



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)**

**CIVIL APPEAL NO. 33 OF 2014**

**BETWEEN**

**PWK..... APPELLANT**

**AND**

**JKG..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nyeri (Sergon, J.)*

*dated 21<sup>st</sup> February, 2014*

***In***

***H.C. Divorce Cause No. 2 of 2002)***

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**JUDGMENT OF THE COURT**

The appellant and the respondent were wife and husband having celebrated their marriage on 5<sup>th</sup> August, 1978 at Siaya Township in the then Nyanza Province. They were blessed with four children who are now adults. However, following marital problems, the appellant filed a divorce cause in the year 2002 seeking, *inter alia*, dissolution of the marriage and division of matrimonial property.

The grounds in support of the petition for divorce were that the respondent was guilty of desertion, cruelty and adultery. The High Court (Makhandia, J. as he then was) directed that the hearing first be in respect of the petition for divorce and thereafter on the division of matrimonial property. The divorce hearing proceeded as an undefended cause and the appellant was granted a divorce on 7<sup>th</sup> May, 2009 on account of the respondent’s adultery.

In regard to the issue of division of matrimonial property, it was the appellant’s case that when she got married in the year 1978, she was working as a Nursing Officer II earning a salary of Kshs. 1,400 per month. By the time she left employment in the year 1988 to run the family business she was earning Kshs. 3,000. She single handedly ran the family business then known as **[Particulars Withheld]**. That business was later closed and a new one known as **[Particulars Withheld] Ltd.** (the company) begun in the year 1991. It had its offices on ½ share of Nyeri **[Particulars Withheld]** (business premises). The company was involved in selling of medicine for human use, veterinary medicine, farm chemicals and

cosmetics. The appellant again single handedly ran the company from the year 1991 until 1997 when the respondent retired from employment and joined her in running it. The appellant and the respondent were the only shareholders of the company.

According to the appellant, when the respondent deserted the matrimonial home in April, 2002 he took the entire stock, two vehicles and money from the company and incorporated parallel businesses called **[Particulars Withheld]** and **[Particulars Withheld]** in Kerugoya. As a result, the company was unable to pay its creditors and operate. Consequently, the appellant began another business known as **[Particulars Withheld]** Ltd using borrowed merchandise from suppliers. At the time of filing the Petition, the appellant was struggling to keep the new business afloat. She operated that new business on the premises wherein the company was located.

The appellant averred that during the subsistence of the marriage, the parties acquired the following properties from their salaries while in employment, and from proceeds of the company:-

- i. *Ngariama/Thirikwa/* [Particulars withheld]
- ii. *Aguthi/Gatitu/*[Particulars withheld]
- iii. *Aguthi/Gatitu/*[Particulars withheld]
- iv. *Nyeri Municipality/Block* [Particulars withheld]
- v. *Nyeri Municipality/Block* [Particulars withheld]
- vi. *Nyeri Municipality /Block* [Particulars withheld]
- vii. *Aguthi/Gatitu/*[Particulars withheld]
- viii. *Ngariama/Rungeto/*[Particulars withheld]
- ix. *Ngariama/Kabare/*[Particulars withheld]
- x. *Nyandarua/01-Joro-Orok West* [Particulars withheld]
- xi. *½ share Nyeri Municipality/ Block* [Particulars withheld]
- xii. *Ngariama/Kabare/*[Particulars withheld]
- xiii. *Ngariama/Kabare/* [Particulars withheld]
- xiv. *Bukhayo Central/ Nambare/*[Particulars withheld]
- xv. *Plot No. 627 Phase II* [Particulars withheld]
- xvi. *Block II/1002* [Particulars withheld]
- xvii. *Nyahururu Block* [Particulars withheld]
- xviii. [Particulars withheld].

She testified that even though the land on which the company operated was registered in the respondent's name, she was the one who actually purchased the same. She stated further that various matrimonial properties were registered in the name of the company including the matrimonial home situated on Nyeri [Particulars withheld]. After deserting the matrimonial home, the respondent transferred some of the matrimonial properties to his lawyer, brother and sister as gifts with the aim of defeating her interests. She has always resided in the matrimonial home and single handedly serviced the mortgage over the said property. At the time of filing the Petition the respondent was only catering for university fees for one child who was studying in Canada, while the appellant catered for the other three children who were studying in USA and Canada, she contended. She therefore prayed that all the above mentioned properties be divided equally between the respondent and herself.

The respondent, on the other hand, contended that the appellant's contribution towards the acquisition of some of the properties listed above was minimal. When he got married to the appellant he was a veterinary doctor and used to get income from private practice. Sometime in the year 1988 he pursued his master's degree in the UK while he was on full pay. Upon returning home, he had saved up a substantial amount of money which he used to purchase some of the properties. He admitted that he joined the appellant in running the company in the year 1997. He moved out of the matrimonial home some time in April 2002 and left the company under the management of the appellant. He denied taking any stock or money from the company and charged that it was the appellant who transferred the company's stock and money into her new business which she was operating in the business premises. He contended that the appellant refused to pay the company's creditors and suppliers causing numerous suits to be filed against the company and an escalation of overdraft facilities. What is more, the appellant wrongfully diverted

payment cheques written in favour of the company to her new business [Particulars withheld].

The respondent contended that he acquired the following properties solely without any contribution from the appellant and has since sold them to cater for school fees and debts: -

- i. **Ngariama/Thirikwa**/[Particulars withheld]
- ii. **Ngariama/Ruguru**/[Particulars withheld]
- iii. **Ngariama/Kabare**/ [Particulars withheld]
- iv. **Nyandarua**/[Particulars withheld]
- v. **Aguthi/Gatitu**/[Particulars withheld]
- vi. **Aguthi/Gatitu**/ [Particulars withheld]
- vii. **Aguthi/Gatitu**/[Particulars withheld]
- viii. **Nyeri/Municipality**/ [Particulars withheld]
- ix. **KAL** [Particulars withheld]
- x. **KAG** [Particulars withheld]
- xi. **Ngariama/Kabare**/[Particulars withheld]

He acquired the following properties before the marriage: -

- i. **Nyandarua/Ol-joro-Orok**[Particulars withheld]
- ii. **Bukhayo/Kisoko**/[Particulars withheld]

He stated that the following properties are not and have never been registered in his name and are nonexistent: -

- i. **Ngariama/Kabare**/[Particulars withheld]
- ii. **Plot No. 627 phase II** [Particulars withheld]
- iii. [Particulars withheld]
- iv. **Kenya Industrial Estate Block** [Particulars withheld]
- v. **Nyahururu/Block** [Particulars withheld]

The only properties registered in favor of the company, according to him, are:-

- i. **Nyeri Municipality Block** [Particulars withheld]
- ii. **Nyeri Municipality Block** [Particulars withheld]

From the record, we note that the respondent in his Answer to the Petition

denied ever owning [Particulars withheld] yet in his testimony he stated he purchased the said property before the marriage. Likewise, he averred in his Answer to the Petition that the property described as [Particulars withheld] Nyeri was charged to Standard Chartered Bank yet in his testimony he stated that the said property was nonexistent.

The respondent maintained that the only property which was in his

name was the business premises wherein the appellant currently operates her new business and he purchased it single-handedly. He admitted having transferred some of the properties to his lawyer, brother and sister but stated that it was for purposes of raising funds to cater for the needs of the children and to pay debts.

By a judgment dated 21<sup>st</sup> February, 2014 Sergon J. found that the only property which was available for division was the business premises. He directed that it be shared equally between the parties. He held that the properties which had since been transferred to third parties and to the company could not be treated as matrimonial property. The learned Judge also found that the appellant had not proved her financial contribution towards the identified matrimonial properties.

Aggrieved by that decision, the appellant filed this appeal based on the following grounds: -

- ***“The learned Judge erred in law and fact in holding that the petitioner (appellant) had failed to establish that properties (ii)-(v) were not matrimonial properties. Sic***
- ***The learned Judge illegally and wrongly held that the petitioner had not proved her financial contribution in respect of the aforesaid properties.***
- ***The learned Judge erred in law and in fact and wrongly held that the petitioner was only entitled to only a quarter of [Particulars withheld] alias [Particulars withheld] despite the findings that the petitioner had participated in its acquisition and development.***
- ***The learned Judge erred in law and fact and wrongly held that prayer (iii) had been overtaken by events while the children were still studying abroad and further erred that they got education through the courtesy of the respondent while it was through the courtesy of petitioner and further that the respondent himself was educated abroad by the petitioner. Sic***
- ***The learned Judge erred in law and fact in holding that properties being registered in the company’s name cannot be regarded matrimonial properties hence no finding was made up (sic) on crucial properties were left out of his judgment. Sic***
- ***The learned Judge erred in law and fact when he held that some properties which were transferred while(sic) pendency of petition and when it was evidently clear that they had been transferred to defeat the petition. The court was wrong when it made a finding that they were not matrimonial properties. Sic***
- ***The learned Judge erred in law and in fact in disregarding the petitioner’s evidence and her well founded submissions.***
- ***The learned Judge was determined to dismiss the petition haphazardly where(sic) he made a judgment in favour of the respondent without looking into the facts and the law.”***

Mr. Gori, the appellant’s learned counsel elucidated on those grounds when arguing the appeal before us as follows; He first submitted that the learned judge erred in categorizing [Particulars withheld] as property of the company when the same was admitted by both parties to be matrimonial property. Counsel urged that the same was property transferred to the company without the appellant’s knowledge or participation notwithstanding that she was a 50% shareholder in the company. In his view, the property is still intact as matrimonial property.

Counsel also criticized the learned judge for failing to find that a number of properties bought during the subsistence of the marriage between the parties, and registered either in the name of the respondent or of the company, were in fact matrimonial property. The company was run by the appellant until the respondent joined her in doing so after his retirement and it is the proceeds therefrom that were used to purchase the properties. Mr. Gori contended that for the learned judge to have secured only one out of more than a dozen properties amounted to a miscarriage of justice. He submitted that all of the properties having been purchased during the marriage with proceeds from the company which the appellant was running, the appellant was entitled to 50% of all by reason of having made actual contributions to their purchase as contemplated by several decisions of this Court including **KIVUITU –VS- KIVUITU** [1991]2 KAR 241 and **PETER MBURU ECHARIA –VS- PRISCILLA NJERI ECHARIA** [2007] eKLR .

Opposing the appeal, Mr. Githiga Mwangi, learned counsel for the respondent submitted that as at the time the parties separated in 2002 they were heavily in debt yet the respondent was required to pay school fees for the children of the marriage, who were still studying abroad. It was for this reason that he sold [Particulars withheld] and [Particulars withheld] **at Ksh.250,000** each and applied the funds to meet those pressing requirements. As for the various properties that are registered in the name of the company,

including the matrimonial home, he contended that the proper forum for the determination of their fate is Winding Up Cause No. 15 of 2005 which is still pending before the High Court. He urged that there was an agreement between the parties as to the propriety of that other forum. This was contested by his counterpart for the appellant, and he was unable to point it out on the record.

Mr. Mwangi submitted that financial contribution to the acquisition of matrimonial property is a matter of evidence and the appellant failed to show her contribution. He also questioned her *bona fides* by pointing out that [Particulars withheld] was acquired during the marriage but she failed to list it among matrimonial properties. We note from the record that the title to that particular property clearly indicates that the appellant holds the same in trust and that aspersion cast is therefore quite plainly unfounded.

Counsel further contended that by awarding the appellant half of the half share of [Particulars withheld] alias [Particulars withheld], the learned Judge was more than fair to her as the property in question, the only one in the names of the parties, is prime. He was categorical that the properties in the name of the company were not matrimonial property and cited in aid this Court's decision in M –VS- M [2008] KLR (G&F) 247. He concluded his submissions by asserting that the properties that the respondent disposed of in 2002 and 2003 were sold for genuine reasons and not to defeat the appellant's cause as she contended.

Replying to those submissions, Mr. Gori maintained that there was nothing genuine in the respondent's sale of the various properties and added that the respondent in fact misappropriated the company's assets which he used to go and set up a business by the name [Particulars withheld].

As this is a first appeal, it proceeds before us by way of a re-hearing but without the benefit of hearing and observing the witnesses as they testified, and we therefore make allowance for that even as we reconsider and reevaluate the evidence from the record, so as to draw our own inferences of fact and arrive at our own independent conclusions. **See Rule 29(1) of the Court of Appeal Rules.** We necessarily approach the findings and conclusions of the trial judge with a measure of deference, interfering only where such findings are based on no evidence, are based on a misapprehension of the evidence or the learned judge is shown to have been plainly wrong and is therefore unmaintainable. These principles have been restated in many cases including EPHANTUS MWANGI & ANOR –VS- DUNCAN MWANGI WAMBUGU [1982-88]1 KAR 278 and SUMARIA & ANOTHER –VS- ALLIED INDUSTRIES LIMITED [2007] 2KLR 1.

Having gone through the entire record before us with a careful eye and considered the submissions made by counsel and the authorities cited, we have isolated the main issues for our determination to be these;

- (a) Whether, and if so to what extent, the appellant contributed to the acquisition of matrimonial property.**
- (b) Whether the properties registered in the name of the company were part of matrimonial property and available for distribution.**
- (c) Whether the properties admittedly sold or otherwise disposed of by the respondent during the pendency of the litigation should be taken into account in the distribution.**

We observe at the outset that the learned Judge appears to have addressed

the matter before him in a rather casual manner and does not appear to have gone into the kind of analysis that would have been called for in a matter as contested as the one before him.

On the issue of the appellant's contribution this is all that the learned Judge stated;

***“As the law stands, matrimonial properties can only be divided amongst the couples (sic) on the basis of evidence, of financial contribution. It was therefore incumbent upon the petitioner to establish her claim. The petitioner has suggested that she be given half of the aforementioned properties;- The respondent urged this court to reject the submissions because the petitioner has***

***failed to establish her claim, I have considered her evidence and it is clear that the petitioner has failed to discharge the burden of proof of financial contribution to the properties mentioned in (ii) –(v) hereinabove.”***

The properties the learned judge was referring to were **Ngariama/Kabare**/[Particulars withheld];

**Plot No. 627** [Particulars withheld]; **Kenya Industrial Estate Block** [Particulars withheld] and **Nyahururu/Block** [Particulars withheld] which, he was satisfied, were registered in the respondent's name despite his denial of the same.

The testimony given and the evidence tendered by the appellant on the issue of her financial contribution (to all the properties subject to the cause and not just the four addressed by the learned Judge) is that when she married the respondent on 8<sup>th</sup> August 1978, she was working at the Siaya District Hospital as a Nursing Officer II. Her salary was Ksh.1,400 per month but had more than doubled to Ksh.3,000 by the time she left the service a decade later. She stated;

***“This was in May 1988. I left in order to run our family business then known as [Particulars withheld] which was started in 1984.***

***In 1993, we stopped the business and opened a new one known as [Particulars withheld]. This was in 1989. We were selling medicine for human use, veterinary medicine for animals, farm chemicals and cosmetics. By then the respondent was a civil servant, a veterinary doctor and a lecturer at [Particulars withheld]. I was therefore literally running the show alone. The respondent later joined me in 1997 after he retired.”***

The appellant stated that it is during coverture that the parties acquired the 18 properties that were listed in paragraph 11 of her Petition. As to the source of funds, she stated that the money came from our **“salaries and the businesses”**. She was able to produce documents showing the dates during marriage when the said properties were acquired.

In cross-examination by the respondent's counsel, the appellant was quite emphatic and consistent that the company was opened in 1989 and registered in 1991. It had one bank account of which the parties were signatories and either could sign. The company made profits between 1992 and 2002;

***“I cannot know how much though. However, I know we used proceeds therefrom to buy several properties. There were 17 properties.”***

Of those seventeen properties she stated that three were bought by the

parties' joint salaries but the rest were from the company's profits and were so registered.

On our own perusal of the appellant's evidence in totality, which was largely uncontroverted, we are quite satisfied that it did establish her financial contribution to the purchase of those properties. The exact proportion of her contribution is not ascertainable with any measure of precision but it definitely is not **“minimal”** as was urged by the respondent's counsel. Both parties were employed in the civil service when they got married and continued to work, on an increasing salary, for a decade. When she left employment, she went to run the family business for nearly a decade single-handedly before he joined her. She was not idly sitting by and we do not accept the respondent's contention before the High Court that she was merely employed by the company as a cashier. He admitted she was co-director of, and had been running the company before he joined her in 1997. Nor are we persuaded by his testimony that the proportions for distribution should be  $\frac{3}{4}$  to  $\frac{1}{4}$  in his favour because **“her contribution was minimal as she used her salary to buy cosmetics and clothes.”**

We think that this is an appropriate case where, subject to what we shall say hereafter, a distribution of 50:50 would have been appropriate. This would not be on account of any compelling legal principle that spouses must share equally in matrimonial property but rather, as was succinctly put by a five-judge

bench of this Court in ECHARIA –VS- ECHARIA (Supra)

*“Where the disputed property is not so 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 the 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 or equity” while heading the caution of Lord Pearson in GISSING –VS-GISSING [1970] 2 All ER 780] at page 788 paragraph c that:*

*‘No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions otherwise than by way of advancement, by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one quarter, I do not think it is helpful or right for the court to feel obliged to award either one half-or nothing’.*”

We are of the respectful view that the principles restated by ECHARIA

–VS- ECHARIA are good law and contribution as the basis for distribution of matrimonial property remains valid.

The evidence on record, (principally documents of title), all show, however, that the appellant did not have any of the properties bought during coverture registered in her name. Rather, 16 of the properties were registered in the respondents name, that is to say;

1. **Nyeri Municipality Block** [Particulars withheld]
2. **Nyeri Municipality Block** [Particulars withheld] (**half share**)
3. **Nyeri Municipality Block** [Particulars withheld]
4. **Aguthi/Gatitu**/[Particulars withheld]
5. **Aguthi/Gatitu**/[Particulars withheld]
6. **Aguthi/Gatitu**/[Particulars withheld]
7. **Kenya Industrial Estate Block** [Particulars withheld]
8. **Nyandarua/Ol-Joro Orok West**/[Particulars withheld]
9. **BukhoyoCentral/Nambale**/[Particulars withheld]
10. **Plot No. 627 Phase 1** [Particulars withheld]
11. **Ngariama/Thirikwa**/[Particulars withheld]
12. **Ngariama/Rugeto**/[Particulars withheld]
13. **Ngariama/Kabare**/[Particulars withheld]
14. **Ngariama/Kabare**/[Particulars withheld]
15. **Ngariama/Kabare**/[Particulars withheld]
16. [Particulars withheld]

It is worth noting, as we stated before, that in his Answer to Petition dated

26<sup>th</sup> November 2002, the respondent denied ownership of nine, of the properties listed above. He denied the very knowledge or existence of four of them. In the list of properties filed in court on 18<sup>th</sup> March 2011 by his advocates, however, he admitted owning four of them and attempted to explain , though this was not borne out by the evidence, that two others were acquired before the marriage.

Significantly, the respondent in his testimony, list of properties and submissions admitted having sold **eleven** of the properties, including some of those he had denied owning or knowing. The disposal took place around 2002 and 2003 ostensibly for purposes of paying school fees and the debts owed by the company. It is telling, however, that the appellant’s testimony on this aspect, backed by documentary evidence which the respondent did not dispute, was that the transfers effected by the respondent occurred during the pendency of the matrimonial property proceedings. What is more, the properties were

transferred to persons very closely associated or related to the respondent. They are **[Particulars Withheld]**, a friend; **[Particulars Withheld]**, his lawyer; **[Particulars Withheld]**, his brother and **[Particulars Withheld]**, his married sister. Contrary to the Respondent's assertions that the transfers were for stated sums of money, the documents show that some at least of the properties were so transferred as gifts. At any rate, the closeness of the persons to whom the transfers were made and the timing thereof are enough reason to doubt that good and effective value was obtained for those transfers, even assuming they were bona fide. Their destination is also suggestive of their being within the reach or control of the respondent.

Having considered the number, sizes and location of the properties sold and those that remain in the name of the respondent, there can be no doubt that in dealing with them as he has, the respondent has kept or disposed of the lion's share of the matrimonial property or otherwise kept it away from the reach of the appellant who sought to have a fifty-fifty division of it in the first instance.

In what appears to have been a pragmatic appreciation of the changed reality, the appellant is recorded to have stated the following in re-examination as the crux of what she sought from the court;

***"We stated (sic) [Particulars Withheld] in November 2002. We started it in the same premises. The building is owned by me as I bought it from the late [Particulars Withheld] and her mother. That is the property in Ex. 22. I was not getting rent from the [Particulars Withheld] itself. The premises being mine I cannot pay rent. I have produced in court bundles of documents showing several parcels of land acquired during the marriage from the proceeds of our business.***

***Accordingly they belong to both of us and should be shared equally. However I allowed the respondent to have the property registered in his name because he was my husband and I trusted him. Whatever he has transferred and registered in his sisters, brothers, friends and his lawyers name should be considered as his share. I should get the remaining properties. I stay in the house on [Particulars Withheld] in the name of [Particulars Withheld] but I am still paying the mortgage. I would wish to retain the same and the adjoining plot. I would also wish to retain the shop where the [Particulars Withheld] (sic) was so that I can continue earning a living."***

On our own appreciation of the evidence as appears on the record, we have come to the quite inescapable conclusion that the appellant was more candid and more gracious in the matter of the matrimonial property than the respondent. We have already pointed out some of the instances where the respondent took positions that were patently untrue or demonstrably incorrect. And we find that the appellant's plea aforesaid is quite unanswerable. It relates to the matrimonial home which she has occupied since 1995 and the premises in which the company was situate and where she now ekes her livelihood running her **[Particulars Withheld]** Ltd.

The matrimonial home is built on Nyeri Municipality/**[Particulars Withheld]** and is adjoined by Block **[Particulars Withheld]** which is used as a kitchen garden. The property is registered in the name of the company, but it was not always so. It is common ground that it was transferred to the company on 2<sup>nd</sup> August 1993, during coverture, by the respondent, as a gift. Although in his testimony the respondent curiously stated that ***"the matrimonial home was our ancestral home. It is in my father's land,"*** the rest of his testimony, as well as the title documents placed before the trial court shows otherwise.

The question that we must grapple with respecting that matrimonial home is whether it is available for distribution given that it is registered in the name of the company. We are aware of some decisions of this Court that seem to suggest that property registered under the name of a company can only be dealt with in accordance with the dictates of company law and do not therefore fall for determination in a family property proceeding. See for instance **SNK -VS- MSK & 5 OTHERS** [2015] e KLR where the Court (differently constituted) reversed a decision of the High Court ordering that certain properties owned by a limited liability company be transferred to the benefit of the wife and the children of the marriage. The Court faulted the Judge of the High Court for failing to give due regard to the settled

principle of company law in **SALOMON –VS- SALOMON** [1897] AC 22 as to the separate legal personality of a company distinct from its shareholders and directors. The Court there took the view that this Court has exhaustively dealt with this issue in **MUTHEMBWA –VS- MUTHEMBWA** Civil Appeal No. 74 of 2001 [2002] 1 EA 186 which was cited in **MEREKA –VS- MEREKA** Civil Appeal No. 236 of 2001 and held that a trial court has no jurisdiction under **Section 17** of the **Married Women Property Act** (1887, of England) to distribute properties registered in the name of the company in which the spouses are the shareholders.

With respect, we are not ourselves persuaded that **MUTHEMBWA –VS-MUTHEMBWA** was to exactly that effect. Quite the opposite. The Court there held, and we respectfully agree, that where the property of the company had been mixed with the matrimonial property, **Section 17** allowed the court to deal with the parties' respective interests in the company as injustice might otherwise result, which, to our way of thinking, is a repudiation, in appropriate cases, of the sometimes unhelpful distinction between the parties as spouses as opposed to shareholders for purposes of **Section 17** proceedings.

The Court in **MUTHEMBWA –VS- MUTHEMBWA** found that **Section 17** of the MWPA did, in fact, allow a court to deal with the parties' respective interests in a company in which they are shareholders. We agree with that Court's conclusion in this aspect as follows;

***“.....a certain landed property is registered in the name of the Appellant but on it stands premises allegedly owned by a limited liability company with the parties herein as the only shareholders, in such a case there will arise problems in tracing what would peculiarly be matrimonial property, And where, as in the instant case, matrimonial property in intertwined with company property we think that injustices might result if the court declines jurisdiction, under section 17 to deal with, the whole property. In the event the wife would normally be the loser as invariably she would be the party out of possession of the property in issue”***(at p.191)

(Our emphasis)

That practical approach to matrimonial property that is so closely linked to or mixed inextricably with property in the name of a company under the sole shareholding of a couple without outsiders in it, appears to us to be more conducive to the doing of real and substantive justice untrammelled and unfrustrated by the technicalities and esoteric niceties of company law that would defeat what ordinary citizens would see as rather straight-forward issues of division of matrimonial property. **MUTHEMBWA –VS- MUTHEMBWA** has been followed in other cases including **RFS –VS- JDCS** [2010] eKLR where the Court appreciated that when the matrimonial home is built on land belonging to a company where the husband is the major shareholder with his consent, the property becomes altered and he cannot be heard to raise the distinctions of company law in the hope of defeating the spouse's interest in it as matrimonial property.

The need to look beyond company law *per se* is the more compelling in the instant case where it is quite clear that the matrimonial home was matrimonial property before the respondent, somehow, transferred it, at no consideration, into the name of the company. The respondent in his testimony himself painted the indistinction and indivisibility of the family and company interest in the matrimonial property as follows;

***“The property where the Petitioner stays is registered in the name of [Particulars Withheld] Ltd. I bought it in 1992 through loan borrowed from Ukulima Sacco of Ksh 100,000. I added another Kshs 60,000 to buy the same at Ksh.160,000. I sold my car to buy the land. I did not transfer the plot to myself but to the company as it was one and the same to me.”*** ( Our emphasis)

There is uncontroverted evidence that the appellant has always lived in that property. When the respondent vacated the house in 2002, she remained therein and has been servicing the mortgage loan on it single-handedly since. Evidence was led, and not countered, that the respondent himself resides in the Kenya Industrial Estate Block **[Particulars Withheld]** property as from the time he moved out of

cohabitation with the appellant.

We find and hold that Nyeri Municipality Block **[Particulars Withheld]** and Nyeri Municipality Block **[Particulars Withheld]**, both in the name of the company, are matrimonial property and ought to be transferred to the appellant absolutely.

Turning now to Nyeri Municipality Block **[Particulars Withheld]** or **[Particulars Withheld]** that is registered in the names of the respondent ( $\frac{1}{2}$  share) and **Fatuma Ali Abdilahi** ( $\frac{1}{2}$  share). Whereas this property, on which first the company, and since 2002 the appellant through **[Particulars Withheld]** Ltd, has always traded, is registered in the name of the respondent, that half-share was not bought by the respondent, but by the appellant. Her testimony on this point, which was not challenged, was as follows;

*“ I have property in Nyeri town in which I run my business....I bought the same with my money. In total it cost me Ksh 520,000. These are the agreement (sic) Ex.18 & 19. However the same was registered in the name of my husband. I paid the purchase price. These are the acknowledgement of payment. This is at Ex.22.”*

We have perused the various exhibits that evidence that transaction and are left in no doubt whatsoever that the half share belonged to the appellant absolutely.

The upshot of our consideration of this appeal is that it succeeds. We think that had the learned Judge gone into a closer analysis of the *viva voce* and documentary evidence placed before him and also considered the various authorities on the subject, he would in all likelihood have arrived at a different conclusion. We set aside the judgment dated and delivered on 21<sup>st</sup> February 2014 and substitute therefor orders that;

- (a) Nyeri Municipality/Block **[Particulars Withheld]** and Nyeri Municipality Block **[Particulars Withheld]**, registered in the names of **[Particulars Withheld]** Ltd, be and are hereby transferred to the appellant.
- (b) The half share in Nyeri Municipality/Block **[Particulars Withheld]** registered in the name of the respondent be and is hereby transferred to the appellant.
- (c) The parties shall bear their own costs of the appeal.

***Dated and delivered at Nyeri this 1<sup>st</sup> day of July 2015.***

**P. N. WAKI**

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**JUDGE OF APPEAL**

**R. NAMBUYE**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**