



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, MWILU & OTIENO-ODEK, JJA)**

**CIVIL APPEAL NO. 236 of 2009**

**BETWEEN**

**C W N.....APPELLANT**

**AND**

**B N ..... RESPONDENT**

***(An appeal from the Judgment of the High Court of Kenya at Nairobi (Gacheche, J.) dated 14<sup>th</sup> May 2009***

**in**

**H.C.C.C No. 31 of 2005 (O.S.)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. The appellant and respondent are estranged wife and husband and the dispute between the two relates to distribution of matrimonial property acquired during subsistence of the marriage. The parties got married on 2<sup>nd</sup> January 1988.
2. By an Originating Summons dated 6th September 2005, the appellant sought a declaratory order that all properties acquired during their marriage and registered in the name of either party be declared as jointly owned; that an order do issue declaring that 50% or such other or higher proportion of the properties be held in trust by the respondent for the appellant and that the properties be settled in proportions as determined by the court.
3. The matrimonial properties in dispute listed in the Originating Summons are:
  - (a) Eldoret Municipality/Block [particulars withheld] approximately [particulars withheld] hectares.
  - (b) Eldoret Municipality/Block [particulars withheld] approximately [particulars withheld] hectares.
  - (c) Eldoret LR [particulars withheld] approximately [particulars withheld] acres.

(d) Mombasa Plot [particulars withheld] Mainland North approximately [particulars withheld] hectares.

(e) Nairobi/Block [particulars withheld]

(f) Nairobi/Block [particulars withheld]

(g) Motor Vehicle Registration No. [particulars withheld]

(h) Motor Vehicle Registration No. [particulars withheld]

(i) Motor Vehicle Registration No. [particulars withheld]

(j) Motor Vehicle Registration No. [particulars withheld]

(k) Motor Vehicle Registration No. [particulars withheld]

(l) Motor Vehicle Registration No. [particulars withheld]

(m) Household goods and items.

4. The grounds in support of the Origination Summons as deposed in the supporting affidavit are that there were three issues of the marriage and the appellant while a student utilized her university allowance and money received from their wedding to bring up the first issue and to cater for the needs of the family; that the appellant made direct and indirect contribution to the acquisition of the matrimonial properties; that her direct contribution was that she used her salary and savings towards purchase of household goods, furniture, electronics and other commodities; that she renovated and redesigned the matrimonial home transforming it from a house into a home; that the indirect contribution was that she took full responsibility for supervising construction work and buying materials; that she dealt with organizational issues as well as catering for the children's needs; that she was involved in sourcing tenants for rental properties and ensuring that the rented houses were occupied; that she handled management issues pertaining to the rented houses.

5. The respondent in opposition to the Originating Summons denied that the appellant had made any direct or indirect financial contribution to the acquisition, purchase and development of most of the matrimonial properties listed; that the appellant never gave moral or financial support in acquisition of the properties; that the appellant did nothing to contribute to the renovation or redesigning of the matrimonial home; that the respondent borrowed some money from family members to acquire some of the properties listed and that the motor vehicles listed in the Originating Summons are not matrimonial property as they belong to third parties and some properties listed are in the name of a limited liability company.

6. The learned judge upon taking oral evidence from the parties delivered a judgment dated 14<sup>th</sup> May 2009 and made the following orders:

***“(i) That Mombasa Plot No [particulars withheld] Mainland North measuring approximately [particulars withheld] hectares registered in the appellant’s name remains her property;***

***(ii) Eldoret LR No. [particulars withheld] measuring approximately [particulars withheld] acres be registered in the appellant’s name;***

***(iii) That the appellant to retain the computer, its accessories and the items of household furniture and fittings which she acquired during the subsistence of the marriage.***

7. In arriving at the distribution stated in the judgment, the learned judge expressed herself as follows:

***“It is clear that although the plaintiff claims to have made both direct and indirect contributions towards the acquisition of the properties, save for LR [particulars withheld], which as stated earlier has been offered to her by the defendant, the evidence on record does not support that she made any other financial contribution. The contention that the plaintiff’s non-monetary contribution to the acquisition of the matrimonial property should be taken into account and a value put on it in support of her claim to a share of the other assets cannot therefore hold any water. (emphasis ours).”***

***I am therefore of the view that save for her contribution towards the acquisition of LR [particulars withheld], the computer and its accessories and the items of furniture, she has failed to prove her case on a balance of probability and her cause fails. I however do take note of the fact that Mombasa Plot No. [particulars withheld] Mainland North is registered in her name and in the circumstances it should not have formed part of the properties in question. It remains her property. I do also note the fact that the defendant has stated that LR No. [particulars withheld] will be registered in her name. It should be so registered. She will also retain the computer, its accessories and the items of household furniture and fittings which she acquired during subsistence of their marriage.”***

8. Aggrieved by the judgment, the appellant has moved to this Court citing the following compressed grounds of appeal.

i. *That the learned judge erred and misdirected herself by holding that the appellant’s non-monetary contribution to the acquisition of the matrimonial property cannot hold any water;*

ii. *The learned judge erred in holding that the appellant had failed to prove her case on balance of probabilities;*

iii. *The learned judge erred and misdirected herself by failing to appreciate that it is inconceivable that in a marriage of 17 years, the appellant’s only contribution can be in computers, its accessories and furniture;*

iv. *The learned judge erred by failing to grant the appellant Nairobi/Block [particulars withheld] which is the house where the appellant and the children of marriage reside;*

v. *The learned judge erred and failed to take into account the unchallenged evidence that the appellant worked hard in the management and supervision of construction of several matrimonial properties and this was an indirect contribution;*

vi. *The learned judge erred in failing to take into account that the appellant took out two loans whose proceeds she used to acquire among other things fittings and renovation of the house and that she looked after the family properties;*

vii. *The learned judge erred by failing to take into account that the appellant had abandoned any claim to the motor vehicles.”*

9. The appellant’s prayer in the memorandum of appeal is that the judgment of the High Court be set aside; that a declaration be made that the matrimonial properties listed be shared between the appellant and respondent on a 50:50 basis; that this Court may grant any further other orders as it deems fit.

10. At the hearing of the appeal, learned counsel Mr. John Swaka appeared for the appellant while

learned counsel Mr. Kimamo Kuria appeared for the respondent.

11. Counsel for the appellant reiterated the grounds cited in the memorandum of appeal; he submitted that the dispute between the parties revolves around the provisions of **Section 17** of the **Married Women's Property Act**; that all the properties in dispute were acquired during the subsistence of the marriage; that the appellant demonstrated before the trial court that she made direct and indirect contribution to the acquisition of the properties; that the appellant in her affidavit in support deposed and demonstrated that she played a role in maintaining the matrimonial properties; that the learned judge erred by failing to appreciate the indirect contribution made by the appellant in the acquisition of the properties; the judge erred in failing to accurately evaluate the evidence and arrived at the wrong conclusion that the appellant had not proved her case on a balance of probability. It was submitted that there was no valuation report before the trial judge to show the value of any of the properties in dispute.

12. Counsel for the respondent in opposing the appeal urged us to find that the learned judge correctly evaluated the evidence and arrived at the proper conclusions; that the criteria to be considered in division of matrimonial property is actual contribution by the parties; that the appellant conceded that she did not make direct contribution to the purchase and acquisition of the matrimonial properties; that the learned judge correctly gave the appellant two matrimonial properties namely Mombasa Plot No. [particulars withheld] Mainland North and Eldoret LR No. [particulars withheld]; that these two properties adequately represent the indirect contribution made by the appellant during the subsistence of the marriage; that the appellant's direct contribution was in relation to computers, furniture and fittings and these items were given to her by the trial court; that the appellant conceded that money for food and clothing came from a joint account into which the respondent was the one depositing money and the appellant the only person withdrawing; that this evidence proved it was the respondent who paid for food and clothing for the family with no direct contribution from the appellant; that what the appellant was given by the trial court was a fair portion of the matrimonial property and that the burden was on the appellant in this appeal to show that what was given to her was insufficient and not fair. Counsel conceded that no valuation report was tendered to show the value of any of the matrimonial properties in dispute.

13. We have considered the grounds of appeal and submissions by counsel as well as the judgment by the trial court. This is a first appeal and we are obliged to re-evaluate the evidence and arrive at our own conclusions. (See **Selle -vs- Associated Motor Boat Co. [1968] EA 123**); see also (**Abdul Hameed Saif vs. Ali Mohamed Sholan [1955] 22 E. A. C. A. 270**).

14. As at the time the High Court determined the appellant's suit the guiding principle for distribution of matrimonial property was **Section 17** of the **Married Women's Property Act**, as applied in various judicial decisions. That Act has since ceased to apply pursuant to the provisions of the **Matrimonial Property Act No. 49 of 2013** that came into effect on 16<sup>th</sup> January, 2014. Nevertheless in determining this appeal, the applicable law remains the **Married Women Property Act** under which the proportion of direct and indirect contribution of each spouse is a relevant factor to be taken into account. As reiterated in **Njoroge -v- Ngari [1985] KLR 480**, the purpose of **Section 17** of the **Married Women's Property Act** was not to defeat rights but to provide a machinery for ascertaining and defining rights and once ascertained, then the register is to be changed to take account of those rights.

15. In this appeal, it is necessary to restate some of the principles to be considered in the distribution of matrimonial property and for us to determine if the trial judge satisfactorily considered the principles in arriving at her decision as per the judgment.

16. In **M -v- M [2008] 1 KLR 247 (Family & Gender Reports)**, this Court held, *inter alia*:

**“(i) 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 bearing the principles of fairness;**

**(ii) where it is impractical to take accounts of respective contributions of spouses in the management of a home, a presumption of equal contribution is raised and it is a presumption which either party can rebut;**

**(iii) a woman's contribution to acquisition of matrimonial property must be recognized.”**

17. In **Hazell -v- Hazell [1972] 1 All ER 923**, it was held that in order to entitle the wife to a share in the proceeds of the matrimonial home, it was sufficient if the contributions made by the wife to family expenses were such as to relieve the husband from expenditure which he would have otherwise have had to bear and thereby helping him indirectly. In **Karanja -v- Karanja, [1976-80] 1 KLR 389**, it was observed that the contribution of the wife need not be direct payments towards purchase of the

matrimonial property but may be indirect such as meeting household and other expenses which the husband would otherwise have had to pay.

18. In **MK -v- SK [2008] 1 KLR 204 (Gender & Family Reports)**; both husband and wife agreed to buy a house to be occupied by them as a matrimonial home; when the husband was away, the wife found a suitable home, negotiated the price and kept the husband fully informed. It was held that due to the initial stages of negotiations for acquisition of the property, the wife had contributed either in kind or otherwise towards its purchase and the property was declared to be jointly owned. In **Njoroge - v- Ngari** (supra), it was held that in matrimonial property disputes, if property is held in the name of one person, even if that property is registered in the name of one person, but another contributed towards acquisition of the property, then both persons have proprietary interests in that property.

19. In **Obuya -v- Obuya [1986] KLR 391**, it was stated that although a trial judge has a wide discretion in distributing matrimonial property and to do what he thinks under the circumstances is fair and just, that discretion does not entitle him to make an order which is contrary to any well-established principles of law. In **Suresh Nanalal Kantaria -v- Miradula Suresh Kantaria, Civil Appeal No. 139 of 2010**, (unreported) this Court observed that indirect contribution of a wife is a factor to be taken into account even though it may not be as high as that of the husband. A five judge bench of this Court in **Echaria -v- Echaria (2007) 2EA 139** stated that a wife's non-monetary contribution cannot be taken into account when determining the total amount of contribution from the wife towards acquisition of the property.

20. In the instant appeal, how did the trial judge apply the principles enunciated above? The trial court appreciate that the decision in **Echaria -v- Echaria** (supra) was her guiding principle and emphasized that neither does the status of marriage solely entitle a spouse to a beneficial interest in matrimonial property nor does performance of domestic duties entitle a spouse to the matrimonial property. The trial court cited the cases of **Nderitu -v- Nderitu [1997] eKLR** and **Kivuitu -v- Kivuitu [1985] KLR 411**.

21. Our analysis of the judgment of the trial court shows that beyond citing the cases of **Echaria -v- Echaria, Nderitu -v- Nderitu [1997] eKLR 606** and **Kivuitu -v-Kivuitu [1985] eKLR 411** there is no judicious extraction and application of the *ratio decidendi* and principles enunciated in these cases to the facts of the instant case.

22. The trial court did not consider the objective of ***Section 17*** of the ***Matrimonial Property Act*** as stated in **Njoroge -v- Ngari [1985] KLR 480** as being a machinery for ascertaining and defining rights of the spouses over disputed matrimonial property. What the trial court did was to give the appellant two properties, one in Mombasa because the property was already registered in her name, and the other in Eldoret because the respondent in his oral evidence had offered the property to the appellant. The legal principle applicable in distribution of matrimonial property is not in whose name the property is registered; neither is distribution determined by one spouse offering the other a particular property; or the status of marriage. The guiding principle as stated in **Echaria -v- Echaria Civil Appeal No. 75 of 2001** is the proportion of financial contribution, either direct or indirect towards acquisition of the matrimonial property. The trial court ignored this guiding principle and erroneously adopted that of in whose name the property was registered or who offered who what.

23. In our re-evaluation of the evidence, it is apparent that the learned judge failed to appreciate the meaning of indirect contribution. The statement in the judgment that “the appellant’s non-monetary contribution to the acquisition of the matrimonial property cannot hold any water,” leads us to conclude that the judge failed to properly evaluate the evidence and to specifically identify and weigh the appellant’s proportion of financial contribution either direct or indirect towards acquisition of the matrimonial properties. The learned judge ignored the dicta in **Suresh Nanalal Kantaria -v- Miradula Suresh Kantaria, Civil Appeal No. 139 of 2010**, where this Court observed that indirect contribution of a wife is a factor to be taken into account even though it may not be as high as that of the husband.

24. In this appeal, both parties conceded that there was no valuation report indicating the value of any of the disputed matrimonial properties. In the absence of a valuation report, it is not possible to tell whether the two properties given to the appellant by the trial judge reflect a fair and proportionate distribution of the matrimonial properties.

25. Given the orders we propose to make in this judgment, we are of the view that we do need to tie the hands of the High Court and hence we refrain from making detailed determination on the factual issues and applicable law raised in the appeal.

26. For the above reasons, we have no factual basis to ascertain a fair, proportionate and equitable distribution of the matrimonial properties. In the circumstances, we find that this appeal has merit and the appropriate order for us to make, as we hereby do, is to set aside in entirety the judgment of the High Court dated 14<sup>th</sup> May 2009 and all consequential orders and decree ensuing there from. We substitute in its place an order for re-hearing of the Originating Summons dated 6<sup>th</sup> September 2005 before any other judge. Each party is to bear her/his costs in this appeal.

*Dated and delivered at Nairobi this 16<sup>th</sup> day of October, 2015.*

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

I certify that this

is a true copy of the original.

**DEPUTY REGISTRAR**