***
>
> ***Since the respondent and the children are the ones in actual possession, the same will remain in the hands of the respondent. This is the only way of ensuring a home for the issues of the marriage. Under Article 53(2) of the constitution of the Kenya 2010 a Child's best interest are of paramount importance in every matter concerning the child. The constitution which is the supreme law of this land therefore mandates and commends me to put the interests of these children before those of their parents. Further the same constitution at article 53(1) (1) (e) gives every child a right to parental care and protection equal responsibility of the mother and the father to provide for the child; whether they are married to each other or not. The petitioner should not therefore feel harassed if he has to give up part of his entitlement to the matrimonial house for the sake of the children"***

The Applicable Law.

The originating summons was laid under the provisions of section 17 of the married Women Property Act 1882. The position in law has now changed as at now.

The Preliminary Issue which we have to determine is which law then applies? The Matrimonial Property Act No. 48 of 2013 which came into effect on 16th January, 2014 is currently the legislation that provides for the rights and responsibilities of spouses in relation to matrimonial property. S19 of this Act expressly provides for the cessation of the operation of the Married Women Property Act 1882.

In **S.R.W. –*v*- S.W.** (Civil Suit No. 62 of 2006) The High Court Observed. *Inter alia thus*:

> *The suit is predicated upon section 17 of the Married Women's Property Act 1882. This was a section of general application which was applicable in Kenya. The Act is now repealed by the Matrimonial Property Act (Act No. 49 of 2013) However, since the suit was filed before the enactment of Matrimonial Property Act, it will be determined on the basis of the law as it was then applicable.*

As to the general issue of the application of the law retrospectively/retroactively the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** observed: *"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)"

From the above we can decisively conclude that although it is no longer in operation in this jurisdiction the Married Women's Property Act (1882), is the applicable law to the determination of this appeal. In the case of ***Rose Mueni Musau versus Brek Awadh***

Mbarak Nairobi CA No.267 of 2011 (UR) a bench of five eminent judges of this Court revisited case law of this same court on the applicability of this provision and made observations thereon. With regard to ***Pettit versus Pettit [1970]*** **Lord Morris** with approval expressed himself 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 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 negativse 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 title to property, the question for the court was whose is this? And not to whom shall this be given?"***

In further reference to the decision in ***Echaria versus Echaria [2007] eKLR*** the following lengthy extract was set out.

> "***The Married Women property Act 1882 is of cause an act of general application in Kenya. (See IV.I [1971] EA 278; Karanja versus 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 summon or otherwise in summary way to any judge of the High Court of justice.... and the judge of the high court may make such orders with respect to the property in dispute, and to the costs of and consequent on the application as he thinks fit"***
>
> ***...***
>
> ***...All the law Lords were in agreement that disputes between husband and wife as to the title or possession of property brought under section 17 of 1882 Act must be decided by applying settled law to the facts as just as courts do in ordinary suits between other parties who are not so married. The opinion of Lord Upsohnet page 989 paragraphs 2, F, G comprehensively and more Lucid 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 proceedings began in division of the High Court or a county court in relation to the property in dispute, for it must be remembered that a part altogether from section 17, husband and wife could sue one another even before the 1882 Act over question 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, questionss must be decided by principles of law applicable to the settlement of claims between those not so related while making full allowance 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 test 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."*

The above assessment of case law on the application of section 17 of the Married Women Property Act as analyzed in the case of ***Rose Mueni*** (supra) is indicative of the fact that this provision therefore gives a judge the authority to *"make such order with respect to the property in dispute and as to the costs of and consequent on the application* ***as he thinks fit****." T*he foregoing observation notwithstanding, Section 17(supra) and the case law on its application are silent as to the considerations which the court is to bear in mind when making orders in relation to the presence of children of the marriage who may be needing the use of matrimonial property intended to be disposed off in the cause of distribution. The upshot of this is that the Act gave the court wide discretion in making orders concerning the distribution of matrimonial property only and not with regard to the may be attendant issue of presence of children of the marriage.

Therefore our understanding of the principles set out above is that in disputes falling for determination under the section 17 of the 1882 Married Women property Act procedures, all that a court of law seized of the dispute is required to do is to establish the following:-

i. That the disputing parties are spouses.

ii. That the property is claimed as matrimonial property.

iii. That there is therefore need to determine whose property it is.

iv. Where there is a title document in place then this spells out clearly the owner of the property and a court has no business to go round that title.

1. Is the fact that the Respondent is residing in the matrimonial property with the children of the marriage a relevant consideration in the division of matrimonial property? Section 17 of the 1882 Married Women Property Act *inter alia* as follows:-

   In any question between husband and wife as to the title to or possession of property, either party,... may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England (as the case may be) and the

   Court may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit.

Our construction of this provision vis avis the status of the presence of the issues of the marriage at the time of division of matrimonial property is that although there is no specific provision that this be one of the factors to be taken into consideration, it leaves sufficient room for the court to consider them where necessary so long as this does not form part of the factors used to determine the percentage shareholding of each spouse. This may be limited to the determination as to whether the matrimonial home if that is where the issues of the marriage reside with either spouse should be sold or not.

As to the important role of the "matrimonial home" and the interest of children in its division, Frances Burton in her book "Family Law" states as follows:

The fate of the matrimonial home will usually be the linchpin of any ancillary relief package for the simple reason that every family needs somewhere to live: whether it is to be sold, transferred outright to one party or made the subject of a deferred settlement the fate of the home will have a profound effect on the remainder of the provision ordered. It is therefore usual in our contemporary homeowning times for the court to view the resolution of the various competing claims to what may loosely be termed the 'matrimonial assets' (although in English law there is technically no such thing) by making one order dealing with all aspects of the parties' ancillary relief applications, and unless there is (rarely) no former joint home involved, to build their order holistically around the disposal of the home. This highly discretionary duty of the court to make appropriate orders in relation to the home has developed naturally as a consequence of the post-war expansion in home ownership generally, and also from the development over the past 25 years of the trend towards regarding marriage as an equal partnership, the routine joint tenancy of the matrimonial home and of the normality of the wife's working in order to help

fund the mortgage payments and the expenses of bringing up a family which appears no longer to be possible out of one salary.

Within the spirit of these social trends, and the letter of the Matrimonial Causes Act (MCA) 1973, the outcome of the dilemma surrounding the destination of the home may well be decided at the outset by the court's duty under s 25(1) to give first consideration to the welfare of the minor children of the family . (emphasis added) Alternatively, there may be considerable choice as to the precise manner in which the parties' assets should be distributed, but whichever is the case it will usually be easier to put the overall package together if a practical decision is reached first about the home. This is especially so as, with the possible exception of the husband's pension rights which have only recently received anything like the same attention from either the law or the parties as the importance of the disposal of the home, the home will usually be the parties' most valuable asset.[1]

Article 53 of the Constitution provides that every child has the right to parental care and protection and to be protected from abuse and neglect. It is arguable that one way of ensuring this is to give prominence to the rights of children when dividing matrimonial property. The High Court of Kenya in **P.M.M v S.M [2013] eKLR** has also considered the best interest of a child when giving orders with regard to the division of matrimonial property. In this case the court stated: *inter alia* thus:

It is also clear that the Loresho house was bought with the intention of having it as the matrimonial home since it was acquired upon their return from Saudi Arabia and they proceeded to move in there. In determining to whom this house should be allocated, 1 Frances Burton, Family Law (2003 Cavendish) 249 *I must say something about the child, P. PM is an autistic child who is in the custody of the Applicant. P. has a structured programme which he follows everyday and he is constantly checked by an assistant. He is also severely impaired in language and social skills. The structure of the house has been changed severally in order to accommodate this child's condition. I am therefore in agreement that this house should be retained by the Applicant for the sake of this child's needs. It offers a peaceful environment for P. because he is accustomed to living in there. It would therefore not be in the best interest of this child to interrupt his life as the parties fight over properties.*

The "best interest" principle was also applied by the High Court in **MNM v DMN [2012] eKLR** whereby the court refused to commit the Respondent therein to prison for failing to honour court orders in a division of matrimonial property case; as doing so would have not been in the children's, who were in the Respondent's care, best interest.

In **Peter Ndungu Njenga v Sophia Watiri Ndungu [2000] eKLR** the Court of Appeal noted that the introduction of children's interest in an action for the division of matrimonial property was being used as a "*red herring"* as all the children of the parties were adults.

From these decisions we can deduce that if the children are not adults, as in our present case, then perhaps the courts may look more favourably on an argument which considers their best interest. We appreciate the above High Court decisions have no binding effect on us. We however found it fit to interrogate them because they touched on the core issue in controversy before us. The issue under consideration is whether the learned trial Judge should or should not have taken into consideration the welfare of the issues of the marriage when she moved to save the matrimonial home from being sold.

We have no doubt that is why she drew inspiration from **Article 53(2)** of the Constitution 2010 and rightly opined that a child best interests are of paramount importance in every matter concerning a child (see also section 4(2) of the children's Act). The only point of departure by us is that at the trial, the learned judge was not dealing with matters touching on children perse. Neither are we. The issue was and still is division of matrimonial property.

Looking at the above assessment of case law on the **section 17** of the Married Women Property Act (supra) and considering that the court has discretion under that provision to make orders that it thinks fit, we take the view that the interests of children is a relevant consideration in determining the appropriate orders to make under **section 17** bearing in mind the peculiar circumstances of each case which must be

considered. We therefore find no fault in the learned trial Judge's move to take note of the fact that the respondent was at the material time residing in the matrimonial home with the issues of the marriage.

The question we have to ask ourselves now is whether the learned trial Judge over stepped the parameters set out above? Our response is in the negative. Our reason for saying so is that a proper reading of the observations, made out above by the learned trial Judge with regard to the issue of the need to spare the matrimonial home from sale on account of the respondent and the issues of the marriage were residing in it was confined to the issues as to whether the matrimonial property should be sold or not considering that the appellant had requested that it be sold without according to the respondent mentioning as to where the issues of the marriage were to be relocated to on the one hand, and the respondents plea that it be spared as a home for the respondent and the issues of the marriage as it has always been on the other hand. This had nothing to do with the percentage share holding of each disputing spouse in the said property.

Likewise, we find nothing in the case law principles assessed above which prohibits spouses or any of them making issues of the welfare of children part of the factors to be considered when determining as to whether to dispose of the property or not where matters of the disposal of the subject property are under consideration like in the matter before us. In this regard, we are satisfied that no extraneous matters were taken into consideration when determining the appropriate reliefs to grant in this suit. We therefore find no merit in this complaint also. It is also dismissed.

Determination of issue number 4.

As for the last issue, the order that is required of us is that dealing with the re-distribution of the subject suit property. When the appellant moved to seek the courts intervention, he fully placed reliance on depositions in his supporting and further affidavit. These indicated clearly that he accepted the fact that the properties were jointly registered, and jointly owned and all that he sought from the court was an order that since both him and the respondent had equally contributed towards the acquisition of the subject properties, then these should be sold and the resulting sale proceeds shared equally between them. It is the respondent who raised the issue of sole contribution towards the purchase of the suit properties in paragraph 12, 16 and 22 of her replying affidavit.

In her assessment of the rival facts relied upon by either side, the learned trial judge first made general observations; drew inspiration from principles of case law namely ***Kamore versus Kamore [2000]IEA81*** for the proposition that the fact that the property is registered in the joint names means that each party owns an undivided share therein; ***Kivuitu versus Kivuitu (supra);*** the decision in ***Essa versus Essa*** Civil Appeal number 1010 of 1995 (UR) for the proposition that where property acquired during the subsistence of the marriage is registered in the joint names of the spouses, the law assumes that such property is held by the parties, in equal shares save that there is no presumption that such property must be treated as being jointly owned by the parties.

Applying the above principles to the rival arguments before her, the learned Judge proceeded to make the following specific observations thereon.

> ***"These arguments lead to the inevitable conclusion that although in this case, the specific contribution of each spouse to the purchase of the two properties has not been established, they had a clear intention that the two were meant to be matrimonial property and thus jointly owned. If their intention were different; they would have specified the share of each into the property***
>
> ***....***
>
> ***My finding on this matter is that the two properties are jointly owned by the parties herein in equal shares"***

It was upon arriving at the conclusion that the property was jointly owned by the disputing parties in equal shares that the learned Judge embarked on the distribution exercise but before doing so the

following observation was made:-

> ***"As noted earlier the proposals made by the parties on the distribution are diametrically opposed and it is not easy to find a mid-way ground. As stated elsewhere in this judgment every case has its own peculiar circumstances which have to come into play when the final decision is made.***
>
> ***....***
>
> ***The starting point in tackling this task is that the family house will not be sold."***
>
> ....

On the basis of the observations and reasoning made above on the totality of the evidence before her, the learned trial Judge handed out the following orders:-

1. ***That the matrimonial home i.e House No.[particulars withheld] High View Estate Phase [particulars withheld] No. Nairobi Block [particulars withheld] remains with the respondent herein. The same should be transferred to her upon discharge after she complete paying the Kshs.1, 000,000.00 she has charged it for.***

2. ***In return she will forfeit her rights in LR. No. Nyandarua/Oljororok salient [particulars withheld] transferred to the petitioner.***

3. ***The respondent refunds the petitioner, Kshs.1,000,000.00 Kshs. To compensate him for losing claim on the matrimonial property and also taking into account the disparity in value between the two properties. The petitioner name not to be removed from the title documents until the said money is paid.***

4. ***.....***

5. ***Each party to bear on costs.***

These are the orders that the appellant has invited us to overturn. We have given due consideration to the learned judges orders set out above in the light of her reasoning before arriving at those orders and we are in agreement that the learned trial Judge properly directed her mind to the facts and arrived at the correct conclusion thereon *inter alia* that:

> "***although in the case before her specific contributions of each spouse towards the purchase of the two suit properties had not been established they had a clear intention that the two suit properties were meant to be matrimonial property and thus jointly owned".***

Turning to the law, we are also in agreement that the learned trial judge properly drew inspiration from the decision in the case of ***Kamore versus Kamore (supra) and Kivuitu versus Kivuitu (supra)*** as giving the correct proposition in law that the fact that the property is registered in the joint names of the disputants it meant that each party owns an undivided share there in; and, two, that the law assumes that such property is held by the parties in equal shares.

With the above in mind, all that was expected of the learned trial Judge was to share the suit property equally between the two disputants but bearing in mind the disparity in their market values then as borne out by two valuation reports, one for each property and which the respondent had not countered, notwithstanding, her resolve that the matrimonial property would remain with the respondent while the Nyandarua property would go to the appellant. Based on the valuation reports the matrimonial property has a higher value than the Nyandarua property hence the need to compensate the appellant for the short fall in equal value on the Nyandarua property so as to ensure that in the end each party got an equal share of the joint value of the two suit properties. Instead the learned Judge ordered that the respondent be

compensated for the shortfall on the value on the Nyandarua property by way of payment of Kshs. 1,000,000.00 by the respondent to the appellant without explaining in the body of the judgment how the Kshs. 1,000,000.00 had been arrived at. A correct approach should have been for the Judge to total up the two values attached to the suit properties, and then give each an equal half share of the total value of the two properties. Had she done so, and using as she did the values indicate in the valuation reports, we are sure she would have found that the appellants correct share entitlement from the total value of the suit properties would have been **Kshs.4,625,000.00,** thereby giving the appellant a compensation entitlement from the respondent to the total tune of **Kshs.3,375,000.00** as the amount forming the excess amount over and above the respondent's equal half share entitlement of the matrimonial property.

By reason of the above assessment we are satisfied that there is justification in the appellant inviting us first to affirm that the suit properties were matrimonial property jointly owned by the appellant and the respondent and each beneficiary is entitled to a share of the same, in equal shares and then proceed to make appropriate orders giving him his equal share of the correct half share value in the suit properties.

In embarking on the above exercise we have to bear in mind the fact that the suit properties were valued on the 29th March, 2011 for the Nairobi property and on the 30th March, 2011 for the Nyandarua property. As mentioned herein earlier on the respondent raised no objection to the said valuations. We are therefore in agreement that the value attached to these properties as per the valuation reports were a correct representation of the value of the suit properties then. We take judicial notice of the fact that value of property may not be static and may fluctuate upwards or downwards as the case may be depending on the external market price. The key consideration herein is for us to determine which is the best way to proceed in the best interest of justice to the parties but within the law. We have to decide whether we should go by the values attached to the suit properties as at the time of the initiation of the litigation or as to be presently valued. In doing so, we have to bear in mind the wishes of the owners of the litigation who are the appellant and the respondent.

The appellant has displayed before us his pleading which is the memorandum of appeal and the prayers attendant thereto. We find nowhere in these any invitation to us to order a re-valuation of the suit properties before embarking on redistribution. There was no cross appeal by the respondent either. At the hearing it is only the appellant and his learned counsel who appeared in court. Once again there was no request to us to look beyond the valuation reports on the record when re-determining the share entitlement of the appellant. The question we have to ask ourselves is whether we have jurisdiction to act *suo moto* and call for current valuation reports before redetermination of the appellants share entitlement.

Generally, the law is that the courts would determine a case on the issues that flow from the pleadings and judgment would be pronounced on the issues arising from the pleadings or from issues framed for courts' determination by the parties. It is also a principle of law that parties are generally confined to their pleadings unless pleadings were amended during the hearing of a case. See the case of **CHALICHA FCS LTD v ODHIAMBO & 9 OTHERS** [1987] KLR 182 for the proposition that *"Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings;* the case of **GALAXY PAINTS CO. LTD. – VS - FALCON GUARDS LTD.-** EALR (2000)2 EA 385 for the proposition that the issues for determination in a suit generally flow from the pleadings and a court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination; the case of **ANTHONY FRANCIS WAREHAM & OTHERS v KENYA POST OFFICE SAVINGS BANK CA 5** and **48 of 2002.** This Court held that a court should not make any findings on matters not pleaded or grant any relief which is not sought by a party in the pleadings; lastly the case of **Greenfield**

Investment Limited v Baber Alibhai Mawji-Civil Appeal No. 155 of 2004, for the proposition that *"..A court of law cannot pluck issues literally from the air and purport*

to make determinations on them. It is the pleadings which determine the

issues determination

for ..."

This same principle has been expounded in other commonwealth jurisdictions. See the case of **WESTERN STEEL WORKS V. IRON & STEEL WORKER UNION** (1987) 1 NWLR (pt 49) 284 at 304; **ONYESOH V. NNEBEDUM** (1992) 3 NWLR (pt 229) 315 and **OLOWOSAGO V. ADEBANJO** (1988) 4 NWLR (pt 88) 275 for the proposition that: *"It is now well settled that issues for determination formulated in any appeal must be related to or arise not only from the grounds of appeal filed by the Appellant but also "must be" traced to the judgment or decision being appealed against.."*

Malawi Supreme Court of Appeal in MALAWI RAILWAYS LTD Vs. NYASULU [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings." The same was published in [1960] Current Legal problems, at P174 whereof the author had stated;

> ***"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….***
>
> ***In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."***

The Ugandan case of LIBYAN ARAB UGANDA BANK FOR FOREIGN TRADE AND DEVELOPMENT & ANOR Vs. ADAM VASSILIADIS [1986] UG CA 6 where the Uganda Court of Appeal (judgment of Odoki J.A) cited with approval the dictum of Lord Denning in JONES Vs. NATIONAL COAL BOARD [1957]2 QB 55 for the proposition that: ***"In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries."; the*** Nigerian Supreme Court in the case of ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, as follows; ***"….it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."; the case of*** the Privy Council in **Atta Md. v. Emperor**, AIR 1930 PC 57 (1 for the proposition that when no plea is taken in the pleadings, no evidence can be looked into in relation thereto; **In Ram Sarup Gupta v. Bishun Narain Inter College**

1987 AIR 1242, 1987 SCR (2) 805The Supreme Court of India held that:

> *"it is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however*

should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities."

IS THERE EXCEPTION TO THE ABOVE PRINCIPLE?. Yes there is.

The law is also trite that although an appeal Court should be wary of formulating or introducing new issues for determination in an appeal before it, where the issues presented by the parties are not appropriate or are inadequate having regard to the grounds of appeal, **the appeal Court may in appropriate cases having regard to the circumstances identify relevant issues taking extreme caution not to go outside the grounds of appeal filed or issues not canvassed by the parties in their respective briefs of argument**. [Emphasis supplied] See the case of **OLORIODE V. OYEBI** (1984) 1 SCNLR 390; (1984) SC 1 and **OLOBA V. AKEREJA** (1988) 3 NWLR (pt 84) 508 for the proposition that although generally, an appellate Court will rely on the issues for determination formulated by an Appellant in the determination of an appeal, failure of the Court of Appeal to be bound by the issues formulated by the parties where the Courts regard such issues as being inappropriate having regard to the grounds of appeal filed, has been held not amount to any injustice or denial of fair hearing.

Closer home there is the case of **ODD JOBS VS. MUBIA (1970) EA 476** for the proposition that : ***"A court may base its decision on an un-pleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision."; the case of*** CHUMO ARAP SONGOK V DAVID KIBIEGO ROTICH [2006]e KLR for the proposition that : *"...parties to a suit are bound by the pleadings and the court has to pronounce judgment only on the issues arising from the pleadings* ***unless a matter has been canvassed before it by parties...and made an issue in the suit through the evidence adduced and submissions of the parties."*** (*emphasis added).*

From the common wealth *jurisdiction there is the* case of **CONNECTICUTT FIRE INSURANCE CO V. KAVANAGH** (1882) 61 LJ PC 60**,** for the proposition that " *When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts admitted or proved beyond controversy,* ***it is not only competent but expedient to entertain the plea; but this course ought not to be followed unless the Court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts fully investigated would support the plea.****"; see also* in **ATTORNEY-GENERAL V FAROE ATLANTIC CO. LTD .** [2005- 2006**] SCGLR 271** is authority for the proposition that an appellate court can deal with a constitutional issue arising from the record before it, even if the issue was not raised in the court below. The Court held thus:

*"The salutary and well-known general rule of law is that where a point of law is relied on in an appeal, it must be one which was canvassed at the trial. But there are exceptions to this rule; the question of jurisdiction being one of them. A jurisdictional issue can therefore be taken or raised at any time, even for the first time, on appeal. Another exception is where an act or contract is made illegal by statute....****Again, the well-established general rule is that where the legal question sought to be raised for the first time is substantial and can be disposed of without the need for further evidence, it should be allowed****. Substantial constitutional issues, such as the one raised before us, falls neatly into this category."*

Closer home once again there is also the Court of Appeal case of **ATTORNEY GENERAL v REVOLVING TOWER RESTAURANT** [1958] KLR 462 for the proposition that an appellate court has discretion to allow an appellant to take a new point before it if full justice can be done to the parties.

On the basis of the above, is it safe for us to order for a current valuation of the properties, in view of the escalation of property prices in Kenya (regardless of the fact that this was not requested for by the appellant. In other words, do we have jurisdiction to do so)? **it is now trite that without jurisdiction a court of law has no business proceeding further with any determination. It has to down tools. See the case of** ***Owners of the Motor Vessel "Lillians" versus Caltex Oil (Kenya) Ltd [1989]KLR 1*** wherein at page 14 paragraph 20-35 ***Nyarangi,JA*** (as he then was) had this to say:

"Jurisdiction is everything, without it, a court has no power to make one more steps.

> ***Whereas court has no jurisdiction, there would be no business for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.***
>
> ***...***
>
> ***By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by like means"***

In proceedings similar to the one at hand the High Court ordered, *suo moto,* for a valuation report. This is seen in the recent case of **UMM v IMM [2014] eKLR** where the court stated:

> *This Court after weighing all evidence reaches a decision that U made a non-monetary contribution to the development of plots. Of significance is that one of them Plots houses the matrimonial home in which she resides..... To enable this Court make an informed decision herein I now order that separate valuations be conducted of each of the plots within 14 days hereof. The costs of valuation shall be shared equally by the parties. The Court shall after receiving the valuation Reports give its final orders.*

Similarly in **PWW v FNK [2014] eKLR** reading the judgment of the court, the court appears to have ordered.

Besides the case law, there is the ready tool in section 78(2) of the Civil Procedure Act which donates to the appellate Court the same powers to perform as nearly as may be the same duties as are conferred and imposed by that Act on courts of original jurisdiction in respect of suits filed therein. Section 3(1) of the appellate jurisdiction Act also donates power to this Court in the exercise of its appellate jurisdiction same powers as those enjoyed by the High Court;as well as Rule 1(2) of the Court of Appeal Rules which provides: *"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."*

On the basis of the above assessment of the relevant case law and enabling provisions of the law, we are satisfied that we are clothed with jurisdiction to intervene and call for fresh valuation. Our reasons for saying so are that the appellant is not satisfied with the learned trial Judges award to him of only Kshs. 1,000,000.00 million compensation for the loss of his equal share in the value of the matrimonial property which was infact the most valuable of the two properties. **Two,** there is no way we could interrogate the adequacy of the **Kshs.1,000,000.00** compensation as at now without reliving the issue of the current values. The appellant's dissatisfaction on how the learned trial judge arrived at Kshs. 1,000,000.00 as compensation is sufficient invitation for us to revisit both the issue of the adequacy of this compensation then, and its relevance now. Its relevance now cannot be interrogated without us calling to mind the need to call for the current value of the subject properties to enable us make a fair and just equal sharing as between the disputing spouses. We therefore make a finding that the best interests of the parties will be served if fresh valuation reports are called for.

The appellant is in favour of the properties being sold and proceeds shared equally. The respondent is desirous of keeping at least the Nairobi Property. In ***Kivuitu versus Kivuitu (supra)*** the Court respected the wishes of one of the spouses ***Mr. Kivuitu*** who wished to keep the matrimonial home. The Court ordered the spouse desiring to keep the property to compensate the outgoing spouse in monetary terms to the extend of her adjudged entitlement. We find the same arrangement is workable here. It therefore follows that in exercising our mandate on redistribution of the properties mentioned in number 1 above, it will be prudent for us to bear in mind the following sentiments expressed by the parties herein:-

(i) The appellant ***D E N*** has no objection if the two properties are sold and the proceeds shared equally between the appellant and the respondent

ii. The respondent ***P N N*** is desirous of keeping the hither to been matrimonial home located on the Nairobi property for her occupation and that of the issues of the marriage.
iii. Neither the appellant ***D E N*** nor the respondent ***P N N*** is desirous of keeping the Nyandarua property.

(iv) There is nothing in section 17 of the Married Women Property Act (supra) which prohibits a court of law seized of a matter under that section from considering the welfare of the issues of the marriage where issues of disposal of the matrimonial home where these reside in is in issue like in the case under consideration so long as such consideration does not go to touch on the share entitlement of each disputing spouse. Herein, the fact of minor children of the marriage needing a place to live cannot therefore be ignored.

In the result and for the reasons given in the re-assessment and recognizing the need for equality between the parties; considering as we do, as already mentioned that children are involved factoring in changes in values of property that may have occurred in the intervening period; cognizant of the powers of the court under section 17 of the Married Women Property Act to render justice, the orders that commend themselves to us are: The appeal is allowed. The orders of the learned Judge made on the 19th day of July, 2012 be and are hereby set aside and substituted therewith orders as hereunder:-

1. A declaration be and is hereby made that properties Title Number Nairobi Block ***[particulars withheld],*** House No. ***[particulars withheld]*** High View Estate Phase II Nairobi and Title No. Nyandarua/Oljoro Orok Salient/ ***[particulars withheld]*** were and still are the joint properties of the appellant **D E N** and the Respondent ***P N N*** in equal shares.

2. We direct that the above mentioned equal sharing be and is hereby terminated in the following manner.

a. The parties shall within thirty (30) days from the date of the delivery of this Judgment cause the matter to be mentioned before the presiding judge High Court Family Division for purposes of getting directions on the appointment of the valuer/valuers and the date for the filing of the valuation report (s). The costs of valuation shall be borne equally by the appellant and the respondent. In default of or lack of cooperation from one party the willing party can pay the whole valuation fees and then seek contribution from the other.

b. The aggregate value of the two properties shall be apportioned equally between the appellant and the respondent.

3. We direct that the Nyandarua property that is LR. No. Nyandarua/Oljoro orok Salient/ ***[particulars withheld]*** shall be transferred into the sole name of the appellant ***D E N.***

4. We direct that the Nairobi property that is LR. No. Nairobi Block ***[particulars withheld]*** High View Estate Phase II house No. ***[particulars withheld]*** shall be transferred to the respondent ***P N N*** on the following conditions.

i. That she does within a period of one hundred and twenty (120) days from the date of the filing in Court of the current valuation reports on the properties pay to the respondent the amount forming the shortfall on the equal sharing of the aggregate value of both properties after factoring in the value of the Nyandarua property**.**

5. There will be liberty to apply in the High Court.

6. Each party shall bear own costs.

Dated and Delivered at Nairobi this 9th day of March, 2015.

R.N. NAMBUYE

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.