**IN THE COURT OF APPEAL**
**AT NAKURU**

**(CORAM: KWACH, OMOLO & BOSIRE JJ.A)**

**CIVIL APPEAL NO.221 OF 2000**

**BETWEEN**

**CMS .....APPELLANT**

**AND**

**SWS .....RESPONDENT**

**(Being an appeal from the judgment and decree of the High Court of Kenya at Eldoret (Lady Justice R. Nambuye) dated 22nd March 1999**

**in**

**H.C.C.C. NO.157 OF 1988)**
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## JUDGMENT OF THE COURT

This is an appeal by **CMS** (the appellant) from the decision of the superior court (Nambuye J.) in its Civil Case No.157 of 1988(O.S) in which **SWS** (the respondent) sought declaratory orders under section 17 of the Married Women's Property Act [1882] of England. The superior court declared that the respondent was entitled to half share of the matrimonial property, and proceeded to apportion the property between the parties.

The appellant and the respondent married each other on 2nd March, 1968. The respondent had two children, a son and a daughter with another man but who the appellant accepted and fostered. The parties established a matrimonial home at Eldoret. As at the date of the Originating Summons the marriage had been terminated as a result of a decree of divorce. During coverture the parties acquired several properties some of which are the subject matter of this litigationand hearing of the present appeal it was common ground that there was only one issue upon which a determination is necessary, namely, whether the apportionment of the suit property was fair, and reflected each party's contribution towards their acquisition.

The respondent's suit in the court below was commenced by Originating Summons. The first prayer in the said summons was that:

"it be declared that the property situate in the ELDORET MUNICIPALITY now registered in the name of the Respondent being:- (a) Block 8/115, (b) Block 8/119 & (c) Block 8/121 is jointly owned by the parties and an order be made for the sale of the same and the proceeds so divided equally or as the court

may deam(sic) fit." In her judgment the trial Judge ordered that parcel number Eldoret Municipality Block 8/121, be retained by the appellant and in addition he would get 8 acres out of a 15 acre agricultural land at Chepleskei, in Uasin Gishu District, which although registered in the name of the respondent, it was common ground that it was part of the matrimonial estate.

The trial Judge ordered that parcel No. Eldoret Municipality/ Block 8/117 be sold and proceeds thereof be used for the education of his son, **JNS**, who was then training in the United States of America as a commercial pilot. To the respondent the learned Judge ordered that she be given land parcel No. Eldoret Municipality/Block 8/115 on which stood the matrimonial home; and in addition the remaining 7 acres of the agricultural land aforesaid. The learned Judge declined to make any orders in favour of the respondent on two other prayers in the Originating Summons. The appellant wanted the matrimonial home and other properties arguing that he made quite a substantial contribution towards its purchase as also towards the purchase of all other matrimonial property. He contended and it was his counsel's submission that the respondent's contribution was minimal, and at best it would not be more than 30%. Besides, he contended that he spent a substantial income in providing for the children the respondent had come with and that what he so spent should have been but was not taken into account in determining his share of the matrimonial estate.

The appellant also lamented that the respondent had sold some vehicles which, although registered in her name, were matrimonial property, but did not account to him how the proceeds were spent. In his view the trial Judge should have taken that into account and reduced her share proportionately.

On the other hand it was urged on behalf of the respondent that the appellant too sold some immovable property which was part of the matrimonial estate but could not say how and for whose benefit he spent the proceeds of the sale. Likewise he was receiving some rent for a house they had let out but did not account for it. It was her case that her contribution towards the purchase of the property in dispute both direct and indirect, was substantial, as entitled her to a 50%A ss hawree .stated earlier the only issue in this appeal is whether the sharing of the matrimonial estate was fair and www.kenyalawreports.or.ke 3 equitable. The appellant conceded that the respondent did make some contribution. Neither him nor the respondent could say with any certainty or even approximate what their respective contributions were. At the time they acquired the subject property neither of them thought that their relationship as husband and wife would at some date in the future terminate. As Lord Reid remarked in the case of Gissing v. Gissing [1970] 2 ALL ER 786 spouses do not generally keep a record of their respective contributions towards the purchase of family property and do not, in making their respective contributions, think about what the position of the wife would be if say there were a divorce.

In a case as the present one where neither party is able to show what his contribution is towards the acquisition of the subject property, the court cannot decline to apportion the family property merely on that ground if it is satisfied that both parties made some contribution. The court must do its best by considering not only the personal earnings of each spouse and how the same was applied in the family, but also each spouse's indirect contribution to the welfare of the family and estimate how such contribution would translate monetarily to the family wellbeing. What would be considered as a spouse's indirect contribution varies from one race to another, one community to another and even one generation to another. But a judge should be able to ascertain from the evidence tendered before him which and to what extent the indirect contribution of a spouse was towards the welfare of the family. Such indirect contribution must be of a nature translatable into money.

The process of doing so is not aneasy one. As in the assessment of damages in personal injury cases, the court must do its best to reach a reasonable estimate and fix what he or she considers to be the parties' respective contributions. In doing so he should consider all relevant matters and exclude the irrelevant and the unimportant, bearing in mind that spouses, as a general rule, do not keep a record of all their transactions, leave alone those which have a financial implication; and also, that whatever spouses do during coverture is generally regarded as being for the good of the family and neither of them at that time evinces any intention of ever sharing such property.

What was the evidence before the trial Judge on the respondent's contribution to the family welfare?

The appellant described the respondent's contribution as follows:

"The first property was purchased in 1973. I said she never contributed towards the purchase. My wives (sic) salary was consumed in domestic expenses possibly food expenses and medical expenses. We were not strict in terms of money used. I used my money and she used her money. If the item was susceptible to be used in common it was used in common for ourselves and her 4 children. Her salary was low as a junior employee but my salary was more. We both took care of the children the normal English way. She did the domestic work. There was an employee. She was in charge of domestic affairs. I was working for Hughes Ltd at the time and they availed it (car) at the cost price for employees. ...

We had some lorries. The maximum number was 3. I carried out mechanical repairs, kept accounts while she was dealing with the business. I was employed full time. It is correct she resigned and went to the lorries business and shamba. I was aware of the income from the lorries. The income was used for variety of purposes.

(1) Paying off loans on new trucks.

(2) Paying off loan on 15 acre shamba

(3) Household expenses

(4) Paid off a loan on a house. It was a house which I built on one of the sub-divisions. ...

She was given a loan to pay off the loan with H.F.C.K which had been used to built (sic) the property." The quoted excerpt of the appellant's testimony sets out in summary his own assessment of the respondent's contribution towards the acquisition of the matrimonial property in dispute.

In her judgment the learned trial Judge rendered herself thus:

> "After assessing all the evidence on the record, hearing and considering the submissions of both counsels (sic) and after considering the principles in the cases referred to me and doing the best I can I make the following distribution:"

The learned Judge then proceeded to share the property between the parties herein as earlier on stated. The assessment should have been more elaborate but failure to do so, per se, would not be a sufficient reason to fault her. For this Court to interfere with her assessment and apportionment, it must be shown that the learned Judge, either erred in principle, was plainly wrong in her assessment and apportionment, or that the apportionment is manifestly disportionate to the parties' respective contribution.

As we stated earlier the appellant gave his own assessment of the respondent's contribution. It cannot be said as his counsel would have us believe, that her contribution was a paltry 30%. The appellant depicted her as an equal partner in providing for their family. The lorries business she was running brought in a substantial amount of income. The income was sufficient to repay loans for the trucks, meet household expenses, repay a house loan and another loan which had been used to buy their 15-acre agricultural land. The appellant also acknowledged that the respondent was solely managing their home with the help of a house maid.

The appellant placed a lot of emphasis on the fact that he was providing for the two children the respondent had come with. He conceded that he was not forced to do so. Besides, the respondent had been reasonably providing for them before the couple married each other. The respondent was not sitting back for the appellant to provide for her and the children, but was a hardworking woman who was making a substantial contribution to the welfare of the family. The appellant conceded this. In our view, therefore, nothing turns on that complaint.

In the result we are satisfied that on the material which was before the learned trial Judge, the respondent was clearly entitled to a 50% share of the matrimonial property. The learned Judge was

exercising a discretionary jurisdiction and as grounds for interfering with exercise of judicial discretion have not been shown to us, we have no basis for interfering. Consequently, it is our judgment that the present appeal lacks merit and it is accordingly dismissed with costs.

**Dated and delivered at Nakuru this 18th day of October, 2002.**

**R.O. KWACH**

**.....**

**JUDGE OF APPEAL**

**R.S.C. OMOLO**

**.....**

**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

**.....**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**