



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 7 OF 2013

BETWEEN

R M M APPELLANT

VERSUS

T S M RESPONDENT

(An Appeal from the Judgment and Decree of the High Court of Kenya at Kisii, (Sitati, J.) dated 16th September, 2011

in

H.C.C.C. NO. 81 OF 2007)

JUDGMENT OF THE COURT

Background

1. This appeal relates to division of matrimonial property after divorce prior to enactment of the **Matrimonial Property Act, 2013**. In the Originating Summons that was filed by **R M M**, the appellant, under **section 17** of the **Married Women's Property Act, 1882**, the appellant wanted matrimonial properties shared out equally between her and **T S M**, her estranged husband, the respondent.

2. The appellant contended that she had financially contributed to the acquisition of the matrimonial properties, though they were all registered in the respondent's name. On the other hand, the respondent argued that he solely acquired the properties. The learned trial judge, Sitati, J., held that the distribution of the properties was dependent on the parties' respective contribution towards their acquisition and proceeded to order distribution as we shall show hereunder. The appellant was aggrieved by that distribution and moved to this Court to challenge the judgment.

The appellant's claim

3. The appellant and the respondent were married in 1972 under the Kisii customary law. At the time they got married they were both gainfully employed. The appellant was a nurse, employed by the Government of Kenya, Ministry of Health. Her salary then was about Kshs. 600/= per month. The

appellant testified that after sometime she left formal employment and concentrated on running the family business, to wit, a wholesale shop, farming and supervising construction of rental properties.

4. She stated that during the subsistence of the marriage they acquired the following properties;

- i. **Wanjare/Bogita/[particulars withheld]**
- ii. **Central Kitutu/Daraja Mbili/[particulars withheld]**
- iii. **Central Kitutu/Daraja Mbili/[particulars withheld]**
- iv. **Motor vehicle registration number [particulars withheld]**

There was also another property, **Central Kitutu/Daraja Mbili/[particulars withheld]** that was single handedly disposed of by the respondent.

5. The appellant further testified that on Central Kitutu/Daraja Mbili/[particulars withheld] (hereafter plot No. [particulars withheld]) they developed rental houses whose monthly income was about Kshs.150,000/=. For over 15 years, the respondent had been collecting the income alone, the appellant stated. She urged the Court to order the respondent to compensate her for the loss of her commensurate share of the rental income over the years.

6. The matrimonial home was located on Central Kitutu/Daraja Mbili/[particulars withheld] (hereafter plot No. [particulars withheld]) which is adjacent to Central Kitutu/Daraja Mbili/[particulars withheld] , (Plot No. [particulars withheld]). That plot is undeveloped and provides access to the matrimonial home. Wanjare/Bogita/[particulars withheld] is agricultural land measuring 0.5 hectares.

7. The appellant contended that she had made both financial and non-financial contribution towards acquisition of all the aforesaid properties. The appellant added that after her separation from the respondent in 1996, the respondent stopped paying school fees for their six children and she had to educate them alone.

The respondent's case

8. The respondent testified that in 1972 he was employed by [particulars withheld] Kenya Ltd as Instant Tea Quality Control Technician. His monthly salary then was about Kshs. 7,000/=. In 1976 he joined [particulars withheld] as a Tea factory manager. His monthly salary was about Kshs. 20,000/=. He remained in employment until 1992 when he retired. He further testified that using his savings, loans and retirement benefits he was able to acquire and develop the two properties in issue, that is plots Nos. [particulars withheld] He also purchased the other undeveloped properties.

9. The respondent contended that the appellant had not made any financial contribution towards acquisition and development of the said properties and therefore if the Court was inclined to grant her any share it should be nominal. That notwithstanding, the respondent conceded to the appellant retaining the matrimonial home exclusively, that is, plot number [particulars withheld] , as well as the adjoining plot No. [particulars withheld] ; while he would retain plots number [particulars withheld] and Wanjare/Bogita/[particulars withheld].

Determination by the trial court

10. The learned judge held that although the appellant had not adduced any documentary evidence of her financial contribution towards acquisition of the matrimonial properties, nevertheless, she had "*played a vital role*" in the acquisition of the properties. And in spite of the fact that the respondent did not wish to lay any claim on both plot No. [particulars withheld] where the matrimonial home is located and the adjacent plot No. [particulars withheld] that provides access to the matrimonial home, only plot No. [particulars withheld] was granted to the appellant. The judge ordered that plot No. [particulars withheld] be sold and the proceeds thereof shared equally between the appellant and the respondent.

11. Wanjare/Bogita/[particulars withheld] was given to the respondent. Plot No. [particulars withheld]

was ordered to remain the property of the respondent **“subject to the payment of 30% of the monthly income therefrom to the plaintiff from the date of this judgment and throughout her life.”**

12. Motor vehicle registration number [particulars withheld] as well as all the household goods were given to the appellant.

Appeal to this Court

13. The appellant, being dissatisfied with the aforesaid judgment, preferred an appeal to this Court. She faulted the learned judge for failing to hold that both her and the respondent had during the subsistence of their marriage jointly acquired and developed plot No. [particulars withheld], and for failing to award her part ownership of the said property.

14. The appellant further argued that the learned judge did not consider fundamental principles of law in distributing the matrimonial properties. She cited the **Matrimonial Causes Act, 2013** and the **Constitution of Kenya, 2010**. She added that the learned judge erred in law by failing to award her partial ownership of Wanjare/Bogita/[particulars withheld].

15. Lastly, the appellant faulted the learned judge for failing to take into account that the respondent had single handedly sold and benefited from the sale proceeds of the property known as Central Kitutu/Daraja Mbili/[particulars withheld] . She urged this Court to set aside the High Court judgment and award her 50% of all the properties acquired during the subsistence of the marriage.

Submissions by counsel

16. **Mr Mbuthia Kinyanjui**, learned counsel for the appellant, urged this Court to take into consideration the fact that no property was acquired by the parties either before or after dissolution of the marriage and therefore find that the appellant had played a very significant role towards acquisition of the matrimonial properties.

17. As regards plot No. [particulars withheld] which the trial court ordered that it be sold and the proceeds shared equally between the parties, counsel submitted that this plot provides access to the matrimonial home, and if it is sold it would not be possible to access the matrimonial home. Counsel wondered why the learned judge ordered the sale of that property, even when the respondent was not opposed to its grant as well as the matrimonial home on plot No. [particulars withheld] to the appellant.

18. Turning to the rental property on plot No. [particulars withheld] , Mr Kinyanjui pointed out that it was the only property that was generating income. He faulted the learned judge for failing to order absolute division of ownership between the parties, rather than ordering that the appellant be entitled to only 30% of the rental income during her lifetime. He submitted that the property should either be sold and the proceeds thereof shared equally between the parties, or order joint ownership in equal shares between the appellant and the respondent.

19. Mr Kinyanjui submitted that the respondent had for years been the sole beneficiary of the rental income and even after the High Court judgment, the appellant did not receive a regular share of the income as ordered.

20. **Mr Oguttu**, learned counsel for the respondent, in opposing the appeal, submitted that the learned judge had rightly considered the extent of the appellant’s contribution towards acquisition of the matrimonial properties. He pointed out that the appellant was unable to adduce documentary proof of her financial contribution. That notwithstanding, the respondent had not contested the respondent’s claim to the matrimonial home. He submitted that the respondent was willing to give plot No. 1907 to the appellant, provided that she relinquishes her 30% stake of the rental income from the rental property on plot No. [particulars withheld] .

21. Mr Oguttu submitted that if this Court were to order that the property on plot No. [particulars

withheld be owned equally or the same be sold and the proceeds thereof shared equally between the parties, the appellant would have obtained undue advantage, since she has been given the matrimonial home absolutely.

22. Regarding the legal principles that govern distribution of matrimonial properties, counsel submitted that upto 27th August, 2010 when the new Constitution came into operation, distribution was founded on the discretion of the trial judge, based on the contribution of each party. And before this Court can interfere with the judge's discretion, it must be shown that the trial judge exercised her discretion wrongly. That had not been demonstrated, Mr Oguttu added.

Determination

23. We have carefully considered the record of appeal as well as the submissions by counsel. Starting with the applicable law that guides distribution of matrimonial properties, we do not agree that the learned judge did not consider the relevant principles as submitted by the appellant's counsel. The learned judge was alive to the fact that the matter before her was filed in 2002, long before the Constitution of Kenya, 2010 came into being. The learned judge stated:

“It is now an established principle that a spouse's contribution in a marriage can be in any of 3 forms:

- a. ***Direct financial contribution***
- b. ***Indirect financial contribution***
- c. ***Non-financial contribution.”***

24. The learned judge observed that under the new Constitution, **Article 45(3)** now provides that 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. The court could not have applied the provisions of the new Constitution since the case was filed in 2002, long before the new Constitution was promulgated.

25. The **Matrimonial Property Act, 2013**, stipulates that 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. As this Act had not been enacted when the matter was heard and determined in the High Court, its provisions were inapplicable to this case.

26. In the circumstances aforesaid, the learned judge was right in applying the provisions of **section 17** of the **Married Women's Property Act, 1882**, under which the originating summons had been brought. The principles set out by this Court in **ECHARIA V ECHARIA [2007] eKLR** were the applicable ones in guiding the trial court in its determination of the matter before it. Those principles were summarized by this Court in **FRANCIS NJOROGE V. VIRGINIA WANJIKU NJOROGE [2013] eKLR** as follows:-

“a) A wife's non-monetary contribution cannot be considered in determining the amount of contribution of the wife towards the acquisition of the property. The performance of domestic duties would also not be considered as contribution towards acquiring the property.

b) Where the property in dispute is not registered in the joint names of the parties, then they have no joint legal interest. It is erroneous to presume that they have an equal beneficial interest in the property.

c) Joint tenancy connotes equality for there is a rebuttable presumption that where two or more people contribute to the purchase price of property in equal shares, they are in equity joint tenants. Equal contribution results in a joint tenancy unless there is contrary evidence to show that irrespective of the registration there was no equal contribution.

d) 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 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 is equity'.

e) A court has jurisdiction to allocate a portion of the disputed property as it deems just. It may also order a transfer of the share to the rightful beneficial owner.”

27. We reiterate that under the repealed Constitution, the above principles were the applicable ones in dividing matrimonial property after divorce. It is against the background of the said principles that we turn to the issue of the parties' contribution towards acquisition of the matrimonial properties. We would agree with the learned trial judge that the appellant failed to tender any credible evidence to show that she had made any direct financial contribution towards acquisition of the properties in dispute so as to entitle her to half share of the same. That notwithstanding, we cannot say that she did not make any indirect financial contribution. The appellant ceased to be in formal employment on 12th day of July, 1991. By 1996 the parties were no longer staying together as husband and wife. Although the appellant may have participated in running a family business, there was no evidence that the said business generated reasonable profits, if any, that could have been used to finance the acquisition of the properties in contention. We however take into consideration that she paid school fees for their children for a number of years. She may also have participated in supervising the development of both plots Nos. [particulars withheld].

28. Turning to the respondent's contribution towards acquisition and development of plot No. [particulars withheld], he testified that he bought the plot at a price of Kshs.35, 000/= in 1987. That sum was paid from his savings. He started developing it in 1991. He took a loan of Kshs.500,000/= from Savings & Loan (K) Ltd. He also got a refund of Kshs.300,000/= from staff provident fund and a further sum of Kshs.83,000/= from his employer, [particulars withheld], Senior Staff Benefit Fund. The respondent further testified that he got Kshs.111, 000/= from the [particulars withheld]. He produced documents to support the aforesaid sources of funds. He contended that the appellant did not make any financial contribution towards purchase and development of the said property.

29. Given the evidence tendered by the parties, and in particular regarding the property that was in serious contention, plot No. [particulars withheld], the learned judge held that the property would remain in the ownership of the respondent, but the appellant would be entitled to 30% of its monthly income throughout her lifetime.

30. With great respect to the learned judge, she did not state what the proven direct or indirect financial contribution of the appellant amounted to. On the basis of the evidence on record, the learned judge ought to have exercised her discretion and assess the respective proportions of financial contribution (direct or indirect) of each spouse. In the absence of such assessment, the learned judge's finding that the appellant is entitled to 30% of the rental income is without firm legal basis.

31. An appellate court cannot properly substitute its own factual findings for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. See this Court's decision in **KIRUGA V. KIRUGA & ANOTHER. [1988] KLR 348**. Again with respect to the learned trial judge, we do not see any evidence to support the conclusion that she reached with regard to apportionment of the rental income only, having ordered that the respondent should remain as the sole registered owner of plot No. [particulars withheld].

32. In the circumstances, we are inclined to interfere with the exercise of the trial judge's discretion. In our view, the appellant's indirect financial contribution towards acquisition and development of plot No. [particulars withheld] can be assessed at no more than 30%. Instead of awarding her a percentage of the rental income therefrom, we order that the property be valued by a reputable valuer, to be agreed upon by the parties within 45 days from the date hereof, and failing agreement, by such valuer as shall be appointed by the Chairman of the Institution of Surveyors of Kenya. The valuation costs shall be shared between the appellant and the respondent in the ratio 30:70 respectively. Thereafter the respondent shall

pay to The appellant 30% of the assessed value of the property within 6 months from the date of the valuation, failing which the appellant shall be at liberty to institute execution proceedings to recover the sum due to her in terms of this judgment.

33. As regards plot No. [particulars withheld], the respondent conceded that the plot, which adjoins the matrimonial home on plot No. [particulars withheld], be allocated to the appellant. We therefore set aside the High Court order that plot No. [particulars withheld] be sold and the proceeds thereof be shared equally between the appellant and the respondent. We substitute therefor an order that plot No. [particulars withheld] be transferred and registered in the name of the appellant.

34. Plot No. Wanjare/Bogita/[particulars withheld] was registered in the respondent's name on 27th October, 1991. The respondent grows maize and sugarcane thereon. We order that its registration shall remain as it is.

35. As regards the costs of the appeal, we order that each party bears its own costs.

Dated and delivered at Kisumu this 17th day of December, 2015

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR