REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, BOSIRE & GITHINJI JJ.A)

CIVIL APPEAL NO. 157 OF 2004

BETWEEN

R F S………………………………………… APPELLANT

AND

J D C S ……..........…………….……. RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Waweru J). delivered on 4th June 2004

in

H.C.C.S. NO. 76 OF 2003(O.S.)

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JUDGMENT OF THE COURT

This is an appeal by R F S, whom we shall hereafter refer to as the appellant, against the decision of the superior court (Waweru J.) dated and delivered on 4th June 2004 in its Civil Case No.76 of 2003(OS). That suit was commenced by Originating Summons by J D C S, whom we shall hereafter refer to as the respondent, on 23rd October, 2003. As at that date the parties were husband and wife, their marriage having been solemnized sometime in 1990 and the same had not been dissolved.

The prayers in the O.S. were mainly the following:

1. A declaration that the respondent is entitled to at the very least an equal share of the matrimonial home situated in Westwood Park in Karen on LR. No**. *[Particulars withheld],*** registered in the name of a company known as ***[particulars withheld]*** Manufacturing Ltd.

2. Alternatively, a declaration that the respondent is entitled to at the very least, an equal share either in kind or cash of the proceeds of the sale of the property.

3. An order that the said property be valued and sold and the proceeds thereof be divided between the parties as the court deems just.

4. A declaration that, in the event of the respondent vacating the matrimonial home pending any sale of the property, then the rental income from the said property be apportioned accordingly in equal shares.

5. A declaration that the Edinburgh flat ***[particulars withheld]*** situate at ***[particulars withheld]*** Avenue in Scotland, registered in joint names may be sold at the respondent's option and the proceeds thereof be split equally.

The other prayers are consequential in nature and we do not consider it necessary to set them out here. The O.S. was supported by the respondent's affidavit, which sets out the background facts upon which her claim was based. The appellant upon service on him of the O.S, filed an affidavit, in reply and himself, set out additional facts regarding the dispute between him and the respondent.

From both the affidavits the background facts may be summarized as follows. The appellant incorporated ***[particulars withheld]*** Manufacturing Company Limited in or about 1976, with him as the major shareholder, holding 80% of the shares. The remaining 20% of the shares, were and are still owned by his sister, one S O A. In or about 1984, the company bought a 10 acre property known as L.R. ***[particulars withheld],*** which it sub-divided into plots, among them L.R. No***.[particulars withheld]*** and L.R. No. ***[Particulars withheld].*** There were three existing houses on the property, and upon sub-division all those houses ended up as part of L.R. No***.[particulars withheld].*** Some of the sub-divisions were sold between 1995 and 1999 but this aspect is not material to the matter before us.

The appellant as stated earlier, married the respondent in or about 1990, and between 1991 and 1992 the couple built a house on one of the sub-divisions with the sole purpose of making it the matrimonial home. The appellant disputed this fact and deposed in the replying affidavit that the house was built by his company at a cost of Kshs.3,796,069/=. The respondent's case was that she actually spent her own money totaling over Kshs.3.45 million which she earned from her practice as a medical doctor. It was common ground that the respondent who is a medical doctor, was during the relevant period, running a medical practice in the name and style of ***[particulars withheld].*** From that income she was meeting the monthly household expenses and part of the children's expenses. The couple have two children born on 3rd March 1995 and 14th September 1997, respectively.

The respondent tabulated her household expenditure but she did not produce receipts to support the expenditure. It was her case that some expenditures are of such a nature that they could not possibly be accounted for by way of receipts. She estimated her annual contribution to the family upkeep at more than Kshs.3 Million. It was further her case that she exclusively provided for herself and the children of the marriage and also maintained the gardens on the property as a whole.

The appellant did not of course agree with the respondent. While he agreed that, the respondent made some contribution for the family's upkeep, it was his case, that the respondent's contribution as stated by her was exaggerated, and that the construction and maintenance of the property in dispute was solely the responsibility of his company which owned them, and the respondent was occupying what she calls the matrimonial property, but which is company property, rent free.

As stated earlier the suit between the parties was commenced by O.S., pursuant to the provisions of section 17 of the **Married Women's Property Act, 1882** of England, which is applicable in this country. The detailed procedure is contained in O.36 of the Civil Procedure Rules. Rule 8 thereof mandates the trial court to give directions as to whether the trial of a suit commenced by O.S is to be conducted by way of affidavit evidence or both such evidence and viva voce evidence. On 5th February 2004, directions on the O.S were given. Both Mr. Majanja for the appellant and Mr. Gross for the respondent did not think oral testimony was necessary. Mr. Majanja was categorical that there were "*no contentious facts*" which would require oral testimony. Following their indication the court ordered that the proceedings would be based solely on affidavit evidence.

As it later turned out, some facts were in dispute. For instance the parties were not in agreement as to their respective contributions towards the construction of the house the respondent was referring to as

the matrimonial home. Besides there was a dispute as to whether the respondent made any contribution towards the improvement of company property.

In a further affidavit the respondent deponed that she was a nominal shareholder in the appellant's company. She held one share up to 2003. She also deponed that before she decided to file suit there had been several reconciliation meetings, and in those meetings the appellant admitted that the house in dispute was the matrimonial home, and that the respondent was entitled to half share of it.

In the meantime, the marriage between the parties broke down. The appellant moved into one of the three company houses leaving the respondent in the subject house.

Waweru J. heard submissions from counsel from both sides. He had no difficulty holding that the property in Scotland was outside the jurisdiction of Kenyan courts and consequently disputes touching on it were not justiciable before Kenyan courts. Besides he held, as the property was registered in the parties joint names any disposition of it was subject to the agreement between the parties and the law governing the property. We agree.

Waweru J. also held that although the alleged matrimonial house was on property owned by the appellant's company, it was matrimonial property and that the respondent made a substantial contribution towards its construction. He accepted the respondent's affidavit evidence to the effect that she raised at least Kshs. 3 million for that purpose and further sums for the upkeep of the family including meeting educational and other expenses of the children of the marriage. He cited this Court's decision in Cosman K. Muthembwa v. Eunice Kyalo Muthemwa, Civil Appeal No.74 of 2001, in support of the proposition that such a contribution improved the suit property and thus entitled the respondent to be considered for a share thereof upon dissolution of her marriage with the appellant. The learned Judge reasoned that the enhancement of the value of the property in dispute improved the appellant's shareholding in his company. He assessed the value of the property as forming 30% of the total assets of the company, and such a percentage in his view if considered vis-à-vis the appellant's shareholding on the company of 80% would upon computation be about 24% of the total value of the assets of the company. He held that the respondent would be entitled to half value of that or 12% of the total value of the assets of the company.

To actualize the 12% in monetary terms, the learned Judge ordered that all the assets of ***[particulars withheld]*** Manufacturing Limited be valued and upon ascertaining the total value, he decreed that the appellant pay to the respondent a sum of money equivalent to 12% of that value. In the result he entered judgment for the respondent in terms and thus provoked this appeal.

As at the date this appeal came up for hearing Knight Frank Valuers, a firm of valuers, had done the valuation. They arrived at a figure of Kshs.47,400,000 comprising only of the external features of the property of the aforesaid company. They were not able to access the inside of all the premises and in their view had the internal inspection been carried out, the total value would probably have been higher.

In his memorandum of appeal the appellant has raised the following grounds of appeal:

" (1) That learned Judge erred in granting orders over the suit property that does not belong to the appellant but to a limited liability company."

(2) The learned Judge erred finding that the respondent had not proved her contribution in respect of shares owned in the Company yet proceeding to grant the respondent relief in respect of the same.

(3) The learned Judge erred in granting relief in the absence of evidence to support the Respondent's claim.

(4) The learned Judge erred in estimating the value of the suit property in the absence of the evidence in the nature of valuation report.

(5) The learned Judge erred in holding that the suit property constituted 30% of the assets of the company in the absence of evidence to support the finding.

6. The learned Judge erred in holding that the respondent's purported contribution amount to ½ of the value of the suit property.

7. The learned Judge erred in holding that the respondent was entitled to the appellant's share in the Company when no such relief was sought in the Originating Summons.

8. The learned Judge erred in concluding that the respondent had contributed to the increase in the value of the company's assets in the absence of evidence to prove the same.

9. The Learned Judge took into account irrelevant material and ignored relevant material when arriving at his decision."

As is evident, the appellant attacks the trial Judge's findings of fact, the major one being that the learned Judge granted orders over property which did not belong to the appellant but a Limited Liability Company. It is important to consider this issue first as the remaining ones flow from it. We earlier stated that the parties herein constructed a residential house on company property for their own occupation. The circumstances which led to this were not explained. The parties adopted an approach in the proceedings before the superior court which denied the court the opportunity of inquiring under what circumstances a decision was taken to construct a matrimonial residence on company property. Had the parties given viva voce evidence they would have been examined and cross-examined on that among other matters, and issues which are presently unclear would have been clarified. O.36 rule 10(1) of the Civil Procedure Rules, as material provides thus:

> *"10 ((1) whereon an originating summons under this order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun, and may, in particular, order that any affidavits filed shall stand as pleadings …"*

We earlier referred to O.36 rule 8 of the same rules. The provision authorizes the court to give directions on whether the hearing of the cause should be by affidavit evidence only or by way of both affidavits and oral testimony. The parties having opted for the hearing of the cause to be by affidavits only, we are left with no alternative but to presume certain facts.

The construction of the matrimonial house was done with the consent and bidding of the appellant. He was and still is the major shareholder of the company. He directly or tacitly invited the respondent to contribute towards the construction of the house. The respondent was not a shareholder of his company. Consequently, as in the Muthembwa case, the property ceased to be in the original form. The appellant having invited the respondent to spend her money in improving company property it can be inferred that he intended it to be the matrimonial home. If we accept the appellant's deposition that the house cost about Kshs. 4 million to construct, and we also accept that the respondent spent about Kshs.3.5 million towards its construction, it will mean that the major expense was met by the respondent, probably because, the appellant contributed the ground on which the house now stands. As we stated earlier had oral testimony been given such issues would have become clearer. Be that as it may, the situation which emerges is that by the appellant's decision certain personal resources were made to be intertwined with company property, and in such circumstances it cannot be argued that the respondent would not have a remedy after the break up of her marriage with the appellant.

This matter may also be looked at from a different standpoint. The appellant knew very well that the suit property was company property. He also knew that the respondent was neither a director nor a shareholder of his company. The reason why he allowed a house for the occupation of his family to be built on the said company land with financial contribution from the respondent is a matter which was especially within his knowledge. Section 112 of the Evidence Act Cap 80 of the Law of Kenya placed

the evidential burden on him to disprove or rebut the presumption created by his conduct, namely, that he meant the house to be matrimonial property. His insistence that the house is company property without more was not sufficient. The respondent spent her own money in the construction of the house in question and the appellant was under a duty to offer a good reason why, in the circumstances of this case, she was not entitled to be compensated. Section 112 above provides:

> *"112 In civil proceedings, when any fact is especially within the knowledge of any party, the burden of proving or disproving that fact is upon him."*

It was instructive that the appellant did not adduce any evidence to show the money his company might have spent in putting up the house in question, other than a bare assertion that the company spent Kshs.3796,069/=. Was it difficult for the appellant to show either through receipts or a balance sheet for the relevant period that such money was spent in the manner stated? After all, the burden was on him to not only disprove the respondent's contention that she spent money for the construction of the house but also that she was not occupying the house as matrimonial house, but as a tenant. Both section 115 and 116 of the Evidence Act placed a burden on him to call evidence to show the respondent's status in relation to the house. He failed to discharge that burden, with the result that we cannot but agree with the trial Judge that the appellant intended the house to be the matrimonial home.

Rule 31 of the Court of Appeal Rules, mandates this Court:

> *"On any appeal… so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such directions as may be appropriate, or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs:"*

Considering what we have stated, above, we find no basis for interfering with the trial Judge's finding that the respondent made some contribution towards the construction of what she described as the matrimonial home. Besides, on the material which was before the trial court it is clear that the respondent was not just a housewife. She was earning a substantial amount of money from her medical practice, a fact the appellant conceded that she was contributing money towards the maintenance of the house and the children of the marriage.

It is true, that no evidence was adduced as to the extent of her contribution. The trial Judge did not go into this. Instead he concentrated on the extent of her contribution towards the improvement of the matrimonial home. He assessed the percentage of her contribution at what we consider to be a conservative rate of 12%. Mr. Kinyanjui for the appellant submitted before us that the learned Judge exceeded his jurisdiction to deal with company property since he was not exercising powers under the Companies Act, Cap 486, Laws of Kenya.

Mr. F. Gross for the respondent on the other hand submitted that as the appellant held the controlling share holding in the company, the company was really him and that the learned Judge was entitled to handle the matter as he did.

As we stated earlier, the issue here is not whether or not the respondent owned shares or an interest in the company. Rather, it is the conduct of the appellant. He offered what was company property for use by his family. He should not be heard to make an about face by contending that the respondent should not claim compensation for improving the property at his behest. The improvements made became intertwined with the company assets, and it was only fair that the percentage of the improvements in relation to the total company assets be assessed for purposes of compensating the respondent.

Her contribution created resulting trust over the appellants shares. It cannot be otherwise. If it were to be otherwise it will defeat the whole object of section 17 above and thus deny the wife a remedy under the Act in a matter in which her contribution for the improvement of company property is clear.

Having come to the foregoing conclusions, we find no necessity of dealing with the remaining

aspects of the appeal.

In the result we dismiss the appeal with costs.

With regard to the Cross-appeal the respondent has raised six grounds namely:

"1. The Learned Judge erred in law and fact in finding and determining that the court lacked jurisdiction to make a declaration as regards the property known as Edinburgh Flat ***[particulars withheld]*** at ***[particulars withheld]*** Avenue, Scotland.

2. The learned Judge erred in law and fact in considering total value of assets of ***[particulars withheld]*** Manufacturing Limited on basis of a supposed Balance Sheet and Accounts of the said company as at 31st December 1991.

3. The learned Judge erred in law and fact in finding and determining that the land known as LR. No. ***[particulars withheld]*** comprising in part the matrimonial home constitutes about thirty per centum (**30%**) of the total value of assets of the aforesaid company.

4. The learned Judge erred in law and fact in finding and determining that the Appellant's interest in the property known as LR. No**. *[Particulars withheld]*** is twenty-four per centum (**24%**) of the total value of the assets of the aforesaid company.

5. The learned Judge erred in law and fact in finding and determining that the Respondent is entitled to the Appellant's shares in the aforesaid company equivalent to **12%** of the total value of the assets of ***[Particulars withheld]*** Manufacturing Limited.

6. The learned Judge's decision was contrary to law and against the weight of the evidence presented."

At the hearing of this matter Mr. F. Gross, for the respondent abandoned grounds (1) and (5) relating respectively to the U.K. property and the trial court's apportionment of her entitlement over the share of ***[particulars withheld]*** Manufacturing Company Limited. In his submissions Mr. Gross invited us to review the apportionment upwards on the basis of the valuation report by Knight Frank. That valuation was made sometime in January 2005. Mr. Gross also invited us to consider up-dating that valuation report because of long passage of time since the report was prepared.

In answer, Mr. Kinyanjui for the appellant submitted that the Knight Frank report showed a partial valuation of the property. Besides he said, there was no proper basis for departing from the trial Judge's apportionment of 12%.

The Knight Frank valuation was given after judgment. It was intended for purposes of execution of the judgment of the superior court. It was not before the trial Judge when he was preparing his judgment. It is not therefore a proper basis for faulting the trial Judge's apportionment of the respondent's entitlement over the shares of ***[particulars withheld]*** Manufacturing Ltd.

In the result, grounds (3) and (4) of the cross-appeal must fail. The only other grounds left for consideration are grounds (2) and (6). Concerning ground (2), the respondent did not present material before the trial Judge to enable him come to a decision on her entitlement. The trial Judge had a balance sheet of the aforesaid company for the year ending 31st December, 1991, and no other evidence. If the respondent thought that the balance sheet was not properly representative of the financial status of the company, it was incumbent upon her to avail other evidence to show the correct position. She did not do so. That ground also fails.

As for the 6th ground, the respondent did not pinpoint aspects of the superior court judgment which were against the weight of the evidence before the court or in what aspects the decision was contrary to the law. There is no basis for that ground as well.

In the result the cross-appeal fails, and accordingly, it is also dismissed, but with no order as to costs.

Dated and delivered at Nairobi this 19th day of March, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

……………………………..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR