REPUBLIC OF KENYA

COURT OF APPEAL

AT MALINDI

CIVIL APPEAL 162 OF 2009

BETWEEN

A.M.R……..... APPELLANT

AND

A.N.J…...……..... RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Mombasa (Azangalala, J.) delivered on the 5th day of March, 2009

In

H.C.C.C. NO 174 OF 2005)

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JUDGMENT OF THE COURT

On *5th March, 2009*, Azangalala, J. dismissed an Originating Summons, filed by ***A.M.R***, the appellant, which Summons was brought pursuant to the provisions of the ***Married Women's Property Act*** 1882, of England. ***A.N.J***, the respondent, was named in the Originating Summons as the defendant. The parties were married under Islamic law on *8th January, 1995*; but the marriage did not have any issues. The marriage was allegedly terminated in or about August 2004, and on *29th August, 2005*; the appellant filed the Originating Summons (OS) aforesaid. In that O.S., the appellant sought declaratory orders, firstly, that property known as ***[…]*** was acquired by the joint efforts and funds of both her and the respondent; Secondly, that the upper floor of the flat on *plot No. […]* was owned by both of them in such shares as the court shall deem proper to grant; thirdly, she was a co-owner with the respondent of Motor Vehicle Reg. No. […]; fourthly that she, the appellant, has a share in property known as *[…]*. Lastly, the appellant prayed for an order that all the aforesaid properties be divided between her and the respondent as the court shall deem fit.

Filed with the O.S. was a Chamber Summons, dated *26th August, 2005*, in which the appellant sought a restraining injunction barring the respondent by himself or otherwise from selling, dealing in or interfering with her possession of all the aforesaid property. That application was heard by Mwera, J. and in a ruling delivered on *22nd September, 2005*, the learned judge dismissed the application on, amongst other grounds, that the state of the marriage between the parties was by then uncertain.

In her affidavit in support of the O.S., she deponed that as at the date of her marriage to the respondent as also the date of her O.S., she was working as a *(particulars withheld).* Her salary is said to have been about Kshs.12,000/= per month. She further deponed that *plot Nos. […]* and *[…]* were acquired by the respondent before marriage and were registered in his name. However, *plot no. […],* was acquired during coverture and both herself and the respondent made financial contribution, though not in equal shares, towards its acquisition and development. She also deponed that she made direct and indirect contribution towards the development of *plot Nos. […]* and *[…].*

Regarding motor vehicle registration no. […], the appellant deponed that she paid duty and other charges to facilitate its clearing at the port of Mombasa and its subsequent registration. She also paid various charges including fees for a road licence and for the vehicles maintenance.

In her oral testimony the appellant stated, inter alia, that although the respondent and her were husband and wife, they lived apart, most of the time. The longest time they stayed continuously together was two months, the reason being that the respondent was ordinarily resident in Dubai, where he worked for a living. He returned to Kenya once in a while. It was her case, therefore, that because of the respondent's absence from Kenya, she was managing the property in dispute herein. She supervised the construction of a house or houses on *[…],* and the completion of the construction of the house or houses thereon; she obtained in *2002*, a loan of Kshs.150,000/= from her bank, ***Barclays Bank of Kenya Limited***, and in 2003, a further loan of Kshs.400,000/= from the same bank which she used in completing the building of those houses. Through money she received from the respondent, she supervised the construction of an additional floor to an existing building on *plot No. […]*. In addition she used money from a Matatu business she was running using motor vehicle Reg. No. […], to complete the construction work of that building and she wanted the court to appreciate that she was both directly and indirectly making a contribution towards the improvement of that property.

Regarding *plot No. […],* the appellant testified that it was agricultural land where they did commercial farming. She testified that she used her own money to sink a borehole and to install power supply there, but that was disputed by the respondent who testified that he used his own money to install the power. The respondent also disputed that the appellant made any contribution towards the acquisition of that property. It was his case that the appellant's earnings from her employment were too low to be used for construction work. He, however, admitted that the appellant was involved in supervisory work at the construction sites and on the farm. It was also his case that he used to support the appellant as his wife, and was regularly sending to her a monthly sum of about Kshs.10,000/= for her upkeep over and above the money he sent to her directly or through proxies for the development of the various properties he owned.

The appellant and the respondent did not agree on how much, if at all, the appellant contributed towards the acquisition and maintenance of motor vehicle Reg. No. […]. That motor vehicle was imported into the country by the respondent. The appellant conceded that the respondent paid for the vehicle, but on her part she paid all the charges for clearing, registration and acquisition of all necessary licences and Insurance cover to make it usable on Kenyan roads. The respondent disputed this and stated that he met all those payments.

It was also the respondent's case that the appellant used to receive income from housing units on *Plot No. […],* which she did not account for. She also used to receive income from the matatu business which she did not also count for. In effect his case appeared to us to be that even if the appellant used some money for construction work which was not part of the money he sent to her, it was money which in actual fact belonged to him, in view of the appellant's low salary. He admitted the appellant borrowed some money which was used to complete construction work of a structure on *plot no. […],* but he contended that it was repaid from rental income.

The issues which the trial court was called upon to determine centred on the singular question whether the appellant was entitled to a share of any or all the suit properties.

The learned trial Judge considered the detailed affidavit and oral evidence from both parties and

their respective written submissions and in the end, held that he was not satisfied the appellant had proved her case against the respondent on a balance of probabilities. He therefore dismissed the O.S. but with no order as to costs. He thus provoked this appeal.

There are ***11 grounds of appeal***, as follows:-

"1. The learned trial judge erred in law and fact in delivering a judgment which was (sic) manifestly accepted evidence from one side.

2. The learned trial judge erred in failing to evaluate and appreciate the strength and weight of the evidence tendered by the Appellant.

3. The learned trial judge erred in law and fact in setting a higher standard of proof than required in cases of this nature.

4. The learned trial judge erred in law and fact in failing to acknowledge the role of Appellant in the acquisition, extension, improvement and development of the matrimonial properties in issue.

5. The learned trial judge erred in law and fact in failing to recognize and properly direct his mind to the gaps and lacunas in the evidence tendered in support of the Respondent's case.

6. The learned trial judge erred in his interpretation and application of the law of Married Women Property Act of 1882 and the trite Law relating to the facts in court.

7. The learned trial judge erred in failing to find that the Appellant was entitled to a share of Plot No. […], […] and Motor Vehicle […].

8. The learned trial judge erred in failing to acknowledge the direct and indirect contribution made by the Appellant in the acquisition, improvement and or maintenance of the Appeal (sic).

9. The learned trial judge erred in failing to appreciate the role of the Respondent to provide for the maintenance of the Appellant.

10. The learned trial judge erred in treating

maintenance and support provided by the Respondent as a husband to the Appellant during the subsistence of the marriage as the Appellant's share in the matrimonial property.

11. The learned trial judge erred in law and fact in dismissing the Appellant's case."

Looking at all the aforestated grounds of appeal, it is clear that the issue running through all those grounds is whether the appellant, directly, or otherwise, made any contribution towards the acquisition or improvement of, or both the acquisition and improvement of any or all the property in dispute. There was no dispute two properties namely, *[…]* and *[…]*, were acquired before marriage. It was the appellant's case regarding the latter, that she sank a borehole and used her money to complete an unfinished upper floor of a house standing thereon. The respondent on the other hand stated that the completion of the house was with funds he sent to one, ***Swale Omar***, and that the premises were completed before he married the appellant. But in cross-examination, he admitted that he might have been mistaken in the date the project was completed, as he conceded that as late as 1996, he was still sending money to the appellant for the project. Clearly therefore, the appellant was right when she stated that she supervised the construction work on that house. It is, however, not clear whether her involvement was for the whole or part of the period the upper floor was under construction.

There is, however, a valuation report which was prepared by one, ***Job J.W. Simiyu***, dated *5th June, 1995*, in which, though the respondent is indicated as the registered owner, the appellant has been indicated therein as owning and occupying the *"top second floor flat"*. The respondent explained that the

report was prepared merely to enable the appellant get owner occupier house allowance from her employer. If that was the only reason, it is not clear why the valuer was specific that the appellant was the owner of the upper floor only.

With regard to property known as *[…],* it was common ground that the plot was used for farming. It was the respondent's case that he bought the land through his brother, one, ***M.A.W*** in *1985*. That, the appellant did not dispute. The respondent, in his affidavit in reply to the O.S. deponed that the electricity which the appellant said she installed and the water pump she bought for use at the farm together with animals, were bought with funds he sent to the appellant. He was also regularly sending money to the farm. He swore that **Swalleh Omar** was managing the farm. He denied the appellant was in anyway involved in the management of the farm. The trial Judge believed the respondent's testimony on that aspect and concluded that the appellant did not satisfy him that the bank statements she produced in evidence showing certain withdrawal from her account had any connection with the developments she allegedly effected on the property.

A quotation for power installation was given on *18th July, 2001* which gave a total cost of KShs.232,460/= comprising of KShs.197,000 plus VAT of KShs.35,0460/=. A fee of KShs.19,700/= being survey fees was separately quoted. The total of those figures came to KShs.252,160/=. The appellant produced her bank statement which showed that on *18th July, 2001*, there was a debit in that account of KShs.233,060/=. That, we believe is the money the learned trial Judge said did not have any clear nexus with the power installation on *[…]*. It is noteworthy that the respondent did not also adduce any clear evidence to show he made the payment. The learned Judge must have assumed that because the respondent was the registered owner of the property in question he had no obligation to show that it was him not the appellant who made the payment for installing power on the property. The matter which was before the learned Judge concerned husband and wife. At the time of the alleged installation of power at the suit property, the couple had no serious issues between them at least to our knowledge. It should be recalled that the respondent was then based out of the country, and only his wife was locally based. The respondent's case was that he used to send money to the appellant for use in construction work and for her own use. It was highly probable that the appellant made the payment, whether from her own sources or from money sent to her by the respondent. Indeed, as stated earlier soon after the Kenya Power & Lighting Company gave its quotation, there is a credit of KShs.253,060 into the appellant's account and a corresponding debit on the same day.

As regards *plot No. […],* the appellant's case was that she made payment by cheque to the seller of the land one ***Aisha Mohamed***. She also raised a total of KShs.550,000/= towards the construction of a house thereon. The respondent, as stated earlier, conceded that the appellant borrowed money and passed the same over to him for purposes of building the house. From where did she get the money? The appellant testified that she was operating a matatu using motor vehicle […]. She was also employed and was earning about KShs.12,000/= as salary and an additional KShs.14,000/= as owner occupier house allowance. The respondent used to send to her, on average, about KShs.10,560/= per month for her maintenance. She also used to receive rental income of at least KShs.12,000/= per month. She did not have children. It is not clear from the evidence what arrangement the parties had on the use of the rental income and the income from the matatu. The respondent appears to imply that the appellant was allowed to recoup from those funds a portion of it to repay the loan which as stated earlier, she obtained from her bankers to complete the building on the property which was under construction. It does not appear to have been the agreement between them that she would repay the loan she took from her bankers out of the rental income she was getting from premises on the property in issue. The respondent must have raised the matter as a way of answering the appellant's claim that she made contribution towards the purchase and development of *plot no. […]*.

The respondent testified that repayment of the loan took over two years. He also admitted that the appellant actually supervised construction work of the house on the property. This is what he said:-

"The loan was paid for about 2 years or more. I am not sure. Construction at the premises was supervised by you."

What emerges from the evidence is that indeed the respondent depended on the appellant to oversee the construction and management of the family property. She was the person on the ground and he personally could not do so as he was away in Dubai. Although the respondent had engaged other people in the construction work, there are aspects he did not consider it appropriate to use them. The respondent admitted he used to send money to her for various purposes. That was expected in view of the fact that the appellant was his wife.

The last property in dispute in this matter was Motor Vehicle reg. no. […]. That motor vehicle was imported into the country by the respondent during the subsistence of his marriage to the appellant. The appellant, as stated earlier, would want it taken into account as matrimonial property even though she did not contribute money towards its purchase. Her case was that she sold motor vehicle Reg. No. […] for KShs.240,000/= and used that money to pay duty for the imported vehicle. She was not cross-examined on this aspect. The respondent on the other hand testified that he paid duty for the same motor vehicle and denied the appellant spent any money to clear the vehicle. His evidence on the proceeds of sale of the matatu was that he did not know what use the appellant put the money to. The respondent, however, admitted that even after the appellant sold the matatu, he still had to send some money to her because **"You are my wife"**. It is curious that the respondent was sending money to the appellant, even after she had sold a motor vehicle he, the respondent, claimed belonged to him. The respondent also admitted that before that vehicle was sold the appellant was operating it as a matatu, but she was not accounting to him for the income she received from that business.

The foregoing analysis gives, in general terms, the background of the case. What is the law on the matter? ***Lord Reid*** of the House of Lords in England summarised the issues which may arise regarding property whenever a marriage breaks up thus:-

"For the last 20 years, the law regarding what are sometimes called assets has been in an unsatisfactory state. There have been many cases showing acute differences of opinion in the Court of Appeal. Various questions have arisen, generally after the break-up of a marriage. Sometimes both spouses have contributed in money to the purchase of a house: Sometimes the contribution of one spouse has been otherwise than in money. Sometimes one spouse owned the house and other spent money or did work in improving it: and there have been a variety of other circumstances."

(See ***Pettitt v. Pettitt [1969] 2 ALL ER 385 at p. 358***).

Like in England, there have been differences of opinion in courts in Kenya concerning the nature of the contribution towards the acquisition or improvement of property for it to qualify to be called ***Matrimonial Property*** for purposes of ***Section 17*** of the ***Married Women Property Act 1882***. In ***Karanja v. Karanja*** (2008)***1 KLR 171***, Simpson J (as he then was) held that the fact that the property acquired after marriage is put into the name of the husband alone and the husband has evinced no intention that his wife should share in the property does not necessarily exclude the imputation of a trust nor preclude the wife in appropriate circumstances.

In ***Kivuitu v. Kivuitu [1990-1994] E.A. 27*** this Court made the point clearer, by holding that the indirect contribution of a wife in a house has to be recognized whenever the question of sharing property in the event of a break-up of a marriage is being considered by the courts. Masime, J.A. authoritatively stated thus:-

"And, even where only the husband is in the income earning sector the wife is not relegated to total dependence on him without an ability to make some reasonable contribution towards the economic management of their family. It is no longer right to assume, as was done under customary law that the wife was totally dependent on the husband and not capable of contributing at all or substantially to the development of the household and increase in the family wealth."

Omolo, Ag. J.A (as he then was) expressed himself thus in the same case of ***Kivuitu v. Kivuitu***.

"For my part I have not the slightest doubt that the two women I have used as examples have

contributed to the acquisition of property even though that 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 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.... 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 of 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."

In ***Nderitu v. Nderitu [1995-1998] E.A. 235***, Kwach, J.A. approved the above passage, and held that the passage:-

"***Settles what the law is in Kenya on the point of indirect contribution. A wife's contribution and more particularly a Kenyan African Wife will more often than not take the form of a backup service on the domestic front rather than a direct financial contribution."***

The learned Judge then concluded that it is incumbent upon a trial Judge hearing an application under ***Section 17***, above, to take into account that form of contribution in determining the wife's interest in the assets under consideration.

There are other decisions which followed, among them. ***Muthembwa v. Muthembwa*** (***2008) 1 KLR 247***. This Court paid loyalty to that principle.

Then there was the decision in ***Echaria v. Echaria [2007] 2 EA. 139***. A bench of five Judges of this Court after a review of several local and English decisions held, inter alia, firstly, that 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 ultimately depend on their proven respective proportion of financial contribution, either direct or indirect towards the acquisition of the property and where the contribution is not ascertainable but substantial it may be equitable to apply the maxim ***"equality is equity".*** Secondly, in all cases involving disputes between husband and wife over the beneficial interest in the property acquired during Marriage which have come to the courts, the Court has invariably given the wife an equal share basing its decision on assessed contribution towards acquisition of the property.

The Court in that case appears to emphasize tangible contribution which is clearly provable towards the acquisition of the property in dispute as the guiding principle in determining the wife's share. Clearly, the Court did not seek to change the approach which the Courts in Kenya had previously adopted. Rather, the Court sought to clarify the issue of contribution, namely that an applicant under ***Section 17*** of the Married Women's Property Act 1882, is obliged to prove the extent of her contribution towards the acquisition of the property in dispute.

In the case before us, the High Court did not think the appellant succeeded in proving that she had made any contribution as would have entitled her to a share in the property in dispute. We earlier analysed and evaluated the evidence which was tendered at the hearing of the appellant's case. The appellant was employed and earned an ascertainable income. In addition, she was operating a matatu. There was a dispute as to how the matatu and another vehicle were acquired, but the evidence adduced is clear that the respondent acquired the vehicles and left the matatu with the appellant to manage. As the respondent was based out of the Country, only the appellant was running it. She was getting an income from it. The respondent implied that he did not insist on the appellant accounting to him for the income from that business. Besides, the appellant was managing the family investments in the country. The respondent acknowledged that she was receiving money from the matatu and also rents from rental houses on one or two of the properties.

It should be recalled that the appellant and the respondent remained married for at least ten years. Throughout that time, the couple were co-operating in the management of their family affairs, more

so the property in dispute. It is not conceivable that throughout that period the appellant did not contribute any financial or non-financial support for the acquisition or maintenance of the property in dispute. The respondent conceded the appellant was the one he relied upon regarding the management of some, if not all the property in dispute. This is what the respondent, in pertinent part, said:-

"There was a matatu No. […]. It was bought in 1997. The money was being taken by the applicant. The applicant sold the matatu to Lion Motor Dealers for 240,000/=. I did not know of the sale. I did not know where she took the money.....

On loan of 300,000/= alluded to by the applicant, I agree the loan was obtained. The money was used for finishing of premises on 3820. That is the money she gave me. The rent repaid the loan."

Later under cross examination the respondent, in part, stated:-

"The loan was paid for about 2 years or more. I am not sure. Construction at the premises was supervised by you.....

On plot No. […] – upper floor (2nd floor) was in the year 1993-1994. It is not true that you were involved in the extension as I used to pay money to Swaleh for the construction. I may have been mistaken on the dates. I sent money in 1996 for construction and extension. I also sent money to you for the same extension as my wife."

Clearly, the respondent was not particularly truthful in some respects as is clear from the above extract. It is clear that the respondent depended on the appellant for the supervision of construction work of the upper floor of premises on *plot No. […]*. The learned trial Judge was clearly in error in failing to recognize that contribution by the appellant. Besides, the respondent, as shown earlier, borrowed money to assist in completing the construction work of the same premises. The fact that the appellant had to borrow the money was clear evidence that the respondent was financially unable to complete the construction work of the premises without the financial support of the appellant.

The appellant, as stated earlier, was also managing the matatu business, and their farm. Both activities were generating income which was used by the couple. No matter that the appellant may not have been accounting to the respondent on all income received. The respondent for about **10 years** did not raise any complaint regarding the use of that money. He did not state in evidence that he raised the matter with the appellant. The relationship between the couple appears to us to have been cordial, considering the conduct of the parties. If the respondent asked the appellant to borrow money for use in the family and she readily obliged, it shows that they were consulting regularly regarding the management of family affairs. It is also noteworthy that the respondent imported motor vehicles and asked the appellant to clear them at the port of Mombasa.

In our view, the learned trial Judge was in error to hold that there was no evidence to show that the appellant contributed in the acquisition of some of the disputed property.

The next question which of necessity follows, is how much the appellant's contribution was. Considering the manner in which the couple managed their affairs, it may not be easy to affix an exact figure based solely on the material before us. In such a case, the court must do its best to fix what in its view, would be the appellant's share. The respondent provided all the money to purchase the vehicles. He bought two properties before he married the appellant. The appellant's contribution related only to the construction of the upper floor of the premises on *plot No. […]* and a house or houses on *plot No. […]* For the former property, the appellant would be entitled to **50%** share of that upper floor, which will translate to about **25%**value of the whole property considering that the greater value of the property is in the land itself. With regard to *plot No. […],* it was acquired during corveture.

Our view is that the appellant would be entitled to about **25%**value also, considering that most of the money came from the respondent. The appellant's contribution towards acquisition, in her own admission, was minimal. Her main contribution was in management.

Plot No. […] was purchased by the respondent alone. The appellant's contribution according to her evidence was in installing power and sinking a borehole. Her contribution was minimal. We assess her contribution at a nominal sum of ***KShs.100,000/=***. In arriving at that figure, we have taken into account the fact that the appellant directly benefited from the rents she received from the property during the subsistence of their marriage which the respondent said she did not account to him for the same.

To ascertain the appellant's exact entitlement, the property needs to be valued and then her contribution be calculated on the basis of the percentages we have assessed above. There is a need for a valuer being appointed by the High Court to do the valuation. As regards motor vehicle […] there is no clear evidence whether it is still with the respondent. We say no more on it.

In the result we allow the appeal, set aside the decision of the High Court dated *5th March, 2009,* and give judgment in favour of the appellant as prayed in the Originating Summons dated *26th August, 2005* and since the couple's marriage was dissolved, the sharing of the property is as assessed in this judgment. The appellant shall have the costs of both the appeal and the Originating Summons.

Dated and delivered at Mombasa this 16th day of March, 2012.

S.E.O. BOSIRE

.....
JUDGE OF APPEAL

R.N. NAMBUYE

.....
JUDGE OF APPEAL

W. KARANJA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR