



**SNK v MSK & 5 others (Civil Appeal 139 of 2010)
[2015] KECA 1010 (KLR) (24 April 2015) (Judgment)**

S.N.K v M.S.K & 5 others [2015] eKLR

Neutral citation: [2015] KECA 1010 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 139 OF 2010
RN NAMBUYE, DK MUSINGA & AK MURGOR, JJA**

APRIL 24, 2015

BETWEEN

SNK APPELLANT

AND

MSK 1ST RESPONDENT

SMI 2ND RESPONDENT

MK 3RD RESPONDENT

TL 4TH RESPONDENT

JCTL 5TH RESPONDENT

KTCL 6TH RESPONDENT

Jurisdiction of a family court to grant orders in respect of distribution of properties registered in the name of a limited liability company.

Reported by Nelson Tunoi

Family Law - matrimonial property - division of matrimonial property - appeal against division of matrimonial property - where the High Court awarded huge lump sums for maintenance of a spouse and for a minor's schooling and upkeep - whether the Family Court had jurisdiction to grant orders in respect of properties registered in the name of a limited liability company in which the spouses were shareholders - whether the appeal was merited - Married Women's Property Act, 1882, section 17; Judicature Act (cap 8), section 3; Companies Act (cap 486) sections 211 & 222(2); Matrimonial Property Act, 2013, section 7

Jurisdiction - jurisdiction of the High Court - jurisdiction of the High Court in matrimonial causes - where the Court had awarded lump sum payments to the spouse and the issue of the marriage for their maintenance - whether the Court was within its jurisdiction in awarding a lump sum payment to the respondents.



Brief facts

The 1st respondent filed for divorce at the High Court against the appellant and consequently the marriage was dissolved. The High Court ruled in favour of the 1st respondent awarding a lump sum of Kshs. 10,000,000/ for maintenance; and Kshs 10,000,000/ to the 3rd respondent for her schooling and upkeep. In addition, the Court ordered for a transfer of properties owned by a limited liability company to the 1st respondent for her benefit and that of the children. The Court also held that the 1st respondent was entitled to 50% ownership of the properties registered in the appellant's name and that Kshs. 80,000,000/ was to be paid to the 1st respondent in lieu of her interest in the limited liability companies where she had interests together with the appellant. The appellant was aggrieved by the High Court's decision thus filed the instant appeal.

Issues

- i. What were the principles applicable by the Family Court in Kenya in dealing with an application under section 17 of the Married Women's Property Act, 1882?
- ii. Whether the Family Court had jurisdiction to grant orders on its own motion in respect of properties registered in the name of a limited liability company in which the spouses were shareholders.
- iii. Whether the Court could grant lump sum payments for maintenance of a divorced spouse and a minor's schooling and upkeep.

Relevant provisions of the Law

Married Women's Property Act, 1882

Section 17

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

Held

1. Where there were disputes between husband and wife as to their respective rights to the shares in a company registered in the name of one spouse, then the Court, like in the case of any other property in dispute between husband and wife, had power to ascertain the respective beneficial rights of husband and wife, to the disputed shares. It could declare that one spouse held a certain number of shares in trust for the other spouse. What the Court could not do under section 17 of the Married Women's Property Act, like in respect of all other properties, was to order for the transfer of the legal titles to property or in other words to pass proprietary interest from one spouse to the other.
2. The Trial Court did not have jurisdiction to order the transfer of property to the 1st respondent for her benefit and that of the couple's children. The Court equally did not have jurisdiction to order the appellant to pay the 1st respondent Kshs. 80,000,000/= on account of her shares or interest in the limited liability company. Such orders could only be made by the High Court in appropriate proceedings brought under section 211 or 222(2) of the Companies Act (cap 486). The High Court did not give due regard to the settled principle of Company Law in *Salmon v Salmon* (1897) AC 22, that a company was a separate legal person from its shareholders and directors.
3. The principle applicable in division of matrimonial property where the properties were registered in the name of one spouse was that where the disputed property was not registered in the joint names of the spouses but was registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards acquisition of the property. However, in cases where each spouse had made a substantial but unascertainable contribution, it could be equitable to apply the maxim equality is equity while heeding the caution by Lord Pearson in *Gissing v Gissing*.
4. Previously, there was no enabling local legislation, the equivalent of the English Matrimonial Causes Act of 1973 that could remedy the injustice visited upon wives in dividing property between spouses where



non-financial contribution of a wife towards acquisition of property by the husband during marriage was not considered. However, the Kenyan Parliament had enacted the Matrimonial Property Act, 2013 which obviously was not in existence during the High Court matter that gave rise to the instant appeal. The determination of the appeal therefore could not be based upon a law that was not in existence at the time when the High Court matter that gave rise to the appeal was decided.

5. The applicable law was the law in force when the Trial Court made its decision where only a wife's direct or indirect financial contribution towards acquisition of matrimonial property had to be taken into consideration. The 1st respondent did not demonstrate that she had made any direct financial contribution towards the acquisition of the three properties. However, she had made some indirect financial contribution, though not as high as that of the appellant. The 1st respondent was a minor shareholder in the family business, which was the major source of the family finances. Apart from the shareholding, she served in that company for some time either as an employee or otherwise, before her marriage to the appellant broke down.

6. Although the appellant stated that the 1st respondent was a heavy spender and that he single-handedly financed the family budget and her lavish lifestyle, the fact that her investment in the said company, financially or otherwise, partially contributed to the success of the company which translated to the appellant's affluence could not be overlooked.

7. According to the evidence on record, the 1st respondent was not entitled to 50% ownership of the three properties. Had the High Court correctly applied the principles laid down by the Court of Appeal in *Echaria v Echaria* [2007] eKLR, it would have arrived at a different conclusion. The 1st respondent's indirect financial contribution towards acquisition of the properties could at best be assessed at 25% and her commensurate ownership thereof would be 25% and not 50% as held by the High Court.

8. The appellant had been paying the monthly sums as ordered by the Court although the instant appeal was subsequently instituted. If there were any arrears that had not been paid by the appellant, nothing prevented the 1st and 3rd respondents from pursuing the appellant for such arrears. Likewise, if the 1st respondent had any valid claim against the appellant relating to her interests or shares in the various companies that she had cited in her originating summons, she could institute an appropriate suit in the Commercial & Admiralty Division of the High Court.

9. Section 30(3) of the Matrimonial Causes Act (repealed) gave the Court the discretion to either secure, for the benefit of the children, a gross sum of money or an annual sum as the Court deemed reasonable until they attained the age of majority or married, whichever date was earlier. When the Divorce Cause was filed in 1997 the 3rd respondent was eight years old, and sixteen years of age when the decision was finally delivered. The age of majority was eighteen years and therefore, the 3rd respondent was entitled to maintenance until she attained the age of majority.

10. In making an order for maintenance, the Court ought to consider the means of the husband. The means of a husband referred to both the cash available at his disposal and his ability to raise cash through overdraft, loan or other means.

11. In assessing the amount of money awardable to a spouse upon separation or divorce, the Kenyan courts had often been guided by the principle that in cohabitation, a wife shared with her husband a standard of living appropriate to his income or if she was also earning, their joint incomes. If cohabitation was destroyed by the wrong conduct by the husband, the wife's maintenance ought to be so assessed that her standard of living did not suffer more than was inherent in the circumstances of separation. Her standard of living could well have to be lower after the breach of cohabitation than it was before since there could now be two households to be maintained in place of the former one, in which household expenses were shared. Although the standard of living of both parties could therefore have to be lower than it was before there was the breach of cohabitation in general, the wife should not be relegated to a lower standard of living than that which her husband enjoyed.

12. The 1st respondent was entitled to a reasonable maintenance sum. Equally, the 3rd respondent was also entitled to educational support and care and the appellant had stated that he was ready to educate her but in



a less costly school than the one she was attending. The vexing question was whether the maintenance sum ought to have been periodical or lump sum.

13. The Court had power in the case of divorce, judicial separation and nullity, to make lump sum orders, capital transfer orders, and settlement of property orders and variation of settlement orders. The power may seem at first sight most likely to be of use in cases where parties were of modest means but it could also be of use in cases where the husband had substantial assets which could be difficult or impracticable or undesirable to realize with undue haste. For example, the husband may own a valuable shareholding in a private company or may be a farmer or a solicitor using substantial assets used in the running of his business. In such cases, although he may be on paper a wealthy man, it may not be possible for him to remove capital from the business at short notice and it would be unreasonable to expect him to sell part of his shareholding probably in disadvantageous circumstances. Since the Court would not make a lump sum order which would have the effect of making it impossible for the owner to continue earning a living and continue maintaining his family, an instalment order may be appropriate.

14. The Trial Court did not indicate why it deemed it appropriate to order lump sum payments in favour of the 1st and 3rd respondents. Ordinarily, a lump sum payment should not be awarded where the effect of such an order would be to cripple a business or cause unnecessary hardship in order to realize the amount ordered by the Court to be paid.

15. The 3rd respondent had attained the age of majority and therefore not entitled to any statutory maintenance from the appellant who had paid for her education up to university level and had also paid a substantial sum of money for her maintenance. The order for the payment of Kshs. 10,000,000/ to the 3rd respondent for maintenance was therefore set aside.

16. There was no justification for the Court to award costs of the suits for three advocates representing the 1st respondent. Whereas the Trial Court had exercised its discretion in making the order on costs and interest in favour of the 1st respondent, the costs ought to have been limited to one advocate.

Appeal allowed in part.

Orders

i. The order of lump sum payment of Kshs. 10,000,000/= to the 1st respondent substituted with an order of a monthly payment of Kshs. 350,000/= during her lifetime or until she remarries.

ii. The order for the payment of Kshs. 10,000,000/= to the 3rd respondent for maintenance set aside.

iii. Costs for the trial suit awarded to the 1st respondent for one advocate.

iv. Each party to bear their own costs of the appeal.

Citations

East Africa

1. *Echaria v Echaria* [2007] 1 KLR 469 -(Explained)

2. *Housing Finance Company of Kenya Limited v Faith Kimeria & another Civil Appeal No 214 1996-(Applied)*

3. *Mereka, David M v Margaret Njeri Mereka* Civil Appeal No 236 of 2001 -(Mentioned)

4. *Muthembwa v Muthembwa* [2002] 1 KLR 91-(Followed)

5. *Tolley v Tolley* [1977] KLR 116 -(Applied)

United Kingdom

1. *Burns v Burns* [1984] 1 All ER 244; [1984] Ch 317 -(Explained)

2. *J v J* [1955] 2 All ER 85 -(Applied)

3. *Kershaw v Kershaw* [1964] 3 All ER 653 -(Followed)

4. *Salomon v Salomon* [1897] AC 22 [1896] UKHL 1-(Followed)

Texts and Journals

Cretney, SM., (Ed) (1984) *Principles of Family Law* London: Sweet



6. Maxwell 4th Edn pp 750-751

Statutes

East Africa

1. Companies Act (cap 486) sections 211, 222(2) -(Interpreted)
2. Judicature Act (cap 8) section 3(1)(c) -(Interpreted)
3. Matrimonial Property Act, 2013 (Act No 49 of 2013) section 7- (Interpreted)

India

Married Women's Property Act, 1882 [INDIA] section 17 -
(Interpreted)

United Kingdom

Matrimonial Causes Act, 1973 [UK] section 30(3) -(Interpreted)

JUDGMENT

1. The Appellant and the 1st Respondent were married on 16th March, 1974 at the Shree Mombasa Lohana Mahajan temple and thereafter they moved to Nairobi. Out of the marriage three children were born. One of the children is deceased. Of the other two, one was an adult when the High Court proceedings that gave rise to this appeal was commenced but the other, a girl known as M, the 3rd Respondent, was 16 years old and still in school.
2. On 15th July, 1997 the 1st Respondent filed Divorce Cause No 6 of 1997 in the High Court of Kenya at Nairobi. The 2nd Respondent was a co-Respondent in the Divorce Cause. On 18th February, 1999 the marriage was dissolved and a decree nisi granted. The 1st Respondent had also sought custody of M, reasonable maintenance for herself and the said child and that the two of them be allowed "Peaceful and quiet enjoyment of matrimonial home situate at LR No [particulars withheld], [particulars withheld] Estate, Gigiri, Nairobi." That company has three shareholders namely, the Appellant (1 share), the 1st Respondent, (1 share) and A K (4998 shares).
3. The judge who heard the Divorce Cause did not address the issues of custody of M, maintenance of the 1st Respondent and M and the issue of the aforesaid property, that is, the LR No [particulars withheld].
4. While the Divorce Cause was still pending, the 1st Respondent filed originating summons dated 27th June, 1999 vide HCCC No 1606 of 1997 (OS) against the Appellant, being an application brought under the *Married Women's Property Act, 1882*, in which she sought the following orders:

- “ 1. That the properties and investments enumerated here below were acquired through the efforts largely of the Applicant and to a lesser extent of the Respondent during their marriage and registered in the name of the Respondent are owned by the applicant and the Respondent in the ratio of 75% to the Applicant to 25% to the Respondent respectively or in such proportions as this honourable court may deem fit.

Schedule of properties

- i. Nairobi/Block [xxxxx] situate Gigiri, Nairobi.
- ii. Nairobi/Block [xxxxx] situate Gigiri, Nairobi.



- iii. LR No [xxxxx] situate at South „C” Estate in Nairobi. Schedule of investments
 - (a) 380,000 ordinary shares in [particulars withheld].
Assets owned by [particulars withheld] Co Ltd.
LR No [xxxxx] situate along Dar-Es-Salaam Road in Industrial Area in Nairobi xxx xxx Mercedes Benz xxx xxx Toyota Corolla xxx xxx Peugeot 504 xxx xxx Toyota Corolla xxx xxx Toyota Corolla xxx xxx Toyota Corolla xxx xxx Nissan Station Wagon xxx xxx Land Rover Discovery xxx xxx Nissan Sunny xxx xxx Nissan Sahara Pick-Up Plus stock in trade.
 - b. 1 ordinary share [particulars withheld] Ltd. Assets owned by [particulars withheld] Ltd.
LR No [xxxxxx] situate at Whispers Estate, Gigiri in Nairobi
 - c. Shares in [particulars withheld] Company Ltd
(applicant is unable to verify the exact quantity as the file at the Companies Registry cannot be traced) Assets in [particulars withheld] Company Ltd.
xxx xxx Nissan Sahara Pick-up xxx xxx Nissan Sahara Pick-up xxx xxx Nissan Sahara Pick-up xxx xxx Mitsubishi Canter xxx xxx Daimler Benz Plus stock in trade
 - d. 6500 ordinary shares in [particulars withheld] Limited Assets owned by [particulars withheld] Limited xxx xxx Peugeot 405 xxx xxx Toyota Pick-up xxx xxx Opel Astra Plus stock in trade
 - e. Bank accounts in the name of the Respondent or his aliases or in name of companies controlled by him both in Kenya and overseas including account held at TrustBank -at Industrial Area -A/C No [particulars withheld] held in the name of S L but which account is controlled and operated by the Respondent.
 - f. Safe Deposit Box Number [particulars withheld] Class: A at Middland Bank Plc PO Box [xxx] Poultry and Princess Street, London [particulars withheld] held in the name of the Respondent.
- 2. That the Respondent do execute all documents and do all such things as are necessary to transfer the Applicant’s proportions in the said properties and investments to the applicant and/or her nominee and in default the Registrar of this honourable court or any such officer be authorized to execute all such documents and do all such things to transfer the same to the applicant in place of the Respondent to be held by the applicant without interruption.
- 3. Alternatively the properties and investments described in paragraph 1 above be valued sold and the proceeds of the sale be shared by the applicant and the Respondent in the ratio of 75% to the applicant and 25% to the Respondent.



4. That the Respondent do render an account for the rents and profits obtained from the properties and investments described above.
 5. That all funds deposited in bank accounts both locally and abroad in the Respondent's name or aliases thereof be shared between the applicant and the Respondent in the same ratio of 75% to the applicant and 25% to the Respondent.
 6. That all necessary directions be given.
 7. That costs be paid by the Respondent."
5. In her affidavit in support of the originating summons, the 1st Respondent stated that in 1978 together with the Appellant, they set up a company known as [particulars withheld] Company Ltd, the 6th Respondent. The company had a share capital of Kshs 5,000,000 divided into 1,000,000 ordinary shares of Kshs 5 each, of which the Appellant held 380,000 ordinary shares and herself 20,000. The 1st Respondent further stated that she assisted directly and indirectly in raising up capital for the formation of the company and growing it. That the Appellant had purported to appoint one A K (his brother) and one U M as Directors of the Company.
 6. The 1st Respondent went onto state that from the income generated by [particulars withheld] Trading Company, the Appellant acquired three properties registered as Nairobi/Block [particulars withheld] situate at Gigiri, Nairobi, Nairobi/Block [particulars withheld] situate at Gigiri, Nairobi, LR No [particulars withheld] situate at South C in Nairobi and LR No [particulars withheld] situate at Industrial Area, Nairobi. The said company also owns the ten (10) motor vehicles listed in the originating summons.
 7. The 1st Respondent and the Appellant incorporated another company, [particulars withheld] Limited, in December 1989, which acquired LR No [particulars withheld], where they put up their matrimonial home and resided until 1994, the 1st Respondent asserted.
 8. The 1st Respondent further averred that from income generated by [particulars withheld] Limited the other eight (8) motor vehicles named in the originating summons were acquired but registered in different companies associated with the Appellant. She alleged that all these limited liability companies were family companies and all their assets were ipso factofamily assets.
 9. In his replying affidavit, the Appellant stated that between 1972 and 1977 he was working as a Sales Executive for [particulars withheld] Limited. In 1977 he left that employment and together with his brother, A K, registered a company known as [particulars withheld] Builders Ltd. Thereafter, using profits acquired from [particulars withheld] Builders Ltd, they incorporated two other companies, [particulars withheld] Limited and [particulars withheld] Trading Company Limited. In 1985 A K resigned as a Director and shareholder of [particulars withheld] Limited and it was agreed that he transfers to the 1st Respondent 100 of his shares and the remaining 900 to the Appellant. The Appellant paid A for the transfer of all the 1000 shares. The Appellant denied that the 1st Respondent was involved in the running and/or growth of [particulars withheld] Limited and/or of the other companies aforesaid. He added that the 1st Respondent was made a director and shareholder simply because she was his wife and in law the company could not operate with one director/shareholder after A's resignation.



10. The Appellant added that the 1st Respondent was employed by [particulars withheld] Trading Company Limited from 1st April, 1993 at a gross salary of Kshs 50,000 but was dismissed on 30th June, 1994.
11. Regarding all the properties listed in the originating summons, the Appellant stated that the 1st Respondent had not made any personal contribution towards their acquisition. With specific reference to the property registered in the name of [particulars withheld] Limited, the Appellant stated that the majority shares (4,998) are held by A K because he was the one who paid the purchase price from his own personal savings. The property was then rented to [particulars withheld] Trading Company Limited for use by its directors. He denied that it was their matrimonial home; saying the 1st Respondent forced her way into the property through an ex parte court order at a time when A. wanted to rent it out to service a mortgage.
12. Ang'awa, J upon hearing the maintenance claim as part of the Divorce Cause and the Originating Summons, delivered a judgment in favour of the 1st Respondent in the following terms:
 - a. Kshs 10,000,000 as a lump sum to be paid to the 1st Respondent for maintenance.
 - b. Kshs 10,000,000 to be paid to M for her schooling and upkeep
 - c. LR No [xxxxxx] owned by [particulars withheld] Limited to be transferred to the 1st Respondent for her benefit and that of the couple's children.
 - d. That the 1st Respondent is entitled to 50% ownership of the properties known as Nairobi/Block [xxxxx], Nairobi/Block [xxxxx] and LR No [xxxxx], all registered in the Appellant's name.
 - e. Kshs 80,000,000 to be paid to the 1st Respondent in lieu of her interest in [particulars withheld] Credit Trading Company Limited, the 5th Respondent, and any other company where she has any interest together with the Appellant, apart from [particulars withheld] Limited.
 - f. Costs for three advocates and interest in the Divorce Cause as well as the Originating Summons.
13. The Appellant, being dissatisfied with the aforesaid judgment, preferred an appeal to this Court. The 4th and 5th Respondents also filed a notice of cross appeal, arguing that they were condemned unheard as they were not parties to the High Court case, that the trial court erred in divesting [particulars withheld] Limited of its property when it was not a party to the suit and in making orders affecting the shareholding in the 5th Respondent without hearing it.
14. This appeal was largely disposed of by way of written submissions which are on record. Only the Appellant, the 1st Respondent, the 4th and 5th Respondents filed submissions. We shall not reproduce the lengthy submissions.
15. The Appellant's memorandum of appeal raises 42 grounds of appeal, though in our view they could have been compressed to less than 10. For clarity sake and ease in drafting this judgment, we shall deal with these inordinately high number of grounds of appeal in three broad categories that relate to the six orders that were granted by the trial court. The three substantive issues are as follows:
 - i. Jurisdiction and principles of the family court in dealing with an application under Section 17 of the *Married Women's Property Act, 1882*.



- ii. Jurisdiction of the family court to grant orders in respect of properties registered in the name of a limited liability company.
- iii. The grant of lump sums for maintenance of a divorced spouse and for a minor's schooling and upkeep.

Determination

16. We shall combine the first two broad issues, that is jurisdiction of the family court in dealing with an application under section 17 of the *Married Women's Property Act, 1882*, and to grant orders in respect of properties registered in the names of limited liability companies. The Originating Summons filed by the 1st Respondent was brought under section 17 of the *Married Women's Property Act, 1882* (*MWPA*) and section 3 of the *Judicature Act*.

Section 17 of the *MWPA* states as follows:

“In any question between husband and wife as to the title to or possession of property, either party may apply by summons or otherwise in a summary way to any judge of the High Court of justice and the judge may make such order with respect to the property in dispute, and to the costs of and consequent on the application as he thinks fit.”

17. Section 3(1)(c) of the *Judicature Act* made the *MWPA* applicable in Kenya but that was until 16th January, 2014 when our own statute, the *Matrimonial Property Act, 2013* commenced.
18. The parties in the Divorce Cause and the originating summons were a husband and wife. The main issue for determination in this regard is whether the trial court had jurisdiction to grant some of the reliefs sought by the 1st Respondent or which it granted on its own motion; particularly regarding properties that were registered in the names of limited liability companies.
19. In *Housing Finance Company of Kenya Limited v Faith Kimeria & another* [1998] eKLR, Faith Kimeria filed a suit against her husband, Mr Kimeria, by way of an Originating Summons under section 17 of the *MWPA*. The wife was seeking a declaration that an immovable property situate in Nairobi and registered in the sole name of her husband was owned jointly by her and her husband. The property had however been charged to Housing Finance Company of Kenya Ltd, the Appellant. The wife made an application to join the Appellant in those proceedings as a co-defendant. The Appellant's argument before the High Court was, inter alia, that the provisions under which the orders were sought did not apply to it. This Court agreed with the Appellant and held that the wife had no cause of action at all against the Appellant.
20. We now consider the prayers sought in respect of LR No [xxxxx] owned by [particulars withheld] Limited as well as the 1st Respondent's claim for shares in [particulars withheld] Credit Traders Limited. The Appellant argued that the trial court had no jurisdiction in making orders in respect of assets of a limited liability company. He further argued that the learned judge erred in failing to appreciate that assets of a limited liability company do not belong to shareholders and could not be dealt with under section 17 of the *MWPA*.
21. We believe that the above issue was exhaustively dealt with by this Court in *Muthembwa v Muthembwa*, Civil Appeal No 74 of 2001 which was cited in *Mereka v Mereka*, Civil Appeal No 236 of 2001 where the Court construed the jurisdiction under section 17 of the *MWPA* as extending to shares in limited liability companies owned by the parties. The Court however held that a trial court in such proceedings has no jurisdiction to distribute properties registered in the name of the company in which the spouses are the shareholders.



22. The Court held:

“If there are disputes between husband and wife as to their respective rights to the shares in a company registered in the name of one spouse, then the court, like in the case of any other property in dispute between husband and wife has power to ascertain the respective beneficial rights of husband and wife to the disputed shares. It can declare, like the learned CA. did in this case, that one spouse holds a certain number of shares in trust for the other spouse. What the court cannot do under section 17 of the 1882 Act, like in respect of all other properties, is to order the transfer of the legal titles to property or in other words to pass proprietary interest from one spouse to the other.”

23. In view of the above holding which correctly pronounced the applicable law, we find and indeed hold that the learned judge erred in law ordering that LR No [xxxxx] owned by [particulars withheld] Limited be transferred to the 1st Respondent for her benefit and that of the couple’s children. She equally erred in law in ordering the Appellant to pay the 1st Respondent Kshs 80,000,000 on account of her shares or interest in [particulars withheld] Credit Trading Company Limited. The court had no jurisdiction to make such orders. Such orders can only be made by the High Court in appropriate proceedings brought under section 211 or 222(2) of the *Companies Act*. Further, [particulars withheld] Ltd and [particulars withheld] Credit Traders Ltd were condemned unheard when the court made adverse findings against them. They were not parties to the suit. The 1st Respondent had also not prayed for an order to compel the Appellant to purchase her shares in any of the companies.

24. The learned judge did not give due regard to the settled principle of company law in *Salomon v Salomon* (1897) AC 22 that a company is a separate legal person from its shareholders and directors. These findings are sufficient to dispose of the 4th and 5th Respondents’ cross appeal against the trial court’s decision.

25. We now turn to consider the trial court’s declaration that the 1st Respondent is entitled to 50% ownership of the three properties registered in the Appellant’s name, that is, Nairobi/Block [xxxxx], Nairobi/Block [xxxxx] and LR No [xxxxx]. The Appellant argued that the learned trial judge erred in implying a trust in relation to the said properties. On the other hand, the 1st Respondent contended that the Appellant acquired the properties through funds generated from [particulars withheld] Trading Company Ltd where she was a shareholder. According to the 1986 returns filed at the companies registry, the shareholding of the said company was: the Appellant -1900 shares (95%) and the 1st Respondent 100 shares (5%).

26. The principles applicable in division of matrimonial property where the properties are registered in the name of one spouse were restated by this Court in *Peter Mburu Echaria v Priscilla Njeri Echaria*, Civil Appeal No 75 of 2001. The Court held:

“Where the disputed property is not registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim “equality is equity” while heeding the caution by Lord Pearson in *Gissing v Gissing*.”



27. The Court went on to state:

“In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during a marriage which have come to this Court the Court has invariably given the wife an equal share (see *Essa v Essa* (supra) *Muthembwa v Muthembwa* Civil Appeal No 74 of 2001 and *Mereka v Mereka*, Civil Appeal No 236 of 2001). However, a study of each of those cases shows that the decision in each case was not as a result of the Application of any general principle of equality of division. Rather, in each case, the Court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property.

The Court considered the peculiar circumstances of each case and independently assessed the wife’s contribution as equal to that of the husband.”

28. All the three properties aforesaid in which the 1st Respondent was granted 50% shareholding were acquired and registered in the name of the Appellant during the subsistence of the marriage between him and the 1st Respondent. The 1st Respondent had urged the Court to find that she is entitled to 75% shareholding in the said properties. The Appellant’s counsel submitted that for the 1st Respondent to succeed in her claims over the three properties she had to prove, on a balance of probabilities, that she made financial contribution to their acquisition. He cited this Court’s decision in *Echaria v Echaria* (supra). He added that if at all the trial court was persuaded that the 1st Respondent was entitled to any share in the three properties, then it should have been limited to her share contribution in [particulars withheld] Company Limited which was 5%.
29. The Appellant’s evidence was that the 1st Respondent did not make any direct financial contribution towards purchase of the three properties. He said that Nairobi/Block [xxxxx] and Nairobi/Block [xxxxx] were purchased by himself with money which his father gave him in 1978. With regard to LR No [xxxxx], the Appellant contended that he bought it with his own personal funds.
30. The 1st Respondent gave evidence of her contribution to the acquisition of the three properties. She said that since her marriage to the Appellant in 1974 she worked throughout in various family businesses that the two of them were engaged in. In particular, from 1980 she was fully engaged in [particulars withheld] Trading Company Limited where she was handling administration, banking and debt collection. She also contributed indirectly to the acquisition of the said properties by taking care of the three children of the marriage and basically keeping the home running smoothly, which enabled the Appellant to concentrate on the family business.
31. The 1st Respondent’s counsel submitted that the Appellant had not made out a case for varying the trial judge’s finding that the 1st Respondent was entitled to 50% ownership of the three properties. He urged the Court to reject the Appellant’s submission that the 1st Respondent is only entitled to 5% of the three properties.
32. In the five judges’ decision in *Echaria v Echaria* (supra) which was cited before the trial court, this Court, after a careful review of several English and local decisions, rejected the argument that a wife’s non-monetary contribution like performance of domestic chores or bearing children ought to be taken



as a form of contribution in determining the wife's interest in a case for distribution of property upon dissolution of a marriage. The Court adopted the position in England and stated:

“According to the English law of trusts it is only through the wife's financial contribution, direct or indirect, towards the acquisition of the property registered in the name of her husband that entitles her to a beneficial interest in the property.”

33. The Court lamented that there was no enabling local legislation, the equivalent of the English Matrimonial Causes Act of 1973, that could remedy the injustice visited upon wives in dividing property between spouses where non financial contribution of a wife towards acquisition of property by the husband during marriage is not considered. Our parliament has now enacted the Matrimonial Property Act, 2013 which obviously was not in existence when Echaria v Echaria and the High Court matter were that gave rise to this appeal decided. The determination of this appeal cannot therefore be based upon a law that was not in existence at the time when the High Court matter that gave rise to the appeal was decided.
34. Section 7 of the Matrimonial Property Act, 2013 states as follows: “7. Subject to section 6 (3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

The Act defines contribution to mean “monetary and non-monetary contribution and includes -

- a. domestic work and management of the matrimonial home;
 - b. child care;
 - c. companionship;
 - d. management of family business or property; and
 - e. farm work;”
35. We must however apply the law that was in force when the trial court made its decision and as we have already stated, it is only a wife's direct or indirect financial contribution towards acquisition of matrimonial property that had to be taken into consideration. In Echaria v Echaria (*supra*) the Court cited the English case of Burns v Burns [1984] 1 All ER 244 where Fox, LJ; talking of the nature of the contributions towards acquisition of a house said:

“If there is a substantial contribution by the woman of the family expenses, and the house was purchased on a mortgage, her contribution is, indirectly referable to the acquisition of the house since in one way or other, it enables the family to pay the mortgage instalments.

Thus a payment could be said to be referable to the acquisition of the house if, for example, the payer either:

- a. Pays part of the purchase price; or
- b. Contributes regularly to the mortgage instalments; or
- c. Pays off part of the mortgage; or
- d. Makes substantial financial contributions to the family expenses so as to enable the mortgage instalments to be paid.”



36. In this appeal the 1st Respondent did not demonstrate that she had made any direct financial contribution towards acquisition of the three properties. We are however convinced that she made some indirect financial contribution, though not as high as that of the Appellant. The 1st Respondent was a minor shareholder in the family business - [particulars withheld] Limited which was obviously the major source of the family finances. Apart from the shareholding, she served in that company for some time, either as an employee or otherwise, before her marriage to the Appellant broke down. Although the Appellant told the court that the 1st Respondent was a heavy spender and that he single handedly financed the family budget and her lavish lifestyle, we cannot overlook the fact that her investment in the said company, financially or otherwise, partially contributed to the success of the company which translated to the Appellant's affluence.
37. That notwithstanding, from the evidence on record, we are unable to find that the 1st Respondent was entitled to 50% ownership of the three properties. Had the trial judge correctly applied the principles laid down by this Court in *Echaria v Echaria* (*supra*) she would have arrived at a different conclusion. In our view, the 1st Respondent's indirect financial contribution towards acquisition of the three properties aforesaid can at best be assessed at 25% and her commensurate ownership thereof must therefore be 25% and not 50% as held by the trial judge, we so find.
38. We now turn to consider awards made for lump sum payments of Kshs 10,000,000 to the 1st and 3rd Respondents. The Appellant stated in his grounds of appeal that the learned trial judge failed to appreciate the jurisdiction conferred in the court under the *Matrimonial Causes Act* by awarding a lump sum of Kshs 10,000,000 to the 1st Respondent as maintenance, which he considered arbitrary and contrary to law. He also argued that the lump sum award of Kshs 10,000,000 to the 3rd Respondent for her schooling and upkeep was without jurisdiction, arbitrary and contrary to law. He argued that the 3rd Respondent was not entitled to maintenance as she was not an infant in terms of the *Matrimonial Causes Act*.
39. Shortly after 11th May, 2005 when the Appellant filed a notice of appeal, he also filed an application for stay of execution of the orders issued by the High Court pending hearing and determination of the appeal. In its considered ruling delivered on 13th October, 2006, this Court appreciated that the 1st Respondent and her daughter needed maintenance before the appeal could be heard and determined. The court made the following orders:
- “(a) That subject to the applicant complying with the following conditions, the execution of the judgment/ decree of the superior court dated 10th May, 2005 in the High Court Divorce Cause No 6 of 1997 as consolidated with Miscellaneous Civil Application No 1606 of 1997 (OS) shall be and is hereby stayed pending the hearing and determination of Civil Appeal No 277 of 2005.
- i. The Applicant shall pay to the Respondent a monthly sum of Kshs 200,000 with effect from the 1st day of November, 2006 and thereafter on the first day of each succeeding month till the intended appeal is heard and determined.
 - ii. The Applicant shall pay for the maintenance of their daughter a sum of Kshs 100,000 per month with effect from the 1st day of November, 2006 till the Appeal is determined.
 - iii. The Applicant shall pay all the school fees payable in respect of their daughter till the appeal is determined.



- iv. The Applicant shall not sell, alienate, transfer or in any way dispose of the property Gigiri Estate LRNBI/[9104 [xxxxx], NBI/Block [xxxxx], NBI/Block [xxxxx] and LR [xxxxx] or any of his interests or shares in the companies owning the same properties.
 - v. That the Applicant shall not sell, transfer or in any way dispose of shares in [particulars withheld] Credit Trading Co, [particulars withheld] Co Ltd and any other company.
- b. The costs of and incidental to this application shall abide the outcome of the Appeal.”

40. The Appellant has been paying the monthly sums as stated hereinabove, despite the fact that Civil Appeal No 277 of 2005 was struck out on 12th February, 2010, although the current appeal was subsequently instituted. If there are any arrears that have not been paid by the Appellant, nothing stops the 1st and 3rd Respondents from pursuing the Appellant for such arrears. Likewise, if the 1st Respondent has any valid claim against the Appellant relating to her interests or shares in the various companies that she cited in her Originating Summons, she can institute an appropriate suit in the Commercial & Admiralty Division of the High Court.
41. Turning back to the submissions before us, the 1st Respondent submitted that section 30 of the *Matrimonial Causes Act* (repealed) gives the Court the power to make maintenance and education orders of children of the marriage whose parents are the subject of divorce proceedings. Section 30(3) gives the court discretion to either secure for the benefit of the children a gross sum of money or an annual sum as the court may deem reasonable, until they attain the age of majority or marries, whichever date is earlier.
42. The 3rd Respondent was born on 24th February, 1989. When the Divorce Cause was filed in 1997 she was eight years old and when the judgment was delivered in 2005 she was sixteen years of age. The age of majority is eighteen years. The 3rd Respondent was therefore entitled to maintenance until she attained the age of majority. The 3rd Respondent was attending a high cost school although the father wanted to move her to a medium cost one.
43. The Appellant’s counsel conceded that the trial court had jurisdiction to make lump awards in favour of the 1st Respondent for her maintenance and for the 3rd Respondent’s education and care. See SM Cretney, “*Principles of Family Law*”, 4th Edition, pages 750-751. He however lamented that the awards of Kshs 10,000,000 were manifestly excessive. He argued that the awards were based on wrong principles of law.
44. In her affidavit in support of the Originating Summons, the 1st Respondent stated that she needed Kshs 552,000 per month for both herself and the 3rd Respondent. The 1st Respondent testified at length about the lavish lifestyle her daughter and her enjoyed during the subsistence of the marriage. She stated, inter alia;

“ Before the separation I had been groomed by the Respondent to live in style. I had a credit card. I had an account for numerous places for clothings and our house. The account for groceries was at Fruity Fruits. Our food -Parklands Vegetable Shop Wine and Spirits, laundry - couple, Little Red, Sheila”s Boutique. I had a Mercedez Benz, Nissan Sunny then given



to my son -then Toyota Corolla. I had open accounts everywhere. I had no problem with money I had four maids, a gardener and 2 others.

I had another special maid to look after Meera (when) going out in the evening.”

45. The Appellant’s affidavit of means showed that his total monthly income was Kshs 255,500 and offered to pay Kshs 50,000 per month for the 1st Respondent’s maintenance and continue to pay for his daughter’s education. The trial court did not believe the Appellant’s evidence regarding his income. The learned judge found that the Appellant’s real income was approximately Kshs 1,000,000 per month.
46. In making an order for maintenance, the court must consider the means of the husband, see this Court’s decision in *Tolley v Tolley* [1977] KLR 116. The means of a husband refer to both the cash available at his disposal and his ability to raise cash thorough overdraft, loan or other means. See *J v J* [1955] 2 All ER 85.
47. In assessing the amount of money awardable to a spouse upon separation or divorce, our courts have often been guided by the principles stated by Justice Simon in *Kershaw v Kershaw* [1964] 3 All ER 653 which the learned trial judge cited in her decision. In that case the court held:

“In cohabitation a wife shares with her husband a standard of living appropriate to his income or if she is also earning, their joint incomes. If cohabitation is destroyed by the wrong conduct by the husband the wife’s maintenance should be so assessed that her standard of living does not suffer more than is inherent in the circumstances of separation. Her standard of living may well have to be lower after the breach of cohabitation than it was before since there may now be two households to be maintained in place of the former one, in which household expenses were shared. Although the standard of living of both parties may therefore have to be lower than it was before there was the breach of cohabitation in general, the wife should not be relegated to a lower standard of living than that which her husband enjoys.”

48. We do not think that there can be any dispute that the 1st Respondent was entitled to a reasonable maintenance sum. Equally, the 3rd Respondent was also entitled to educational support and care and the Appellant said that he was ready to educate her but in a less costly school than the one she was attending. The vexing question is whether the maintenance sum ought to have been periodical or lump sum.
49. SM Cretney, “*Principles of Family Law*” (*supra*) discusses the above issue at pages 750 to 751. The author states, *inter alia*:

“The Court has power in the case of divorce, judicial separation and nullity to make lump sum orders, capital transfer orders, settlement of property offers and variation of settlement orders.

This power may seem at first sight to be most likely to be of use in cases where parties are of modest means ... but it may also be of use in cases where the husband has substantial assets which it may be difficult or impracticable or undesirable to realize with undue haste. For example the husband may own a valuable shareholding in a private company or may be a farmer or a solicitor using substantial assets used in the running of his business. In such cases, although he may be on paper a wealthy man it may also not be possible for him to remove capital from the business at short notice; and it would be unreasonable to expect him to sell part of his shareholding probably in disadvantageous circumstances.



Since the court will not make a lump sum order which would have the effect of making it impossible for the owner to continue earning a living and continue maintaining his family, an instalment order may be appropriate.”

50. The learned judge did not state why she deemed it appropriate to order lump sum payments in favour of the 1st and 3rd Respondents.

Ordinarily, a lump sum payment should not be awarded where the effect of such an order would be to cripple a business or cause unnecessary hardship in order to realize the amount ordered by the court to be paid.

51. We are inclined to vary the orders made by the trial court for lump sum payments to both the 1st and 3rd Respondents. For the 1st Respondent, we find that a monthly payment of Kshs 350,000 is sufficient for her maintenance. Consequently, we set aside the order for lump sum payment of Kshs 10,000,000 and substitute therefor an order that the Appellant pays to the 1st Respondent a monthly sum of Kshs 350,000 with effect from 5th May, 2015 and thereafter on every 5th day of the subsequent months during her lifetime or until she remarries. That periodical payment may be varied or modified on application.

52. As regards the 3rd Respondent, she is now 26 years old or thereabout. At that age she does not qualify to get any statutory maintenance from the Appellant. The Appellant paid for her education upto university level and has also paid a substantial sum of money for her maintenance. This Court was not told anything about her current status. We therefore set aside the order for payment i of Kshs 10,000,000 to the 3rd Respondent.

53. Lastly, on the issue of costs and interest, we do not think that there was any justification for the trial court to award costs of the two suits for three advocates to the 1st Respondent. Whereas the trial judge exercised her discretion in making the order on costs and interest in favour of the 1st Respondent, we are of the view that the costs ought to have been limited to one advocate. To that extent, we vary the High Court order on costs and award them to the 1st Respondent for one advocate. As regards the costs of this appeal and the cross appeal, we order that each party bears its own costs.

DATED AND DELIVERED AT NAIROBI THIS 24th DAY OF APRIL, 2015

.....

R.N. NAMBUYE

JUDGE OF APPEAL

.....

D.K. MUSINGA

JUDGE OF APPEAL

.....

A.K. MURGOR

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

