



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Appeal 10 of 2003

BETWEEN

W K G.....APPELLANT

AND

J W G.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Aluoch, J.) dated 26th day of September, 2002 in HCCC NO. 640 OF 2000 (O.S))

JUDGMENT OF THE COURT

W K G (appellant) married J W (respondent) on 3rd August, 1968. Between 1968 and 1984, they were blessed with four children. They divorced on 28th February, 2000 vide Kiambu Senior Principal Magistrate's Court DC No. 2642 of 1995.

On 26th February, 2000 the respondent filed Civil Case No. 640 of 2000 (O.S) seeking the following orders:-

- (1) ***That the property known as [particulars withheld] situated Langata (sic) Nairobi and registered in the name of the respondent is jointly owned by the applicant and the respondent holds half share of the said property in trust for the applicant.***
- (2) ***That the said property be sold and the net (sic) proceeds be distributed equally between the applicant and the respondent.***
- (3) ***The immovable properties to wit motor vehicle registration No. [Particulars withheld], [Particulars withheld] and [Particulars withheld] registered in the name of the respondent and (sic) his possession are jointly owned by the applicant and respondent and that the respondent holds one half share in trust for the applicant.***
- (4) ***That the said immovable properties be sold and the net proceeds of sale be distributed equally between the parties.***

The originating summons was heard by Aluoch J (as she then was) who allowed the same making a

finding that:

“the respondent had made equal contribution albeit indirect as the husband towards the acquisition of the family assets during the subsistence of the marriage, and is therefore, entitled to equal share in all the properties registered in the husband’s name.”

The Honourable Judge ordered that the said properties be shared on a 50:50 basis. This did not go down well with the appellant and consequently, he filed this appeal in which he has proffered the following seven (7) grounds:-

“(1) That the learned Judge of the Superior Court erred both in Law and in fact by awarding half of the appellants property to the respondent in the absence of evidence of any direct, or any tangible indirect contribution, by the respondent, towards the acquisition of the said property.

(2) That in making a finding that the respondent had indirectly contributed to the acquisition of the said property the said learned Judge of the Superior Court erred both in Law and in fact by ignoring evidence to the effect that the respondents conduct, during the marriage, both as the wife of the appellant and as the mother of the children of the union, clearly exhibited a disinterest in the welfare of the appellant and the children of the union.

(3) That the learned Judge erred and misdirected herself on the application of Section 17 of the Married Women’s Property Act, (1982) in Kenya generally and in the case before her in particular.

(4) That the learned Judge erred and misdirected herself in the manner in which she applied and/or assessed the evidence before her and by so doing reached wrong conclusions and/or made erroneous inferences in law.

(5) That the learned Judge erred in law and in fact by failing to find that the appellant had acquired and/or developed all the properties at his own cost, using borrowed funds without any contribution at all from the respondent.

(6) That the learned Judge erred in law and in fact by failing to find that the mere fact that a wife is earning an income or salary is not, a qualification to an equal share in property acquired during coverture, without more evidence that she has contributed to either the acquisition or development of such property.

(7) That the learned judge of the Superior Court erred both in law and in fact by accepting evidence based of a document which was not produced by either the appellant or the respondent as required by law, which document was merely referred to by counsel for the respondent during her cross-examination of the appellant.”

He entreats us to allow his appeal in the following terms:-

(a) That the Judgment of the Superior Court be set aside.

(b) That the evidence on record be reviewed, and the respondent’s claim for an equal share in the subject properties, be reduced to the extent proved, or be disallowed for lack of proof.

(c) That the costs of this Appeal be paid to the appellant by the respondent.

This being a first appeal, it behoves this Court to re-analyse and re-evaluate the evidence tendered before the trial court and arrive at our own independent decision. See **Selle Vs. Associated motor Boat Company** [1968] EA 123 at page 126 where this Court expressed itself thus:-

“... this Court must reconsider the evidence, evaluate it and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in

that respect...” See also *Jivanji Vs. Sanyo Electrical Company Ltd [2003] KLR 425.*

The respondent and the appellant, both admit that they celebrated their marriage on 3rd August 1968, but were divorced on 28th February, 2000. They sired four children who are now adults. The respondent who was the applicant in the High Court testified that by the time she was getting married to the appellant, she was a primary school teacher. She worked as a school teacher between the year 1966 and 1971 earning a monthly salary of Kshs. 600/=. She further testified that at the time of marriage, the appellant was working for the City Council of Nairobi earning a salary of Kshs. 2000/=. The couple lived at [...] in a City Council House, paying a rent of Kshs. 500/= which, the appellant paid. She testified that the two did not have any properties then save for a Volkswagen vehicle, bought with the money they received as a gift during the wedding. The said vehicle was registered in the appellant’s name. She testified that they shared responsibilities; as appellant paid the rent and handled the vehicle expenses, and the respondent would buy the food in the house.

In 1971, the appellant was sponsored by the City Council to pursue a valuation diploma in Britain. Three months after the appellant’s departure the respondent joined him in Britain for a year leaving behind her first born child. Whilst in Britain the respondent trained as a secretary while working in a hotel for their upkeep. She stated that the appellant did not work but he received an allowance.

Upon their return to Kenya, the respondent worked as a short hand typist earning Kshs. 1,500/= and the appellant received a promotion to the post of Senior Valuer after six months. The respondent stated that she did not know the appellant’s salary at the time. She testified that the domestic arrangements continued as before. The first born child joined nursery school and the appellant paid the school fees. Later, the appellant sold the Volkswagen and used the proceeds to purchase a Peugeot 403 at a price that was unknown to the respondent. The respondent explained that the appellant got an accident in the Peugeot and it was declared a write off. After the accident, the appellant bought a mini car using his salary. She testified that they would share the cost of utility bills, electricity and water, in such a way that either one of them would settle the bill.

It is common ground that in 1970, the appellant obtained a loan and purchased a property of about 9 acres in Karen known as [*Particulars withheld*] through a mortgage for Kshs 320,000/= from Kenya Commercial Finance Company Limited. The property had a bungalow residential house, with four (4) small bedrooms. The respondent told the court that she and the appellant then renovated it into a bigger residential house. She told the Court that the appellant paid for the mortgage while she assisted the appellant by buying food, clothes for the children, supervising and paying the workers and farming in the property. She explained that they had about eleven (11) cows that were producing a lot of milk for sale that would fetch about Kshs. 6,000/= monthly. She also grew vegetables for subsistence and she would sell the excess. The respondent would however pay the workers and veterinary services for the animals from the income generated from the farm.

When she was blessed with her second born in 1973 the respondent stopped working for about one year to look after the baby. In 1975 she got another job with [*particulars withheld*] as a personal secretary for a monthly salary of Kshs. 3,500/=. She worked there until 1980, by which time her salary had improved to Kshs. 4,500/=. She stated that her husband was then working privately as a valuer and he continued paying the school fees and mortgage.

When the children started going to school the respondent took the responsibility of driving them to and from school like any good mother would do but when she was not able to do so the appellant would step in. By the time she left the matrimonial home, there were four cars, all in the appellant’s name. The appellant was solely responsible for the maintenance of the said vehicles. She, like any good African wife of the time, used to perform all the domestic chores either directly or indirectly through the workers to ensure the smooth running of the home and above all to ensure that the man of the home was properly taken care of. She told the Court that one of the unenviable chores she used to undertake with pleasure for the eighteen years her marriage lasted was to always serve the appellant’s meals at his bed side. She also packed lunch for the children, supervised their homework and checked their books. She made sure that all their material and psycho-social needs were catered for as the appellant was a busy man who only talked

to the children over the weekends.

As part of the back-up she used to give her husband, she accompanied him to Zambia to see the firm, Richard and Petterson on benchmarking. This firm assisted her husband with Kshs 200,000/= to commence his business in 1978.

She testified that during the startup of the business the appellant would travel frequently to Zambia while she was left to supervise the workers and assume full responsibility of the children. She testified that she stayed in her matrimonial home until 1986 when she left after her marriage became unsustainable. She left the children behind as she did not have the wherewithal to continue taking care of them while ensuring that the standards they were used to were not compromised. To her dismay, the appellant's secretary moved into the matrimonial home.

She testified that some of her children lived with the appellant but the daughter lives with her. She further told the court that it is the appellant who continued to pay the school fees. She continued contact with her children by visiting them, and sometimes buying them items they needed for school.

She produced as exhibit a bundle of receipts and copies of money orders from 1989 to 1994 being receipts issued in respect of school fees she had paid for her children, assorted receipts of purchases in the supermarket and other receipts to show that she continued supporting the children. She admitted that she did not directly contribute to the purchase of any of the motor-vehicles.

The appellant testified that he is a valuer by profession and owner of [*Particulars withheld*]. He confirmed that he divorced his wife in the year 2000 in Senior Principal Magistrates Court Kiambu DC No. 2642 of 1995 on the basis of desertion.

He testified that he acquired the suit property vide a loan of Kshs 320,000/= from Kenya Finance Company Ltd. The appellant paid off the loan and denied any contribution by the respondent towards the purchase of the property and the motor-vehicles. He produced documents to show that the property and vehicles were registered solely in his name and the vehicles were bought on a hire-purchase terms. As far as the appellant was concerned, his wife the respondent, did not buy or cook food, supervise the workers, take children to school or buy anything at all for use in the house. He recalled that his wife left the matrimonial home of her own free will. The appellant then moved in with his current wife who was his secretary.

When this appeal came up for hearing on 8th June 2011, the Court following the consent of both parties directed that the appeal proceeds by way of written submissions with the parties being given time to briefly highlight the same. Pursuant to these directions, the appellant filed the submissions on 23rd June, 2011 and the reply to the respondent's submissions on 12th August, 2011. The respondent filed his submission on 22nd July, 2011.

The appellant's submissions are two tiered. The first tier challenges the contribution of the respondent to the purchase of the four assets that form the subject matter of the originating summons as well as this appeal. According to the applicant, there was neither direct nor indirect contribution made by the respondent towards the purchase of any of the said properties. In his view, therefore, the respondent's originating summons taken out under **Sections 17** of the **Married Women Property Act 1882** was for dismissal.

The second tier is on the challenge of the quantification of the respondent's shares. According to the appellant, if the court found that there was contribution, then the same should not have exceeded 10%.

In making these submissions learned counsel for the appellant relies heavily on the case of **Echaria Vs. Echaria (Civil Appeal No. 75 of 2001)** which according to him corrected "*the error which comes to Kenya through the use of the naton of non-financial contribution to acquisition of property which was introduced in England by Section 5(1) of the English 1970 Matrimonial Proceedings Act and Section 24*

of the English Matrimonial Causes Act 1973.” (Page 3 of the Appellant’s Submissions filed on 23rd June 2011).

We may at this point, acknowledge that the law in England in respect of distribution of Matrimonial Property changed substantially with the enactment of the **1970 Act** and the **English Matrimonial Proceedings Act 1973**. Unfortunately, we have not had a similar development in our Matrimonial Laws as we do not have any specific legislation dealing with distribution of matrimonial properties other than the Constitution of Kenya 2010 which came into force long after this matter had been decided and whose provisions cannot therefore, be applied retrospectively to confer a benefit that was hitherto non-existent or divest any accrued rights to any of the parties herein.

To that extent, we are in agreement with *Dr. Kamau Kuria*, the learned counsel for the applicant. On the other hand, however, applying the same principle of retrospectivity, we cannot apply the law as set out in **Echaria Vs. Echaria** which was also determined after the judgment herein had already been rendered and appeal filed.

The Supreme Court of Kenya recently faced with the question of retroactive/retrospective application of the law in the case of **Samuel Kamau Macharia & Others Vs. Kenya Commercial Bank Limited & Another, (Supreme Court at Nairobi Appeal No. 2 of 2011)** pronounced itself thus:-

“As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless by express words or necessary implication, it appears that this was the intention of the legislature (Halsbury’s Law of England, 4th Edition Vol.44 at 570.”

The court went on to state that:-

“Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately accrued before the commencement of the constitution.”

For the purposes of this appeal therefore, we shall be guided by the relevant decisions on the subject that were in place as at the time the matter was heard and determined before the High Court.

As stated earlier, the appellant denies that the respondent contributed either directly or indirectly towards the acquisition of the properties in question. In his evidence before the High Court he stated as follows:-

“It is not true that the applicant contributed for the purchase of food. She did not want to contribute. She said that her money was her’s and me as the husband should take care of the family.”

On the contrary, according to the respondent, she was not just in salaried employment, (a history of which she gave in her testimony in court) but she also used to make other indirect contributions to the running of the home which made it easier for the appellant to save money and thus make the financial commitments he made towards the acquisition of the said properties.

She testified , and this is also repeated in her submissions, that she used to pay water and electricity bills; she assisted in buying food for the family; clothes for the children; paying workers; buying books and stationery and other personal items for the children among other things. Indeed, she produced a bunch of receipts as proof that she had continued to buy books and pay for the children’s school fees even after the marriage had broken down.

She also testified that she used to do some farming and grew vegetables for domestic consumption and even kept eleven (11) cows from which she was able to raise an average of six thousand (Kshs 6000/=) per month which money went to the family kitty.

It was the submission of learned counsel for the respondent that all this, including her salary amounted to direct and indirect financial contribution. The payment of the domestic utility bills, school fees, food etc. enabled the appellant to save money on his income which money he would then apply to service the loans. Learned counsel for the respondent therefore, submitted that his contribution amounted to 50% contribution and the learned Judge of the High Court could not be faulted for making that finding.

We have considered all the material placed before us vide the record of appeal along with the written submissions of both counsel and their oral submissions made in court by way of highlighting the written submissions. We have also considered the judgment appealed from. As stated earlier, the only issue for decision in this appeal is whether the respondent contributed to the purchase of the properties in question, and if so, whether the learned Judge was right in awarding her the 50% share. If not, then what share should be apportioned to the parties?

In arriving at her decision, the learned Judge of the High Court relied on precedents earlier set in the cases of **Kivuitu Vs. Kivuitu [1991] 2KAR 241; Essa Vs. Essa (Civil Appeal No. 101 of 1995); Kimani Vs. Kimani (Civil Appeal No. 79 of 1997)** and others which had applied English Case Law. She cited in extenso the holding of Kwach, J.A in **Nderitu Vs. Nderitu Civil Appeal No. 203 of 1997** where he said...

“All that a wife has to show is that she is married to the husband at the time of launching her application; that the property in question was acquired during the subsistence of the marriage and thirdly, that she contributed directly or indirectly to the acquisition of the assets. It is not enough for her simply to show that during the period under review she was sitting on the husband’s back with her hands in his pockets. She has to bring evidence to show that she made a contribution towards the acquisition of the properties. That is the burden she must discharge on a balance of probabilities.”

The learned Judge continued to state as follows.....

“... As I have already said, contribution need not only be in the form of money. The court has to look at the bigger picture. As to how the issue of contribution is to be determined has been settled by this Court in the case of Kivuitu Vs. Kivuitu [1991] 2 KAR 241. In that case, this Court held that the wife was entitled to half share in the matrimonial home because she had made a substantial indirect contribution to the family income to pay household expenses to prepare food and clothing for the children, organized their schooling and generally enhancing the welfare of the family.”

The learned Court of Appeal Judge quoted a portion from the Judgment of Omolo Ag JA (as he then was) in KIVUITU VS. KIVUITU, in which he said,

“For my part, I have not the slightest doubt that the two women I have used as examples have contributed to the acquisition of the property even though the contribution cannot be quantified in monetary terms. In the case of the urban housewife, if she were not there to assist in the running of the house, the husband would be compelled to employ someone to do the house chores for him; the wife accordingly saves him that kind of expense. In the case of the wife left in the rural home, she makes even a bigger contribution to the family welfare by tilling the family land and producing either cash or food crops. Both of them, however, make a contribution to the family welfare and assets. So that where such a husband acquires property from his salary or business and registers it in the joint names of himself and his wife without specifying any proportions, the courts must take it that such property, being a family asset, is owned in equal shares. Where, however, such property is registered in the name of the husband alone then the wife would be, in my view, perfectly entitled to apply to the court under Section 17 of the Married Women’s Property Act 1882, so that the court can determine her interest in the property and in that case, the court would have to assess the value to be put on the wife’s non-monetary contribution. I can find nothing in Chapman Vs. Chapman, Falconer Vs. Falconer, or Karanja Vs Karanja which would force me to the conclusion that only monetary contribution must be taken into account. Any such limitation would clearly work an injustice to a large number of women in our country where the reality of the situation is that paid employment is very hard to come by. The case of Watchtel Vs Watchtel [1973] 1 ALL E.R 829 provides full support

for this position.”

Kwach J.A said the following on the above passage,

“This passage which I fully endorse and adopt chapter and verse, kills two birds with one stone, so to speak. It settles the law in Kenya on the point of indirect contribution and also provides a full answer to Mr. Gaturu’s submissions. A wife’s contribution, and more particularly a Kenya African Wife, will more often than not take the form of a backup service on the domestic front rather than a direct financial contribution. It is incumbent therefore, upon a trial Judge hearing an application under Section 17 of the Act to take into account from form of contribution in determining the wife’s interest in the assets under consideration.”(underlining ours).

This was the case law obtaining in this country as at the time the learned Judge of the High court heard the matter and rendered her decision. We do not see any misdirection on the part of the learned Judge in her application of the cases she cited. She applied the law on Matrimonial Property strictly as it was then. We should juxtapose that position to the case at hand.

There is no dispute that the respondent was gainfully employed from the time she got married to the appellant in 1968 up to 1984 when according to her the appellant gave her an ultimatum to stop working so that she could look after the family. She nonetheless had intermittent breaks in between after giving birth to enable her give more attention to the babies for instance in 1973 after giving birth to her second born child. She told the court that even when she stopped working to join her husband in Britain, she was still working part time in a hotel for their upkeep as she trained as a secretary. Even when she stopped working, she continued to take full care of her household, her children, the cows and vegetable garden and attended to all their needs. She seemed particularly passionate about the fact that for the 18 years they were married she used to serve the appellant his meals by the bedside. That act of subservience does not nonetheless appear to have helped much because according to her, the appellant made her continued stay at their matrimonial home so difficult that she had to leave with nothing including her young son who she left behind.

She told the court that a day after she left, the appellant’s secretary moved into the matrimonial home and was subsequently promoted to wife status. In her view, this was clear demonstration of the fact that the appellant made her life in the home impossible so that she could leave and then immediately replace her with a companion of his choice. It is clear to us from this act, which the appellant does not deny that his secretary was always waiting on the wings to move in with her boss at the earliest opportunity at his behest.

We have found it necessary to bring out this evidence because the appellant has portrayed the respondent herein in very bad light. According to him, she did not contribute anything at all towards the purchase of any of the properties; that she never bought any food for the family or paid any bills; that she never even used to look after him, cook for him, or supervise the workers or even take the children to school!

According to him, the respondent used to keep all her money and that she even left the matrimonial home out of her own free will.

This in our view could not be the correct position because if she had been saving all her money, she could not have moved in to live with her brother for six (6) years after she left the matrimonial home. She also produced in evidence several documents to show that she took small loans after she left to enable her meet some of her children’s expenses and also help her son to set up a small business. What we are saying here is that the respondent was not the kind of wife who was just “*sitting on her husband’s back with her hands in his pockets*” to use Kwach J.A’s words in *Nderitu Vs Nderitu* (Supra).

She was a hardworking woman in our view who contributed both directly and indirectly towards the acquisition of the properties in question. The appellant made savings in terms of not paying the domestic utility bills, buying food, clothes etc. which savings he applied to service the mortgage. She also

accorded the appellant comfort and emotional solace in the home which enabled him go to work without having to worry about his home and children and thus be productive at work.

This case falls on all fours with the **Gissing vs. Gissing Case** which the trial Judge rightly found applicable in this case in which Lord Denning very succinctly stated:-

“... The financial contributions may be direct, as where it is actually stated to be a contribution towards the price of installments. It may be indirect, as where both go out to work; and one pays the house-keeping and the other the mortgage installment. It does not matter which way round it is. It does not matter who pays what so long as there is a substantial financial contribution to the family expenses, it raises the influence of trust. But where it is insubstantial no such influence can be drawn.”

We are satisfied that the respondent contributed her money indirectly towards the purchase of the said properties. Like the learned Judge of the High Court, we find that the respondent was indeed entitled to an equal share in the properties in question which were all registered in the appellant's name.

However, her 50% share of the property was in respect of the property as at the time she left the matrimonial home. Any property the appellant may have acquired thereafter or any mortgage he may have continued to service did not benefit from any direct or indirect contribution of the respondent. As at the time the respondent left the matrimonial home, the mortgage in question had not been cleared. There was evidence on record to show that the appellant continued servicing the same sometime under extreme hardship. The respondent cannot justifiably benefit from the value of the payments made towards that property long after she had left. It is not in dispute that cohabitation came to an end in 1986. The mortgage was not fully paid up until 1995 or thereabouts which was about 9 years after she had left the matrimonial home. It would not in our view be fair to award her a benefit which had not accrued to her as at the time she left. For these reasons, we find that her entitlement in the Karen property should be reduced to 30%.

On the Motor vehicles in question we note that the respondent in her evidence admitted that she had not contributed to the purchase of any of them financially. There was no production of evidence e.g log books to show that the said Motor vehicles were registered in the appellant's names. Some documents at page 316 – 318 of the record of appeal show that the Mercedes 200 whose registration number is not clear was to be registered in the name of **[Particulars withheld]**. A document at page 312 of the record of appeal issued by CMC in respect of the Range Rover is issued to **[Particulars withheld]**. The same case applies to the pick-up.

In our view, there was no serious attempt on the part of the respondent herein to stake a claim on these motor vehicles. If indeed they belonged to **[particulars withheld]** without any proof of partnership or shareholding in the said outfit, then the respondent cannot be entitled to any share in the said motor vehicles.

We are of the view that the learned Judge misdirected herself when she awarded the respondent 50% share in the said motor vehicles. We find that she did not prove any entitlement in the same.

In sum therefore, we find that this appeal succeeds in part. We allow the same and set aside the Judgment of the High Court dated 26th September, 2002 and substitute the orders thereof with an order that the respondent is entitled to 30% of

- 1) **The property known as [Particulars withheld] situated in Langata, Nairobi.**
- 2) **Same be subdivided and she be given 30% of the same on the side not occupied by the appellant's residence.**

In the alternative, the entire property be valued by an independent valuer, and the respondent be paid the 30% of the total value of the same by the appellant within 60 days from the date of this judgment.

In default, the property be sold in the open market at the current market rates and 30% of the proceeds be given to respondent.

The cost of the valuation be shared on a 70:30 ratio as per the parties” share.

3) ***The listed motor vehicles to remain with the appellant herein.***

Since the Appeal has succeeded in part, we order that each party bears its costs of the appeal.

Dated and delivered at Nairobi this 24th day of May, 2013.

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

D. K. MARAGA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR