IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, WARSAME & AZANGALALA, JJ.A.)

CIVIL APPEAL NO.280 OF 2012

M G N K……APPELLANT

VERSUS

A M G……RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi Delivered on 27th day of July 2012 by Hon. Mr. Justice George Dulu

in

H.C.C.C. NO. 9 OF 2008(OS)

****

JUDGMENT OF THE COURT

[1] This appeal is by ***M G N K*** (the appellant) and is from the decision of the High Court (***Dulu J.*****)** in Civil Case No.9 of 2008, Originating Summons (O.S) in which the appellant sought various reliefs under ***Section 17 of the Married Women's Property Act [1882]*** of England. The O.S was lodged against ***A M G*** (the respondent). The High Court found as follows:-

1. ***That L.R. No. [Particulars Withheld] , Otiende Estate (Otiende Estate property) was acquired solely by the respondent and awarded the same to him***

2. ***That L.R. No. [Particulars Withheld], Kahawa West Estate (Kahawa West property) although registered in the joint names of the parties, be registered in the sole name of the respondent.***

3. ***That plot Nos. [Particulars Withheld], Hinga Estate (Hinga Estate plots) registered in the joint names of the parties, be sold and the proceeds thereof be shared equally***

between the parties.

4. ***That L.R. No. [Particulars Withheld], Dennis Pritt Road (Dennis Pritt Road property) be awarded to the appellant***

5. ***That Property at Karengeta (Karengeta property) be awarded to the appellant***

6. ***That Property at Kiserian (Kiserian property) be awarded to the appellant.***

[2] The appellant and the respondent married each other on 1st August 1987. They have four children. At the time the Originating Summons was heard, the respondent was living with the first three children in Canada where he had lived for about nine (9) years. It was common ground that one of the three children was a special child who required special attention. The appellant was at the time staying with the last born of the union in Kenya. As at the date of hearing the Originating Summons, the marriage had been terminated as a result of a decree of divorce. During coverture several properties were acquired some of which the appellant disclosed in her O.S.

Other properties were disclosed in the respondent's response to the O.S. and all the properties became the subject of this litigation with regard to the mode of distribution and share each party is entitled to.

[3] The appellant was aggrieved by the distribution of the said properties and therefore lodged this appeal premised upon six (6) grounds of appeal. However, in their written submissions, ***M/s Mutitu Thiongo & Co. Advocates*** for the appellant condensed the grounds into four (4). The first three of the condensed grounds related to the orders of the High Court with respect to the subject properties and the last ground related to accounts which the appellant prayed be given by the respondent regarding the rental income he has been receiving from some of the properties.

[4] In finding for the respondent with respect to the Otiende Estate property, the trial Judge stated:

"Considering the evidence on record, I find that the Plaintiff did not make any direct contribution on this asset. It was acquired by the defendant and paid for by him during marriage. It was registered in his sole

name. It is awarded to the defendant."

[5] With regard to the Kahawa West property, the trial Judge appreciated that the same was indeed registered in the joint names of the parties and was acquired during the subsistence of the marriage. The learned Judge was also clearly alive to the law applicable. Notwithstanding the joint registration, the learned Judge found that the appellant had acquired the Dennis Pritt Road property, the Karengeta property and the Kiserian property using funds from ***[Particulars Withheld],*** College, a joint family business, and cash withdrawals from the respondent's bank account. In essence the learned Judge found that the presumption of joint ownership by registration was rebutted by the respondent.

[6] With regard to the Hinga Estate plots, the trial Judge found that the parties had half share interest in each of them "*since the property had been registered in the joint names of the plaintiff and the defendant."*

[7] It is those orders made by the trial Judge with respect to the three sets of properties: Otiende Estate, Kahawa West Estate and the Hinga Estate Properties, which the appellant challenges in this appeal. The appellant prays that the Otiende Estate property be subdivided in equal shares between them; that the Kahawa West Estate property be either retained as joint property or alternatively be sold and the proceeds thereof be shared equally between them and that the Hinga Estate properties instead of being sold as ordered, one of the two properties be retained by her.

[8] Besides those reliefs sought in the Memorandum of Appeal, the appellant's counsel ***Mr. Mutitu*** in both his written and oral submissions before us urged that an order for accounts be made against the respondent with respect to rental income received from the Otiende Estate and the Kahawa West Estate properties. However, as this relief is pegged on the success of the appeal, we shall say no more thereon at this stage.

[9] The appellant's case before the High Court and before us, in summary, was that the subject properties were acquired during the subsistence of the marriage between her and the respondent and by their joint efforts. She therefore, in the premises, claimed she had a legal, beneficial and equitable interest in the properties. She also advanced the further view that the Kiserian and Karengata properties were single handedly acquired by her and that she subsequently sold the two properties and used the proceeds thereof to buy the Dennis Pritt Road property which event happened when she was not cohabiting with the respondent and after the latter had filed for divorce. In those premises, the appellant contended, the Dennis Pritt Road property was not matrimonial property and should therefore not have been treated as such by the trial Judge.

Related to this argument the appellant contended that having sold the Kiserian and Karengata properties in order to acquire the Dennis Pritt Road property, the properties sold should not have, as the learned Judge did, been considered as still available for distribution at the time of his judgment.

[10] In answer to the appellant's claim, the respondent and his counsel ***Mr. Macharia,*** contended as follows with respect to each of the properties: That the Otiende Estate property was identified by the respondent for purchase and he commenced the process of acquiring it before his marriage to the appellant. He further contended that he single handedly took out a mortgage to finance the purchase and duly paid the requisite installments until the property was discharged.

With respect to the Kahawa West property, the respondent contended that he solely purchased and developed the same without any contribution from the appellant. He claimed that he had the property registered in their joint names as he intended it to be a secure investment that would provide a regular income for the maintenance of their children, especially the special child who suffers a development and

mental disability requiring medical care throughout his life.

[11] We have considered the grounds of appeal and the submissions of learned counsel as well as the judgment of the trial Court and the applicable law. This is a first appeal and we are obliged to re-evaluate the evidence and arrive at our own conclusions. *(See* ***Selle vs Associated Motor Boat Co. [1968] EA 123;*** *See also* ***Abdul Hameed Saif -v- Ali Mohamed Sholan [1955]22 EACA 270).***

[12] Ideally, marriage should be based on love and respect for each other. No difficulty or dispute is foreseen when acquiring properties during the subsistence of the relationship. There are, however, a few calculating and pessimistic characters who view marriage as an economic venture from which they expect returns. We have no reason to think that the couple herein were not of such character. The way they dealt with each other especially in the management and acquisition of business and properties is a clear testimony of a marriage made to last till separated by death. As fate would have it, the unpredictable, unfortunate and undesirable event of disagreement leading to divorce took place. The consequence of which is unpalatable and acrimonious dispute over the issues and more importantly the properties acquired before, during and shortly after the divorce. As a Court we were not a party or aware of the events as they happened. As is always, we as judges are called upon to adjudicate or determine matters, of which we had no knowledge or interest in. As part of our daily menu, we have no choice but to intrude legally into personal and often times distressing events involving what was yesterday a perfect marriage. As a matter of fact we rely solely on the evidence adduced by the parties. We are only expected, indeed mandated to do our best despite our frailties as human beings. The premium placed upon our shoulders is to consider the factual issues and marry the same with the applicable law. That is what we intend to do in this journey of determining the parties' rights.

[13] In a marriage set up, it is not realistic to expect partners to keep track of their respective contributions towards the purchase of family property because at the time of such purchase, divorce is not on their minds. It is therefore pretentious to expect any of them to be able to show their exact contributions towards the acquisition of the subject property. Notwithstanding the difficulty in determining the exact contributions of each spouse towards the purchase of family property, the court still has the duty to apportion family property to the best of its ability taking into account not only the personal earnings of each spouse and how it was applied in the family, but also each party's indirect contribution not only to the purchase of the subject property but also to the welfare of the family as a whole.

[14] Personal earnings are obviously identifiable as pay slips, gratuity, pension payments, business profits etc would easily be availed. Indirect contributions are however not so obvious. The courts over time have however, trodden a clear path in identifying what is to be considered as indirect contribution of a spouse towards acquisition of family property. It is a question of fact and law and often times a mixture of the two.

[15] In the matter before us, the learned trial Judge accepted the fact that the appellant was not merely a housewife but was engaged in gainful employment initially as an employee in secretarial colleges and subsequently as a co-proprietor in family business christened ***"[Particulars Withheld], College"*** offering secretarial and computer training at a fee. The appellant's contribution towards purchase of family property was, therefore, considered direct. She however based her claim on both her

direct and indirect contribution and urged the view that she was entitled to equal share of all the properties acquired during the period of cohabitation and that the properties she acquired after that period was her's absolutely. In the first category, she placed the Otiende Estate property, the Kahawa West Estate property and the Hinga Estate properties. In the latter category, she placed the Dennis Pritt Road property, the Karengeta property and the Kiserian property.

[16] With respect to the Otiende Estate property, the trial Judge, after considering the evidence adduced before him by both parties, accepted the version adduced by the respondent that the appellant did not make any direct contribution towards the purchase of the property. The learned Judge did not expressly state that he had considered indirect contribution, if any, made by the appellant. In ***M -v- M, [2008] 1 KLR 247 (G&F)*** it was held, in part, that a woman's contribution to acquisition of matrimonial property must be recognized.

[17] A wife's indirect contribution towards acquisition of matrimonial property has been recognized for some time now. The English position with regard to the issue has been stated in several decisions including that of ***Hazell -v-Hazell,[1972] 1 All 923***. There, it was held that in order to entitle the wife to a share in the proceeds of the matrimonial home, it was sufficient if the contributions made by the wife to family expenses and well being, progression or otherwise were such as to relieve the husband from expenditure which he would otherwise have had to bear and thereby helping him indirectly. It need not be a monetary contribution but bearing on monetary expendure.

[18] The position in ***Hazell -v- Hezell, (supra)*** was taken in ***Karanja -v-Karanja, [1976-80] 1KLR,*** where it was observed that the contribution of the wife need not be direct payments towards purchase of matrimonial property, but may be indirect such as meeting household and other expenses which the husband would otherwise have had to pay. Nine years later, in 1985 in ***Njoroge -v- Ngari, [1985] KLR 480,*** the Court held that in matrimonial property disputes, if the property is held in the name of one person, even if that property is registered in the name of one person but another contributed towards acquisition of the property, then both persons have proprietary interests in that property.

[19] In ***Echaria -v- Echaria, [2007] 2 EA 139,*** a five judge bench of this Court stated that a wife's non-monetary contribution cannot be taken into account when determining the total amount of contribution from the wife towards acquisition of the property. The Court somewhat non-gallantly observed that marriage *per se* does not entitle a spouse to a beneficial interest in the property registered in the name of the other nor is the performance of domestic duties. The Court however, relying upon the English case of ***Burns -v- Burns, [1984] 1 All ER 244,*** accepted that non-direct financial contributions by a spouse may be taken into account. The court stated:

If there is a substantial contribution by the woman to the family expenses, and the house was purchased on a mortgage, her contribution is, indirectly referable to the acquisition of the house since in one way or another, it enables the family to pay the mortgage installments. Thus a payment could be said to be referable to the acquisition of the house if, for example the payer

either:

a. ***Pays part of the purchase price or***

b. ***Contributes regularly to the mortgage installments or***

c. ***Pays off part of the mortgage, or***

d. ***Makes a substantial financial contribution to the family expenses so as to enable the mortgage installments to be paid.***

[20] That decision remained law until parliament enacted the ***Matrimonial Property Act, 2013*** which provides, in ***section 7,*** as follows:-

"7. Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved."

[21] The contribution envisaged under ***Section 7*** is not limited to direct monetary contribution or contribution which is referable to acquisition of the subject property as it was posited in ***Echaria -v- Echaria, (supra)***. We say so, because of the definition ascribed to the term "contribution" in the Matrimonial Property Act, 2013. The Act defines contribution to mean monetary and non-monetary contribution and includes –

"(a) domestic work and management of the matrimonial home;

b. ***child care;***

c. ***companionship;***

d. ***management of family business or property; and***

e. ***farm work."***

[22] ***The Matrimonial Property Act, 2013***, was however not in existence when the decision challenged before us was rendered. The said ***Act*** had also no retrospective effect as it did not expressly say so. (See Supreme Court decision in ***Samuel Kamau Macharia & Another -v- Kenya Commercial Bank Limited & 2 Others, [2012]eKLR)***. See also ***D.E.N -v- P.N.N. [CA No. 226 of 2012]UR.***

[23] ***The Matrimonial Property Act*** was enacted by Parliament pursuant to ***Article 68 (iii)*** of the ***Constitution, 2010***. Its design and purport is to recognize and protect matrimonial property. In ***Article 45(3)*** the Constitution provides as follows:-

"45

3. ***Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage."***

This provision was in existence when the trial Judge herein rendered his decision but the learned Judge made no reference to the same. It could be because the legislation (the Matrimonial Property Act) intended to be passed by Parliament to recognize and protect matrimonial property under Article 68 (c) (iii) had not been enacted by then. It could be that the trial Judge felt bound to apply the then existing law which had been expounded in ***Echaria -v- Echaria, (supra)*** especially as all the pleadings were filed before the promulgation of the Constitution, 2010.

[24] The dilemma of the learned Judge is however neither here nor there. It does not matter either way. Our view of the matter is that the decision to award the Otiende Estate property to the respondent cannot be determined in isolation. The award must be considered together with the rest of the awards made by the learned trial Judge. The guiding principle being what we said in ***M -v- M, (supra)*** that in assessing the contribution of spouses in acquisition of matrimonial property, each case must be dealt with on the basis of its peculiar facts and circumstances bearing in mind the principles of fairness.

[25] In the matter before us, the record shows that the respondent commenced the process of acquiring the Otiende Estate property even before he married the appellant. He negotiated the price with the previous owner of the property, ***Mrs. Dorcas Mulamula***. He specified the initial payments made towards the purchase price and final payments. He disclosed the source of those payments which ousted the appellant's claim to direct monetary contribution to the acquisition of the property. The record does not show that the appellant demonstrated to the satisfaction of the court that her contribution towards other family expenses, in some way had enabled the respondent meet his obligation to the seller of the said property and to the mortgage company. We hold the considered view that the said property was acquired before the marriage and does not qualify to be family or matrimonial property under the relevant law.

[26] With respect to the Kahawa West Estate property, the trial Judge held that the same was jointly owned by both the appellant and the respondent. While appreciating that each party had an equal and undivided share in that property, he concluded that the same be registered in the name of the respondent absolutely. The appellant is unhappy with this finding. She would prefer that the property be retained as joint property or in the alternative it be sold and proceeds thereof be shared equally between her and the respondent.

[27] The reason why the trial Judge disturbed the joint registration of the Kahawa West Estate property was that during the subsistence of the marriage, it emerged that the appellant had acquired

properties which she did not disclose to the respondent. The trial Judge further found that the appellant had sought no orders with respect to the family business of ***[Particulars Withheld], College*** which business had featured prominently during the proceedings. The evidence showed that the profits earned from the said family business were handled solely by the appellant who utilized the same without accounting to the respondent. The evidence further revealed that the appellant had at the same time had unlimited access to the respondent's bank account at Barclays Bank. The business profits so earned and the withdrawals made from the respondent's bank account were utilized to purchase the Dennis Pritt Road property and the Karengata and Kiserian properties which the trial Judge found to have been registered in the appellant's name.

In the appellant's own words:-

"When I filed the proceedings I did not mention the

Dennis Pritt property, but it was mistake of lawyer. I did not mention the property in Kiserian and

Karengata……..

Plot at Kiserian registered in my name because the defendant was out of the country. I readily concede that it was family property. The Karengata property was in my name. He was out of the country and gave me permission to register. I concede it was family property. I sold both and bought the Dennis Pritt

property…….

I declared the Dennis Pritt property as family property."

[28] Where matrimonial property is registered, in the joint names of the parties, there is normally a presumption that each party made equal contribution towards its acquisition (See ***Kivuitu -v- Kivuitu, [1991]KLR 248. [1988-1992]2 KAR 241***). The presumption is however, rebuttable by either party. On the face of the facts of the present case it can be safely stated that the respondent rebutted the presumption by demonstrating that despite the joint registration of the Kahawa West property the appellant was not entitled to her share of the same because she had utilized family income and assets to acquire other properties which were registered in her name absolutely. The learned Judge no doubt came to the conclusion that retention by the appellant of her share in the joint property and the properties she had acquired using family income and assets would amount to double enrichment. We have not been persuaded that we should hold otherwise with respect to the Kahawa West property. We entirely agree with the learned trial judge.

[29] We turn now to the Hinga Estate properties: plot Nos ***[Particulars Withheld]***. They are registered in the joint names of the appellant and the respondent. The trial Judge found that the contributions made by the parties were equal. He therefore, ordered that the same be sold and the proceeds thereof be shared equally between the parties. The appellant does not dispute the finding that

the parties have equal shares in the properties. She is however unhappy with the order that the same be sold and the proceeds be shared equally between them. She would prefer that she be awarded one of the properties.

[30] In her Originating Summons, the appellant sought a declaration that plot Nos. ***[Particulars Withheld]*** at Hinga Estate, Nairobi were purchased by her solely and prayed for an order that the same be registered in her name. At the trial, the appellant acknowledged that she acquired the said plots using funds from the ***[Particulars Withheld] College*** account and that she did not solely buy them. The respondent too, claimed the same plots for himself. Given the conflicting claims by the parties, we are not at all surprised at the final order of the trial Judge that the same be sold and the proceeds of the sale be shared equally between the parties. No valuation reports for the plots were filed. We, therefore, find no basis to substitute the order of the learned Judge with one awarding one of the plots to the appellant as she now pleads. There is no evidence that the plots are equal in value. We see no basis to depart from the conclusion of the trial judge. We think he was right and exercised his judicial discretion appropriately.

We reiterate what was stated in ***M -v- M, (supra)*** that *"In applications under* ***section 17,*** *the court has a wide and unfettered discretion to make such order or orders as justice may demand including sale and distribution of property subject of the application"*

[31] The record shows that in addition to the properties claimed by the appellant, matrimonial funds were utilized by the appellant to purchase shares at the stock market. She admitted that she invested at the stock exchange to the tune of Kshs.2 million from income made from ***[Particulars Withheld] College*** business which she acknowledged was family business. It was also not in contest that the appellant had unlimited access to the respondent's bank account at Barclays Bank before their relationship got sour.

[32] The record further shows that the respondent was at the time of trial living with three of the issues of the marriage in Canada: It is immaterial that the issues are adults as there was no evidence that they were independent. Indeed there was evidence that one of the issues would require support for the rest of his life. The learned Judge was alive to all these.

[33] In all those premises we have come to the conclusion that the learned Judge properly applied principles of fairness in making the orders which the appellant has challenged in this appeal. That being our view of the matter, this appeal crumbles and is dismissed. Having dismissed the appeal the issue of accounts does not arise.

[34] With regard to costs, we think each party should bear her/his own costs of the appeal given that they are former wife and husband respectively. These then are our orders.

DATED AND DELIVERED THIS 22ND DAY OF APRIL, 2016.

W. KARANJA

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR