



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 116 OF 2006

BETWEEN

H W M APPELLANT

AND

DR. W N M RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya (Rawal, J.) dated 26th May, 2004

in

HCCC NO. 746 OF 2000 (O.S.)

JUDGMENT OF THE COURT

[1] The issues in this appeal arise from a judgment of the High Court that determined a dispute over division of matrimonial property between a wife and husband. In May, 2000, HWM, the appellant herein filed a suit before the High Court by way of an originating summons against her husband, WNM, the respondent herein. The suit was seeking declaratory orders that certain properties which were in the name of the husband were jointly owned and the wife was entitled to one half share of the said properties which were described as; land Reference LOC 3/ *[particulars withheld]*, LOC 3/ *[particulars withheld]*, shares in two companies *[particulars withheld] Co. Ltd* and *[particulars withheld] Co. Ltd*.

[2] The wife contended that the aforementioned properties were acquired through her and the husband's joint efforts during the subsistence of their marriage. The appellant married the respondent in 1959 according to a certificate of marriage that was produced in evidence. The marriage was blessed with children who had reached the age of majority by the time the suit was filed. According to the affidavit and the evidence in support of the suit, the wife claimed that when she married the respondent, she was working as a teacher, earning a salary which she used to augment with income from dairy farming and other income generating activities she engaged in to support her family. She claimed that the respondent was a student pursuing a degree in medicine at *[particulars withheld]* University when they got married. The respondent was thus not working or earning anything until about 1963 when he completed his studies. For the entire duration of the time the respondent was undertaking his studies, the appellant contended that she single handedly supported the family as well as the respondent.

[3] In 1964, the parties purchased LR No. *[particulars withheld]* within Garden Estate in Nairobi where

they set up their matrimonial home. The appellant claimed that although it was registered in the respondent's name, she contributed in the development and improvement of the matrimonial home. She also made substantial indirect contributions to the maintenance of the said home for a period of over 30 years when she has been in occupation of the same. She stated that she single handedly installed farm machinery and dairy farming. The respondent abandoned the appellant and the issues of marriage in 1973; she looked after and maintained the children and whenever the respondent failed to pay school fees she stepped in. The appellant alleged that she was instrumental in the successful acquisition of the property known as **LOC 3/ [particulars withheld]** which was purchased while the respondent was still pursuing his studies.

[4] The respondent was accused of transferring the matrimonial property in the name of a company called **[particulars withheld] Ltd** secretly in order to defraud and frustrate the appellant from staking a claim over the said property despite the fact that it has been her home for over 30 years. The respondent neglected the family when he moved out of the matrimonial home, he sold a piece of land that was bought with the contribution of the appellant measuring 31 acres. He used the proceeds to purchase and built a home for himself in Thika town where he resides and the appellant resides at Garden Estate which is registered in the name of a company.

[5] The suit was opposed by the respondent. He swore a replying affidavit in response to the appellant's claim. He also gave oral evidence by which he contended that he purchased all the properties claimed by the appellant without her contributions. He claimed that the matrimonial home in Garden Estate was purchased in 1964, and he later transferred it to a limited company known as **[particulars withheld] Limited** in order to obtain a loan from a bank. Since the title was in his name, he did not require the consent of the appellant; he later subdivided the title where the matrimonial home is situated into (10) ½ acre plots with the intention of giving 2 plots to each of their children with him and appellant retaining one plot each; the appellant and the children however refused to pay for their proportionate shares of outstanding rates to facilitate their respective transfers; the respondent further contended that he paid for the education, medicine bills and clothing for the appellant and the children and the appellant made no contributions to the acquisition of the said properties.

[6] The respondent denied that the appellant made any contribution as most of the properties especially the parcels of land in Muranga were purchased upon separation. Both parties adduced oral evidence before Rawal, J. (as she then was) in support of their respective positions as propounded in their sworn affidavits which were also considered in evidence. After considering the entire matter and the evidence that was before court, this is what the learned trial Judge concluded in a pertinent portion of the said judgment:

"I shall thus find, and hereby do, that the applicant contributed directly to the acquisition of the plot of land bearing LOC 3/ [particulars withheld] and Garden Estate property L.R. No. [particulars withheld] and indirectly, to the acquisition of plot bearing

LOC 3/ [particulars withheld] which was purchased after selling 31 acres plot bearing LR [particulars withheld] Ruiru Town.

Unfortunately the picture of the properties is very dim and no factual evidence are (sic) coming forth through either sides. I can sympathize with wife because no property is in her name but the husband also has been secretive about it. Unfortunately, no proper orders were sought to force him disclose his properties. Thus I am left with faint picture before me. The applicant/wife has prayed:

- 1. That it be declared that the properties known as L.R. LOC 3/ [particulars withheld], LOC 3 [particulars withheld] registered in the name of the respondent are jointly owned by the applicant and the respondent and the respondent holds half share of the said properties in trust for the respondent.**
- 2. That the said properties be sold and the net proceeds be shared equally by the applicant and**

respondent.

3. The respondent's shares in *[particulars withheld]* Company Limited and *[particulars withheld]* Ltd are jointly owned by the applicant and the respondent and the respondent hold half of his said shares in trust for the applicant.
4. That the said shares be sold and the net proceeds of sale be shares equally by the applicant and respondent.
5. The costs of this originating summons be borne by the respondent on the grounds that:-
 - a. That the said properties were acquired through the joint efforts of the applicant and the respondent during the subsistence of their marriage.

So far as *[particulars withheld]* Company Limited is concerned, the husband has admitted that he owns 25 percent of the shares of the said company which is now the owner of Garden Estate property which is admittedly a matrimonial home and where the wife has stayed with family since at least 1965. The sole (sic) action of the husband of transferring to a company and then on his own sub-dividing it, can obviously raise an eyebrow and also raise a doubt as to its corporate existence. The property as at January 2000 had a rate arrears of about Kshs. 410,920/= and had a mortgage for Kshs. 400,000/=. It is a very complex situation and best I can do is to direct that the shares of the husband in the said company be considered as in trust for the applicant wife and if there is a sub-division, as indicated, the property shall be held in trust for her and children in the ration of 25:75 per cent.

I shall have no hesitation in directing that the plot of land bearing L.R. Loc. 3/ *[particulars withheld]* be held by the respondent husband in trust in equal shares for the benefit of the applicant wife.

As the husband has acquired the plot bearing Loc. 3/ *[particulars withheld]* after selling 31 acres of the plot land in Ruiru which was purchased after the contribution received from the applicant I shall direct that the respondent/husband shall also hold the same in trust in equal share on behalf of the applicant wife.

I have no other details on *[particulars withheld]* Co. Ltd or *[particulars withheld]* Co. Ltd and also because they are not before the court, I shall not make any order against any other shares or property held by them..."

[7] The learned trial Judge therefore concluded that the appellant was entitled to a share of the properties claimed and made the aforementioned orders. The appellant was aggrieved in particular with the order in regard to the sharing of the matrimonial home and appealed against the above judgment on the following grounds:-

“1. THE Honourable judge erred in fact and in law by failing to lift the corporate veil although it was clearly evident that *[particulars withheld]*Limited the alleged owner of L.R. No. *[particulars withheld]* Garden Estate, Nairobi is the respondent in Alter Ego.

2. THE Honourable judge erred in the circumstances of this case by holding that if there is a sub-division of the property L.R. No. *[particulars withheld]* Garden Estate Nairobi, it shall be held in trust for the appellant and her children at the ratio of 25:75.

3. THE Honourable judge erred in fact by holding that the respondent purchased the plot bearing L.R. Location 3/ *[particulars withheld]* after selling 31 acres of land at Ruiru Town, that is, L.R. No. *[particulars withheld]* Ruiru Town while the respondent's evidence was that on selling the said 31 acres of land at Ruiru, he bought a 0.6 acre plot in Thika where he established another home where he lives to date.

4. **THE Honourable judge erred in fact by holding that the properties bearing L.R. Location 3/ [particulars withheld] and L.R. Location [particulars withheld] be held in trust by the respondent in equal shares on behalf of the appellant and failing to direct that the said parcels of land be sub-divided for the applicant to be able to enter each of her portions therein and utilize the same for her own benefit.**

5. **THE Honourable judge erred by failing to direct that since the respondent bought the Thika property after selling a matrimonial property measuring 31 acres at Ruiru bought by the couple in 1967, then he ought to retain the said Thika property and the applicant retains L.R. No. [particulars withheld] Garden Estate, Nairobi as prayed.**

6. **THE Honourable Judge erred in fact by failing to give specific orders sub-dividing the shares held by the respondent in [particulars withheld] Co. Ltd in equal numbers between the said respondent and the appellant.**

7. **The Honourable Judge in the circumstances erred by holding that the applicant was entitled to only three quarters of the costs of this matter.”**

[8] The appellant then proposed the following orders if the appeal was allowed;

“a) The aforesaid judgment and decree of the superior court be set aside partly;

b. The appellant seeks to have the corporate veil of [particulars withheld] Limited lifted and a declaration that the said company is the respondent in Alter Ego.

c. An order that the applicant in the circumstances of this case be allowed to hold the whole of the property L.R. No. [particulars withheld]Garden Estate, Nairobi.

d. An order that the properties bearing L.R. Location 3 [particulars withheld] and L.R. Gaichanjiru/ [particulars withheld] be sub-divided in equal shares between the appellant and respondent.

e. An order that the shares of [particulars withheld] Company and those of [particulars withheld] Company held by the respondent be shared equally by both the appellant and respondent.

f. An order that the appellant is entitled to full costs of this appeal and the costs of the trial in the superior court.”

[9] This appeal came up for hearing on 26th February 2015 and on that occasion, both counsel for the appellant and the respondent proposed by consent that the appeal be determined on the basis of written submissions. The court gave directions on the time frame within which each party was to file their respective written submissions and directed that the appeal be fixed for hearing so that counsel could highlight their submissions. However, when this matter came up for hearing before us on the 15th June 2015, counsel for the respondent did not attend court although the record indicated that she was duly served with the hearing notice. Mr. King’ara, learned counsel for the appellant made some brief oral highlights and largely relied on the written submissions. Counsel for the respondent had also filed written submissions which are before us.

[10] We have considered the written submissions by the respondent, by which it is argued that the corporate veil of [particulars withheld] Company Ltd cannot be lifted as this issue was merely introduced in the appeal as an afterthought. The other issues raised in the submissions challenge the appellant’s contribution to the acquisition of the matrimonial properties: that the respondent paid for the entire upkeep of the family: the appellant did not seek for orders of maintenance or divorce: the matrimonial properties cannot be divided during the existence of a marriage as held in the case of; **SAA Vs. FM [2005] e KLR**. We think these issues were not cross-appealed against by the respondent thus the only

challenge mounted against the judgment of the trial Judge has to do with the matrimonial home which the respondent transferred to *[particulars withheld]* Co Ltd which is the gist of this appeal.

[11] The main issue under contention in this appeal is to do with the lifting of the corporate veil of *[particulars withheld]* Company Ltd. to which the respondent transferred the parcel of Land LR No. *[particulars withheld]* Garden Estate which is the matrimonial home of the parties. According to the respondent, *[particulars withheld]* company was not a party to the suit; citing the case of **Eunice Kyalo Muthembwa V. Cosmos Muthembwa [2014] eKLR** where the High Court ruled that shares in a limited liability company are not subject to division as matrimonial property; the corporate entity of the company was not challenged, that the respondent contributed to the acquisition of the matrimonial properties singlehandedly and his decision to transfer a property that was in his name was not subject to any challenge.

[12] Noting as we have done here above that there was no cross-appeal by the respondent, the arguments that the appellant did not contribute to the acquisition of the matrimonial properties in our view are misplaced and the findings by the trial Judge remain intact in the absence of a cross- appeal. For the sake of clarity we restate what the learned trial Judge held:

“I shall thus find, and hereby do that the applicant (wife) contributed directly to the acquisition of the plot of land bearing LOC 3/*[particulars withheld]* and Garden Estate property LR No. *[particulars withheld]* and indirectly to the acquisition of plot bearing LR *[particulars withheld]* Ruiru Town.”

[13] To us, there is no cross-appeal to challenge the above findings. When this appeal came up for hearing, Mr. King’ara indicated that the only issue the appellant intended to pursue was the equitable distribution of the matrimonial home at Garden Estate being LR No. *[particulars withheld]* which is covered under ground No. 5 of the grounds of appeal. According to counsel for the appellant, the trial Judge was required to deal with the transfer of the matrimonial property to *[particulars withheld]* Ltd. because the respondent admitted that he is fully in control of the aforesaid company when he stated as follows in evidence:

“When I retrieve the Garden Estate property I intend to give it to my children. I have already given half an acre to my son to build his house.”

[14] To buttress the point that the aforesaid transfer of the matrimonial home to a company was not genuine, it was indicated that the sale price was Kshs. 75,000/= which was inordinately below the market value. Moreover, the respondent said he was selling to pay off a mortgage of Kshs. 1,100,000/= and later a sum of 400,000/= which is illogical as the alleged purchase price was far below the loan that was purportedly obtained on transfer. This issue was aptly captured by the learned Judge when she posited as follows in a portion of the judgment:-

“That is not all, the matrimonial home property (which is termed as such by both) was mortgaged by the husband so as to get financial assistance to acquire further properties by him. To add insult to injury, husband sells it to a company for only Kshs. 75,000/= out which (sic) loan of Kshs. 1,200,000/= was obtained and later Kshs. 400,000/= was obtained immediately after the same was purchased by *[particulars withheld]* Company.

Admittedly, the shareholders of the company are husband and his brothers. He admits he owns 25 percent shares in the company. However, on the other hand he himself avers that he on his sole choice has subdivided the property. What kind of a corporate entity is that? His reason to form a company was (sic) difficulties in payment of debts, but in his own testimonies, he stated that he bought some tea farms of 9 acres in Murang’a and another 3 acres of coffee farm. That is not the language or action of a person who is financially starving”.

[15] The learned trial Judge having made the aforesaid findings, Mr. King'ara learned counsel for the appellant submitted that the Judge ought to have lifted the corporate veil and in this regard he cited an English case: Atlas Maritime Vs. Arabian Maritime No. 3 [1991] 4 ALLER to underscore the principle that the respondent was the sole beneficiary of the shares in the company that he transferred the matrimonial home to. The respondent also admitted that he made key decisions on behalf of *[particulars withheld]* co. Ltd, which means he was the mind and soul of the said company or the alter ego of the company. In the Atlas case, while Neill LJ., was dealing with the issue of when a court can be called upon to lift a corporate veil of a company, he made reference to instances where; notwithstanding the principle of Salomon Vs. Salomon & Co. Ltd [1897] AC 22, “*the corporate veil*” between two companies can be pierced so that one company is to be regarded as the alter ego of the other.”

The above approach was recognized by Dankwerts LJ., in Merchandise Transport Ltd Vs. British Transport Commission [1961] 3 ALL ER 495 at 518, where he said:

“.....where the character of a company, or the nature of the persons who control it, is a relevant feature the court will go behind the mere status of the company as a legal entity, and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance.”

[16] It should be noted from the above excerpts of the judgment which we have reproduced verbatim that the learned trial Judge accepted the circumstances under which the respondent transferred the matrimonial home to a company were meant to defraud or deny the appellant any claim over the same. That being the case, the singular issue before us in this appeal is whether the learned Judge having made those conclusions should have proceeded to lift the corporate veil of *[particulars withheld]* Co. Ltd and declare the entire shares and ownership of LR No. *[particulars withheld]* situated in Garden Estate as owned between respondent and the appellant. And further having found that the respondent sold a parcel of land measuring 31 acres and bought another property in Thika where he lives, whether the Garden Estate property should go to the appellant alone.

[17] We have to interrogate the issue of whether the corporate veil of *[particulars withheld]* Company Ltd should have been pierced to unveil the wrong doing by the respondent. According to Black's Law Dictionary 9th Edition, “*Corporate Veil*” is defined as:-

“The legal assumption that the acts of a corporation are not the actions of its shareholders, so that the shareholders are exempt from liability for the corporation's actions.” While “*piercing the corporate veil*” is defined as:

“The Judicial act of imposing personal liability on otherwise immune corporate officers; directors or shareholders for the corporation's wrongful acts – Also termed disregarding the corporate entity.”

[18] It can be observed, and indeed the learned trial Judge made a finding that the *bona fides* of the transfer of the matrimonial home, which was done far below the market price and the rationale of the respondent allegedly transferring shares to himself and his brothers when in his evidence he maintained that he had total control of the sub division of the land left the Judge wondering what kind of a corporate body *[particulars withheld]* Company Limited was. Having made these conclusions which are also supported by the evidence, in our view, *[particulars withheld]* Company's corporate existence should have been disregarded and declared a mere sham, that was incorporated merely to mask the respondent as he attempted to alter and confuse the ownership of the matrimonial home and thereby make it impossible for the appellant to make any claim over it. Fortunately, for the appellant, this country is governed by the rule of law and not by the whims of individuals, erstwhile husbands included.

[19] Returning to the issue at hand for our determination, we think that we have to look at the prayers sought by the appellant under prayer No. 3 of the Originating Summons which stated:-

“That it be declared.....

That the respondent’s shares in , [particulars withheld] Company Limited and [particulars withheld] Company Limited are jointly owned by the applicant and the respondent and the respondent hold half of his said shares in trust for the applicant.”

Going by the above pleading, the appellant did not seek the whole share in [particulars withheld] Company Limited. In our view, therefore, she cannot seek the entire parcel of land LR No. [particulars withheld] which was transferred to [particulars withheld] Company Limited. Her claim is only for one half shares. It is trite that a party is bound by their own pleadings and the appellant cannot in an appeal seek what was not pleaded.

[20] Having established that the appellant’s claim, which can be entertained, is for one half share of the matrimonial home as there is no dispute over the sharing of the other properties declared by the trial Judge, how should we proceed from here? Firstly, the law in Kenya has now been spelt out in the Constitution of Kenya 2010 **Article 45 (1) (3)** which states:

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”

[21] Recently, Parliament enacted the Matrimonial Property Act which makes the following definitions of what constitutes **“contribution”** to mean **“monetary and non-monetary contributions and includes-**

- a. **Domestic work and management of the matrimonial home;**
- b. **Child care;**
- c. **Companionship**
- d. **Management of family business or property; and**
- e. **Farm work.”**

...

Ownership of matrimonial property is described under Section 7 of the Matrimonial Property Act as:-

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

[22] We are however aware that this case was decided before the current Constitution came into force and that is why we trace the law as it was then. The law was clearly re-stated by this Court in the case of **Muthembwa Vs. Muthembwa** [2002] I KLR page 92. Indeed the High Court decision in the Muthembwa case that was referred to by counsel for the respondent was overturned by the Court of Appeal in the above case. In that case, this Court was deciding just like in the present appeal, the division of matrimonial property acquired during coverture between a husband and a wife. In that case, just like in the present one, the properties were intertwined with company property. The Court clarified the law in the following passages:

“In assessing the contribution of spouses in acquisition of matrimonial property each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness.

The jurisdiction of the court is to determine a question or questions between husband and wife principally as to title to or possession of property.

In the instant case, where matrimonial property is intertwined with company property the court cannot decline jurisdiction under Section 17 to deal with the whole property as this would be unjust. In application under section 17 the court has wide and unfettered discretion to make such order or orders as justice may demand including sale and distribution of property subject of the application.”

[23] The aforementioned authority settled the law regarding shares held in a company. 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 a husband and wife has power to ascertain the respective beneficiaries’ rights of husband and wife to the disputed shares. See **DM V. MM [2008] 1 KLR 263.**

[24] In the case before us, it is not in dispute that the appellant has been in possession of the matrimonial home at LR No. ***[particulars withheld]*** Garden Estate from 1965 when it was purchased. The husband left the matrimonial home in 1970s or thereabout and settled in Thika. In our view, the fact that the appellant was in possession of the matrimonial home granted her beneficial interest over the same and therefore no valid transfer of the said property could possibly be effected without first seeking and obtaining her consent. Similarly no valid subdivision could be effected without first of all establishing the interests of the persons who were in occupation. (See the provisions of section 30 (g) of the repealed Registered Land Act).

[25] In the event, the respondent ought to have recognized the beneficial interest of the appellant who was in possession of the suit land from 1965 and realized he owed her not only a duty of care but one of a trustee. This is the position of the law as very well articulated by the courts in Kenya, if we may trace it in the oft cited case of **Karanja Vs. Karanja [1976] KLR 307** where (Simpson, J.) said at page 311 paragraph b.c.d.:

“On the basis of these authorities, payments by the wife need not be direct payments towards the purchase of the property, but may be indirect such as meeting household and other expenses including expenditure on clothing for the wife and children and the education of the children which the husband would otherwise have had to pay: and even though the husband may never have evinced on intention that his wife should have a share in the property the wife may in the circumstances of the case be entitled to a declaration that the property registered, in the husband’s name is held wholly or in part in trust for her by virtue of its acquisition as a joint venture. Although most authorities deal with disputes in relation to the matrimonial home, it is because the majority of married couples in England have only one house. Section 17 is not limited in its application to matrimonial home and content.”

[26] That position of the law in this country was stated in 1976. It has been expounded by this Court in numerous other decisions to name but a few like **Kivuitu Vs. Kivuitu [1988-1992] 2 KAR 241**, **James Kamore Njomo Vs. Phoebe Wangui Kamore [1998] LLR 714**, **DM VS. MM** (supra) and others.

[27] Bearing in mind the principles that have been expounded over time, we are of the view that the holding by the trial Judge regarding the appellant’s share of matrimonial home in the following terms cannot be said to be fair and reflective of the appellant’s interest, and contribution of the acquisition of the property. This is what the Judge held:

“That the shares of the husband in *[particulars withheld]* Company Limited which now owns the Garden Estate property admittedly a matrimonial home and where the wife has stayed with family since at least 1965 be considered as held in trust for the applicant (wife) and if there is a sub-division, is indicated the property shall be held in trust for her and the

children in the ratio of 25:75 percent.”

[28] With tremendous respect, we do not see how or where the issue of children came from into this dispute where the appellant applied for determination of her own shares in her own right as having contributed to the property. It is a good gesture to think of children but first the appellant should be given what is her legal entitlement in her own right as there was no claim by the children. If the appellant deemed it fit she could then give her share to the children. For the aforesaid reasons, we would partly allow the appeal to the extent that we set aside the above part of the judgment and decree as stated above and substitute it with an order that the appellant and respondent are declared equal owners of the property known as LR No. **[particulars withheld]**, situated in Garden Estate Nairobi.

[29] As the respondent single handedly caused a sham transfer of the said land to a company called **[particulars withheld]** Company Ltd, the respondent as the prime mover of the said company holds the said shares equivalent to one half share of LR No. **[particulars withheld]** in trust for the appellant. We are also inclined to issue a consequential order, to preserve the above property by restraining the respondent, his agents, co-directors or nominees from transferring or dealing with the ownership of LR No. **[particulars withheld]** until the appellant’s share is delineated and identified or transferred to the appellant as the case may be.

This appeal has partially succeeded and this being a family dispute, there are no orders as to costs.

Dated and delivered at Nairobi this 31st day of July 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR