REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, AKIWUMI & O'KUBASU, JJ.A.)

CIVIL APPEAL NO. 44 OF 1999

BETWEEN

FN.....APPELLANT

AND

VWN.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya

at Nairobi (Lady Justice Owuor) dated 7th October, 1993

in

H.C.C.C. NO. 534 OF 1982)
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JUDGMENT OF THE COURT

In the end, even the parties to the appeal were of the view that the best course open to this Court is to allow the appeal and order a retrial of the dispute between them in the superior court. We regret in concluding that that is the best course of action open to us and we regret taking that course because of the fact that the plaint in the case was filed way back on the 23rd February, 1982, a period of over eighteen years now. Mrs VWN, the respondent, filed a plaint against her then husband Mr. FN, the appellant, and the dispute was over property known as L.R. N. xxx situate in Karen - Langata, Nairobi. That property was then and still is registered in the joint names of the appellant and the respondent as joint tenants. The property was acquired during the existence of their marriage. In her plaint, Mrs. N had prayed for orders that:- "

> *(a)The joint tenancy in respect of the suit premises to be severed by an order of the court;*
>
> *(b)The suit premises to be partitioned between the Plaintiff and the Defendant on equal basis and/or in such shares as the Honourable Court may deem fit, having regard to each party's contribution towards the purchase of the suit premises. (c)The Defendant do pay the Plaintiff the ren t collected by the Defendant (at the rate of Shs.2,000/ - per month, i.e. half of the monthly rent of Shs.4,000/ - per month) for the period of 1 1/2 years calculated upto the time of filing this suit and thereafter a monthly rent of Shs.2,000/ - per month (sic) until full payment and rental the joint tenancy has been severed by the court;*
>
> *(d)Costs of this suit;*
>
> *(e)Interest on (c) and (d) hereabove at court rates until full payment;*
>
> *(f)Such other or further relief as this Honourable court may deem fit and just to grant in the unique circumstances of this suit."*

It must be clear to anyone reading these prayers that the respondent wanted the joint tenancy between herself and her then husband over the suit property to be brought to an end by either giving each one of them half-share in that property or by assessing the contribution made by each one of them towards its purchase and giving a share in the property proportional to the contribution made.

On the 19th March, 1982, Mr. N filed his defence and counter-claim and while admitting the joint tenancy over the disputed property, he

stated that the property was purchased solely by him and that Mrs N's registration as a joint tenant with him was merely for their convenience as she was his wife. In the counter-claim, he set out other properties acquired during the marriage and said he was entitled to a share in each of them. There was subsequently an amended defence and counterclaim, but that appeared only to add to the list of properties to be contested.

The proceedings opened before Owuor, Ag. J. (as she then was) on the 16th June, 1982, when some interlocutory application was to be argued. The then counsel for Mr. N raised a preliminary objection to the effect that the whole claim of Mrs N was incompetent as it ought to have been brought by way of an originating summons. It is not clear from the record if the learned Judge ever dealt with this point. Mr Ngatia for the appellant informed us that the point was never dealt with. Be that as it may, Owuor J. eventually heard the whole dispute. Each side gave detailed evidence regarding the acquisition of each of the disputed properties and apart from oral evidence, numerous exhibits were produced.

In a 21/2 page judgement delivered on the 7th October, 1993, the learned Judge did not refer to any of the evidence which the parties had taken so much trouble to put before her.

She did not refer to any of the exhibits the parties had produced before her. Neither Mrs. N nor Mr. N had, in their respective evidence ever referred to the concept of presumption of advancement and in their submissions, the advocates for the respective parties did not at all refer to that concept. And yet in her very brief judgment which did no credit at all to the work the parties and their respective advocates had done in assisting the learned Judge to reach a decision, she introduced the concept of presumption of advancement and proceeded to decide the matter as follows:-

"... the presumption of advancement may be rebutted by evidence demonstrating the contrary. Here, there is no material before me up on which I can find that the presumption of advancement has been rebutted in any way. I am satisfied on the material before me that the property was held in joint tenancy and having regard to all the circumstances of the case this is a fit and proper case where I should order, as I hereby do, that the same property should be partitioned equally between the parties."

With profound respect to the learned Judge, none of the parties before her had relied on the doctrine of presumption of advancement and none of them gave evidence before her from which it could be presumed that there was an advancement from one to the other. Mrs N's case was that she had herself bought the property she claimed and also the others which Mr N was claiming in his counter-claim. Mr N's case was that he had solely acquired the property from his own resources and his wife had been jointly registered with him merely as matter of convenience. They placed evidence before the learned Judge in support of these conflicting contentions. It was clearly the duty of the learned Judge to resolve these issues. She totally failed to say anything on them and as we have seen, she instead chose to determine a matter which no one had asked her to determine.

The consequence of what the learned Judge did is that we do not have the views of the trial court on any of the issues which that court was required to resolve. In the absence of any findings at all by the superior court on these issues, we do not think it would be right for us to attempt to determine them in the appeal. The counter-claim by the appellant received equally cursory treatment and we must make the same conclusion on it.

We allow the appeal and, apart from her order on costs which we uphold, we set aside all the other orders made by her.

There is the question of the procedure which the respondent adopted in bringing her claim to court. This was clearly a dispute under the Married Women's Property Act, 1882, and the only way provided for such claims is through originating summons. The property which the respondent claimed is still registered in their joint names and somehow, that dispute must be resolved. While we order that the whole dispute be heard afresh i.e. while we order a retrial, ex debito justitiae, we also order that for this purpose, the respondent Mrs N, shall within 90 days of the date hereof, file an originating summons in the superior court and the appellant shall be at liberty to answer to the said summons. It is the hearing of that originating summons which shall constitute a rehearsing of this dispute. We make no order as to the costs of the appeal and these shall be the orders of the court.

Dated and delivered at Nairobi this 22nd day of September, 2000.

R.S.C.OMOLO

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JUDGE OF APPEAL

A.M. AKIWUMI

.....

JUDGE OF APPEAL

E. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.