

[2017] KECA 195 (KLR)

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suit property was matrimonial property and that the appellant was entitled to a share of 10% of Page 2 of 14 **Civil Appeal No.9 of 2016** its current value. Further, that the suit property be valued and either sold and the sale proceeds thereof be shared out in the ratio of 10% and 90%, the appellant taking 10% and if the respondent wished to keep the property, to pay to the appellant 10% of the value of the suit property. Believing she was entitled to more in the suit property, the appellant was aggrieved by this decision and consequently gave notice of appeal on 13th August 2015 in accordance with rule 75 of the Rules of this Court. On 19th January 2016, the appellant lodged in this court the record of appeal in which she proffered ten (10) grounds of appeal. In the said grounds, the appellant contended that as the suit property was found by the learned judge to be matrimonial property, the learned judge erred in holding that the appellant did not deserve an equal share with the respondent; that the 10% in the suit property awarded to her was based on the erroneous assumption that the role of the appellant was inherently inferior to that of the respondent as a husband; that the 10% awarded in the matrimonial property offended the principle of equality under the **Constitution of Kenya 2010**, the **Universal Declaration of Human Rights**, **The Convention on the Elimination of all forms of Discrimination against women** and **The African (Banjul) Charter on Human and Peoples Rights**; that the 10% award in the matrimonial property did not reflect fairness and accurate contribution; that as the appellant took part in the day to day management of the respondent's business whose resources financed the acquisition of the matrimonial property, that the appellant was entitled to a bigger share than 10%; that the appellant as the respondent's wife Page 3 of 14 **Civil Appeal No.9 of 2016** was an equal business partner and was entitled to equal share of the matrimonial property; that the learned judge erred in finding that the appellant did not make any direct financial contribution; that the learned judge erred in not finding that the appellant was entitled to proceeds of rental income received from the suit property; that the learned judge erred and misdirected herself on the application of the principles of law on the subject. When the appeal came up for hearing before us on 4th May 2017, learned counsel **Mr. Kenyatta Odiwour** appeared for the appellant while learned counsel **Mr. Ngani** appeared for the respondent. Both parties had filed and exchanged written submissions pursuant to directions given during the Case Management held on 22nd February 2017. Mr. K. Odiwour adopted the appellant's written submissions and argued the grounds of appeal together. He highlighted the fact that the award of 10% to the appellant in the suit property was too low as a non-monetary contribution to a wife who had carried out her responsibility as a wife. Mr. Odiwour contended that "there is no law that monetary contribution entitles one to more than non-monetary contribution." He pegged his reasoning in this regard to the equality of spouses enshrined in Article 43 (3) of the Constitution and contended that parties to a marriage are equal. In spite of our probing, Mr. Odiwour did not enlighten the court on the criterion or methodology to be used in evaluating or determining the value in percentage terms of the indirect non-monetary contribution to the acquisition of a matrimonial property. Mr. Ngani, on his part, opposed the appeal. He disagreed with Mr. Page 4 of 14 **Civil Appeal No.9 of 2016** Odiwour's interpretation of Article 45(3) of the Constitution of Kenya 2010 on equality of spouses and opined that the Article was in relation to personal rights of spouses and not matrimonial property. In his view, the interest of each spouse to matrimonial property depended on the monetary contribution of each in the acquisition. He supported the impugned judgment

and submitted that the learned judge was right in her findings and decision. He emphasized that one does not acquire property rights because one is married. In his view, the impugned judgment was correct and should be upheld. We have perused the record of appeal and the parties' written submissions and have duly considered the same and the oral highlighting by counsel in court. This is a first appeal and consequently we are enjoined to re-evaluate the evidence and give the appellant a re-hearing in line with the principles set out in the case of **Selle v. Associated Motor Boat Co.** [1968] EA 123; see also **Abdul Hameed Saif v. Ali Mohamed Sholam** [1955] 22 EACA 270. The issue in this appeal is whether the learned judge of the Environment and Land Court was correct in her decision in awarding the appellant 10% interest in the suit property. Admittedly, the appellant did not make any monetary contribution to the acquisition of the suit property. But there is no controversy that the appellant, qua wife of the respondent, provided services in caring for the children of the marriage and in giving comfort to the respondent. The learned judge found that the appellant was entitled to 10% of the suit property on account of that indirect non-monetary contribution. This is how Page 5 of 14 Civil Appeal No.9 of 2016 the learned judge expressed herself – **"...the picture painted by the evidence of both parties is that the plaintiff was a great home-maker. She catered for their children ensuring they were ready for school. She made food and tea and took it to her husband and their staff at their business. The Plaintiff also provided the Defendant a home where he could return to after his daily business endeavours. She also enabled him go to work without having to worry about his home and children and thus be productive at work. This support us what is classified as non-monetary contribution, which I am satisfied that the Plaintiff did execute to the best of her abilities. In that regard, I am inclined to find that the Plaintiff is deserving of a percentage of the suit property.*"** **"the plaintiff's (appellant's) claim is that she is entitled to 50% of the value of the suit property. However, having made a finding that there was no direct or indirect financial contribution, the plaintiff/appellant does not deserve an equal share thereto. Nevertheless, with the non-monetary financial (sic) contribution, I am of the considered view, and I so hold that the plaintiff/appellant is entitled to 10% of the suit property."*** First, we need to disabuse the notion that the equality between spouses enshrined in the Constitution of Kenya 2010 in Article 45(3) is in relation to matrimonial property. The Article provides – **"45(1) The family is the natural and fundamental of* society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.* 45(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during marriage, and at the dissolution of the marriage.*** Page 6 of 14 Civil Appeal No.9 of 2016 The equality and rights referred in Article 45(3) of the Constitution relate to personal rights as opposed to rights of ownership of matrimonial properties. It outlaws discrimination against either spouse in relation to matters that touch on personal rights, whether they be customary or otherwise. This court has had occasion to allude to the interpretation of Article 45(3) of the Constitution in the following cases in which the view we now express was echoed, see the following cases that buttress this view. The other issue in this appeal relates to the question whether the 10% interest in the suit property awarded by the learned judge to the appellant by dint of the appellant's non-monetary contribution was correct. The learned judge did not expound on how she arrived at it. Section 2 of The Matrimonial Property Act, 2013 which came into force on 16th January 2014 defines **"contribution"** to mean

monetary and non-monetary contribution and to include –

1. Domestic work and management of the matrimonial home;
2. Child care;
3. Companionship;
4. Management of family business or property and
5. Farm work; Family business is defined as any business which is run for the benefit of the family by both spouses or either spouse and generates income or other resources wholly or part of which are for the benefit of the family. The learned judge found that the suit property was matrimonial Page 7 of 14 Civil Appeal No.9 of 2016 property. Section 6 of the Matrimonial Property Act 2013 defines matrimonial property as –

1. The matrimonial home or
2. Household goods and effects in the matrimonial home or homes or
3. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage. The provisions of Section 7 of the Matrimonial Property Act 2013 as read with Sections 2 and 6(1) thereof have ushered in equity and fairness to the jurisprudence on the law in sharing of matrimonial property. But the issue of quantification of indirect non-monetary contribution reposes on the courts to develop principles that are fair to both spouses in sharing the matrimonial property in line with Section 7 of the said Act which states – **“*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.”*** The provisions of Section 7 of the Matrimonial Property Act 2013 as read with Sections 2 and 6(1) thereof have ushered in equity and fairness to the jurisprudence on the law in sharing of matrimonial property. But the issue of quantification of indirect non-monetary contribution reposes on the courts to develop principles that are fair to both spouses in sharing the matrimonial property in line with Section 7 of the said Act which states – **“*subject to Section 6(3) ownership of matrimonial property* *vests in the spouses according to the contribution of either* Page 8 of 14 Civil Appeal No.9 of 2016 *spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”*** This court posited in *M v. M* [2008] 1KLR 247 (G & F) that in assessing contribution of spouses in matrimonial property, each case must be determined on the basis of its peculiar facts and circumstances regard being had to the principle of fairness. The court also held that a woman’s contribution to acquisition of matrimonial property must be recognized. Although the **Matrimonial Property Act 2013** does define contribution as including non-monetary contribution, and although non-monetary contribution includes “domestic work and management of matrimonial home; child care; companionship; management of family business or property and farm work, there is no stated formula on how to value or determine the percentage of non-monetary contribution.

This aspect was left to the good and fair sense of the court's discretion. Way back in 1980 in the case of **Karanja v. Karanja** [1976 – 80] 1 KLR, this Court made an observation that a wife's contribution need not be by way of direct payments towards purchase of matrimonial property; that it can be indirect such as meeting household and other expenses which the husband would otherwise have had to pay. This court changed time in **Echaria v. Echaria** [2007] 2 EA 139 in which a five judge Bench opined 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 matrimonial property. In light of Section 2 of the Matrimonial Property Act, that proposition Page 9 of 14 **Civil Appeal No.9 of 2016** is no longer good law as domestic work, child care and companionship are defined to be contribution, albeit of a non-monetary nature. In seeking to find the criterion for measuring the value of non-monetary contribution such as domestic work, child care, companionship, farm work, management of family business or property, the court must ascertain whether such indirect contribution had the effect of relieving the husband from expenditure which he would otherwise have had to meet and thereby helping him indirectly financially. In effect, the question to be asked is whether the effect of non-monetary contribution bore on monetary expenditure. In the English case of **Hazell v. Hazell** [1972] 1 All ER 923, the wife had to establish sufficient cause so as to be entitled to a share of the proceeds of sale of the matrimonial home by showing that she had made contributions to family expenses and well-being. The English Court of Appeal again in the case of **Burns v. Burns** [1984] 1 All ER 244 recognized that where substantial contribution by a woman to family expenses that enables payment of the mortgage installments of the mortgage over matrimonial home are indirectly referable to the acquisition of the matrimonial home, they are acceptable as non-direct financial contribution by the wife or spouse and may be taken into account. This however does not resolve the question of the value to be attached to indirect non-monetary contribution. However, where family expenses can be quantified it would be possible to place a monetary figure to the contribution of the wife in acquisition of a matrimonial property and thus facilitate division of the matrimonial property as required by **Section 7 of the Page 10 of 14 Civil Appeal No.9 of 2016 Matrimonial Property Act 2013**. However, in a case such as the instant one, non-monetary contribution in the nature of work or service aforementioned would have to be quantified and whatever methodology is used to gauge its equivalent in monetary terms must bear and impact on expenses and the extent of the relief to the husband who is in turn is better able to meet the expenditure of mortgage repayments or of putting money together to acquire the matrimonial property. In his presentation during the hearing of this appeal, and in the written submissions Mr. Odiwour urged that **International Treaties** on the equality of spouses during division of matrimonial properties supported the position that the property acquired during coverture ought to be shared equally. It was his contention that since the Court has discretion to determine the contribution of each spouse, such discretion should be exercised judicially and used to uphold equality of spouses during marriage as well during acquisition and distribution of the matrimonial property. It was his submission that a trial court is enjoined to give reasons for its decision and that failure to do so as in this case smacks of improper exercise of discretion. The methodology to be applied

so as to reach a fair distribution of the matrimonial property where the wife's non-monetary contribution is indirect and non-monetary is an intractable problem. But a result that is fair between the spouses must be achieved. It is implicit that women are more likely to suffer a disproportionate financial loss when the marriage breaks down, in large part because of their traditional role as home-makers and carers of the Page 11 of 14 **Civil Appeal No.9 of 2016** children. This is a feature that cannot be overlooked in assessing the value of their indirect non-monetary contribution. Our attention has been drawn to the case of *R v. R* [1992] 1 AC 399, 617, where Lord Keith of Kinkel observed that spouses are equal partners in marriage and ... that the yardstick of equality ought to be applied as an aid in division, not as a rule. We realize that normally parties enter into marriage with the optimism that it will endure, and thus there is expectation by the wife that she will enjoy the standard of living her spouse has introduced her to. But this is perilously close to suggesting that parties must be placed in the same financial position as they would have been had the marriage not broken down. That argument does not bode well nor does it attract merit. Moreover, marriage between the spouses may develop problems leading to its dissolution after a short time or after a long period of time. In the latter case, the wife will have (invested a lot more in the marriage) and given a great deal more in terms of indirect non-monetary contribution than would be the case where the marriage lasted for a short time. This will of necessity attract, deservedly, a much higher percentage of indirect non-monetary contribution than would otherwise be the case where the marriage was for a short time. In addition, the court cannot ignore to look into the relationship of the spouses to see if the quality of non-monetary contribution of the wife in relation to domestic work, child care, management of the matrimonial home, companionship and well-being of the family had to effect of motivating the husband or of pulling him down or whether it added little or nothing to the well-being of the family. The Page 12 of 14 **Civil Appeal No.9 of 2016** quality of the wife's non-monetary contribution also is not irrelevant because where it impairs the husband's ability to work hard, the wife ought to take a less percentage than where she evinces a desire to build a happy and prosperous family. What we are in effect saying is that there is no hard and fast rule on how a judge should quantify the indirect non-monetary contribution of a wife. Each case will depend on its own peculiar circumstances and the judge has to weigh one thing with another and then come up with what ultimately will result in fairness in the distribution of the matrimonial property. In the instant case, the learned judge used her discretion and awarded the appellant 10%. She did not go to great lengths to analyse the indirect non-monetary contribution but she was convinced that the appellant who appeared before her and testified did not deserve more than this. After carefully examining the record and the evidence, we are unable to say that the learned judge was wrong in her decision in awarding the appellant 10% of the value of the matrimonial property, nor in our view, can it be said that the award was so inordinately low as to be a wholly erroneous estimate of what the appellant was entitled to. In the result, we uphold the decision of the Environment and Land Court in suit No. ELC No.675 of 2011 and accordingly dismiss the appeal. Page 13 of 14 **Civil Appeal No.9 of 2016** We decline to condemn any party to costs and instead order that each party shall bear his or her own costs. **Dated and delivered at Nairobi this *19th* *day of**

October, 2017*. G. B. M. KARIUKI SC JUDGE OF APPEAL

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..... JUDGE OF APPEAL *I certify that this is a* *true copy of the
original* *DEPUTY REGISTRAR* Page 14 of 14 Civil Appeal No.9 of 2016

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