REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION NO. 11 OF 2020

(Coram: Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola SCJJ)

—BETWEEN—

JOSEPH OMBOGI OGENTOTO.....APPELLANT

—AND—

MARTHA BOSIBORI OGENTOTO.....RESPONDENT

—AND—

THE FEDERATION OF WOMEN LAWYERS (FIDA KENYA) .....1ST AMICUS CURIAE

LAW SOCIETY OF KENYA.....2ND AMICUS CURIAE

---

*(Being an appeal from the Judgment of the Court of Appeal **Visram, Karanja & Koome, JJ)** at Nairobi in Civil Appeal No. 81 of 2017 dated **23rd February, 2018**)*

Representation

Learned Counsel Mr. Odhiambo for the Appellant
(Instructed by Nchogu Omwanza & Nyasimi Advocates)
Learned Counsel Mr. Guandaru Thuita for the Respondent
(Instructed by Guandaru Thuita & Co. Advocates)
Learned Counsel Ms. P W Mundia for the 1st *Amicus Curiae*
(Instructed by Patricia Wanjiru Mundia & Co. Advocates)
Learned Counsel Ms. Rose Mbanya for the 2nd *Amicus Curiae*
(Instructed by R.W. Mbanya & Co. Advocates)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This Petition of Appeal dated and lodged on 3rd July, 2020 is before us upon certification by the Court of Appeal *(Ouko (P) (as he then was), Warsame & Sichale JJ. A)* in ***Civil Application Sup No.6 of 2018*** in its ruling delivered on 19th June, 2020 as one involving a matter of general public importance under Article 163(4)(b). The appellant is challenging the entire Judgment and Orders of the Court of Appeal *(Visram, Karanja & Koome, JJ. A)* in ***Civil Appeal No. 81 of 2017*** delivered on 23rd February, 2018.

[2] The petition, in summary, concerns the mode of distribution of property acquired during a marriage and the applicable law where a suit was filed before the promulgation of the Constitution, 2010 and under the Married Women Property Act of 1882 (*now repealed*).

B. BACKGROUND

[3] The appellant and respondent entered into a marriage under Abagusii customary law in 1990 and subsequently, began cohabiting as man and

wife. On 30th August, 1995, their union was formalized under the Marriage Act Cap 150 (*now repealed*) at the Office of the Registrar of Marriages in Nairobi and a marriage certificate issued. They were then blessed with two children during the subsistence of their marriage.

[4] The appellant and the respondent later moved into their matrimonial home on Land Reference No. Nairobi/Block 97/564 *(matrimonial property)* located at Tassia Estate within Embakasi in Nairobi. The respondent has also claimed that the appellant and herself proceeded to construct rental units on the property. The respondent added that during construction of the rental units, she successfully applied for a loan of Kshs.200,000/- which she gave to the appellant to enable him complete construction of the said units. The appellant denies this contention.

[5] The respondent furthermore claims that, during the subsistence of their marriage, the appellant proceeded to acquire more assets in the form of properties situated in Ngong, House No. 61 at Hillcrest Estate House in Athi River, Eagle Apartment House No. 270*)* as well as a motor vehicle registration No. KAL 217Q.

[6] In 2008, the marriage irrevocably broke down and the appellant applied for its dissolution. A decree absolute was subsequently issued on 15th October, 2015. It was the irrevocable breakdown of the marriage that led to the respondent commencing division of matrimonial property proceedings.

i. At the High Court

[7] The respondent filed an Originating Summons before the High Court- ***Civil Case No. 18 of 2010 (O.S)-*** under Section 17 of the Married Women Property Act of 1882. The respondent sought among other orders:

i. *A declaration that the listed immovable properties, set out as, Nairobi/Block 97/564 in Tassia Estate Embakasi which served as the matrimonial home; two properties in Ngong; Hillcrest Estate House Athi River; Eagle Apartment House No 270; Motor Vehicle registration no KAL 217 Q; and registered in the appellant's name, are joint ventures of both parties;*

ii. *That the honourable court be pleased to grant possession and title of land parcel Nairobi 97/564; and*

iii. *The rental income from units therein be shared equally with the appellant, and logbook of a motor vehicle registration No KAL 217Q, to the plaintiff;*

iv. *That the honourable Court order disclosure of a comprehensive list of all properties, shares and bank accounts held and all the proceeds thereto acquired during coverture and that the same be shared equally.*

[8] The respondent, in seeking the said orders, claimed that the properties were acquired through the joint effort of both the appellant and respondent but were solely registered in the appellant's name, despite the respondent having contributed to the acquisition of the properties.

[9] In its judgment delivered on 2nd February, 2017, the trial court *(Ougo, J)* identified three issues for determination; what constituted matrimonial property; whether the respondent contributed to the acquisition of the alleged matrimonial property and if so, to what extent and; the respondent's share in the matrimonial property.

[10] The trial court in that context found that the only property that amounted to matrimonial property was Land Reference No. Nairobi/Block 97/564 where the appellant and respondent had constructed their matrimonial

home as well as rental units. The court, guided by the principles set out in ***Echaria v Echaria*** [2007] eKLR also held that the respondent had failed to prove her case on the claim that she directly contributed to the acquisition of that property which was registered in the appellant's name. The court however recognized that the respondent did make indirect non-monetary contribution towards the family's welfare in the form of upkeep and welfare. The court for that reason proceeded to award the respondent 30% of the share in Nairobi/Block 97/564 and a 20% share of the rental units constructed within the said property.

ii. At the Court of Appeal

[11] Aggrieved by the decision of the learned judge of the High Court, the respondent filed ***Civil Appeal No. 81 of 2017***. The appeal was premised on nine grounds of appeal with the respondent claiming *inter alia* that the learned Judge erred in law in (a) finding that the respondent had not shown any monetary contribution in the acquisition of the matrimonial property; (b)in applying the decisions in ***Echaria v Echaria*** and ***Francis Njoroge Vs Virginia Wanjiku Njoroge Nairobi Civil Appeal No. 179 of 2009*** which are no longer good law having been effectively set aside by the provisions of Article 45(3) of the Constitution; and (c) awarding a lesser proportion of the rental properties which were part of the matrimonial property.

[12] The appellant, also aggrieved by the High Court judgment, filed a cross appeal claiming that the learned Judge erred in (i) awarding the respondent 30% share of the matrimonial property despite finding that the respondent had not made any monetary contribution; (ii) awarding the appellant 20% share of the rental units on the matrimonial property while no evidence of monetary or non-monetary contribution had been provided

and; (iii) making the award of 30% share which was inordinately high as the respondent had made no direct contribution to its acquisition and development.

[13] On considering the appeal and the cross appeal, the Court of Appeal identified two issues for determination; whether the learned Judge erred by awarding the appellant 30% share of the matrimonial home and 20% of the rental income and; whether the cross-appeal should be allowed by substituting the said awards with lesser percentages or by dismissing the suit filed at the High Court altogether.

[14] The Court of Appeal in its judgment was cognizant of the developments in family law being the enactment of Article 45 (1) and (3) of the Constitution as well as the provisions of the Matrimonial Property Act 2013 despite the suit before the High Court having been filed before the two laws came into effect.

[15] The learned Judges in that regard found that the respondent, having been married to the appellant for 18 years, 15 years of which were spent in gainful employment, constantly took loans and helped acquire the matrimonial home jointly with the appellant. The court also found that, the respondent thus acquired beneficial interest in the matrimonial property and further that, the trial court erred in awarding the respondent a 30% share of the house and 20% share in the rental units. The court on its part and for the above reasons proceeded to set aside the trial court's findings and ordered that the matrimonial property and the rental units built thereon- Nairobi/Block 97/564- be shared equally between the appellant and respondent at the ratio of 50:50.

iii. At the Supreme Court

[16] Dissatisfied by the Court of Appeal Judgment, the appellant has now moved this Court, citing 13 grounds in support of his appeal claiming that the learned Judges of appeal erred in law and fact in:

i. *Misapprehending the law on applicability of relevant statutes in making reference to and relying on the provisions of the Matrimonial Properties Act of 2013 which came into force after the suit was lodged at the High Court;*

ii. *Interpreting equality of spouses during and after marriage as provided for under Article 45(3) to mean 50-50 sharing of properties upon dissolution of marriage regardless of the contribution of each party.*

iii. *Basing the 50:50 apportionment of the property on Article 45(3) of the Constitution which provides for general rights but does not define the formula for distribution of matrimonial property.*

iv. *Assuming that an employed spouse automatically makes contribution towards the acquisition and development of property*

v. *Disregarding the provisions of the Married Women Property Act 1882 under which the suit was lodged.*

vi. *Not enforcing the rights of the parties that had accrued under the provisions of the Married Women Property Act of 1882 which was the statute in force when the suit was lodged.*

vii. *Finding that the respondent made a contribution to and is entitled to an equal share of Nairobi/97/564 and rental units that are constructed thereon.*

viii. *Awarding the respondent a 50% share of Nairobi Block 97/564 and the rental units that are constructed thereon when there was no evidence of her contribution, directly or indirectly.*

ix. *Awarding the respondent a 50% share of Nairobi Block 97/564 and the rental units constructed thereon yet the property was acquired and developed by the appellant long before marriage;*

x. *Failing to assess the contribution made by the respondent toward acquisition and/or development of the property and basing its decision instead on the period the respondent lived on it;*

xi. *Awarding the respondent an inordinately high share of the property Nairobi Block 97/564 and the rental units that are constructed thereon yet it was evident that the respondent's contribution was not monetary and was in fact barely discernible;*

xii. *Ignoring the case law that elaborately established the principles of distribution of property between ex-spouses under the Married Women Property Act 1882***.**

xiii. *In dismissing the appellant's cross appeal***.**

[17] Consequently, the appellant seeks the following reliefs from the Court:

a) *An order setting aside the decision/order of the Court of Appeal and substituting the said decision/order with one allowing the appeal.*

b) *An order declaring that the law to be considered in determination of a dispute is the law that was in force at the date the suit was lodged and not when the suit was heard.*

c) *An order awarding the respondent 10% share of Nairobi/ Block 97/564 and 10% share of rental units that are constructed thereon.*

d) An order awarding the costs of this Appeal and the proceedings before the Court of Appeal and the High Court to the appellant; and

e) Any other Order or further relief as this Court may deem fit to grant.

C. PARTIES' RESPECTIVE CASES

i. The Appellant's

[18] The appellant's written submissions are dated 4th August, 2020 and filed on 10th December,2020. Therein, the appellant has identified four issues for determination: (a) *whether the Court of Appeal erred in relying on the Matrimonial Property Act, 2013 and not the Married Women Property Act, 1882 in reaching its decision*; (b) *whether equality of parties during and after marriage as provided for under Article 45(3) of the Constitution of Kenya mean 50:50 sharing of property or to each party according to his or her contribution to the acquisition of the property in contest*; (c) *what were the governing legal principles that the Court of Appeal should have considered?* and; (d) *what are the fair and just percentages of the properties to award each party in light of the circumstances?*.

[19] With regard to the issue of the Court of Appeal relying on the Matrimonial Property Act, 2013, the appellant submits that the Court erred in law by failing to apply the Married Women Property Act1882 which was the applicable law in force at the time the suit was lodged as that is when rights, duties and remedies accrued between the parties. He also argues that the law on prospective and retrospective application of statues was determined by this Court in ***Samuel Kamau Macharia & Another v KCB & 2 Others*, SC.** Application No. 2 of 2011; [2012] eKLR **(*'The Samuel Kamau Macharia Case')*** where the Court found that all statutes are

prospective and retrospective application should not be made unless by express words or necessary implication, it appears that this was the intention of the Legislature.

[20] The appellant further urges that the Matrimonial Property Act 2013, could not be applied retrospectively, as it impaired the obligation of parties to a contract of marriage and divests already vested rights over property bought and developed by a spouse; that the repealed Married Women Property Act of 1882 and the Matrimonial Property Act of 2013 are legislations that affect substantive rights of parties and reliance on one or another may have the consequence of depriving a party of his/her property rights 'without due process of law' and; that Parliament did not expressly or impliedly permit retrospective enforcement of the Matrimonial Property Act. In this context he has cited the decision in ***R.M.M v B.A.M*** [2015] eKLR where the Court of Appeal applied the provisions of the Married Women Property Act, 1882 where pleadings had been filed under the said Act as was done in the present case.

[21] To this end, the appellant urges that retrospective application of statutes on substantive issues such as those that affect the property rights of parties, leads to a breach of a party's equal protection and benefit of law in force contrary to Article 27(1) of the Constitution. He thus submits that application of the Matrimonial Property Act has had the effect of conferring a benefit on the respondent while taking it away from the appellant contrary to what the appellant legitimately expected when the dispute crystalized. And that in so far as the Matrimonial Property Act provides for non-monetary contribution, the Act affects past acts disadvantageously and is therefore unjust.

[22] On the issue of whether equality of parties during and after marriage as provided for under Article 45(3) of the Constitution means 50:50 sharing by parties or to each party according to his or her contribution, the appellant submits that equality of parties to marriage during and after the marriage does not mean the mathematical division of assets into two equal halves. That, instead, it requires first, judicial assessment of what each party has brought to the table before any proper mathematical figures can be determined. In that regard, the appellant has cited the Court of Appeal decisions in ***P N N v Z W N [2017] eKLR*** where the court held that division and distribution of matrimonial property must proceed on the basis of fairness and conscience and ***AW v MVCMAWM [2018] eKLR*** which was cited with authority in ***AKM v NNN [2019]*** eKLR where the court held that each case must be considered on its own merit while bearing in mind the peculiarities, circumstances and the principles of fairness and human worth in each such case.

[23] On the issue of the governing principles, the appellant submits that the appellate Court erred in finding that the respondent had made contribution to the acquisition of the matrimonial property only for the reason that she was in occupation of the same for a considerable period of time. That in finding so, the Court of Appeal disregarded the admission by the respondent that the house was constructed in 1995 and not 1996 when she took a loan to purchase a plot. Similarly, in finding that the respondent paid school fees for their children because she was in employment and applied for school fees loans, the court did not properly asses the evidence before it. He therefore submits that the Court did not properly assess the contribution of each party toward the development of the property in question and consequently, fell into error.

[24] The appellant in addition maintains that the correct principles to be applied in the division of such property were set out in ***Echaria v Echaria*** where it was held that a wife's non-monetary contribution cannot be considered in determining the amount of contribution towards the acquisition of matrimonial property neither would performance of domestic duties be considered.

[25] The appellant furthermore faults the appellate Court for failing to consider that the appellant made financial sacrifice to empower the respondent after she lost her job. And that she thus lacked the means to contribute towards the acquisition of Nairobi/Block 97/564. That in any event, the loans she took in 1993 and 1996 were used to purchase plots whose particulars have not been revealed and remain unknown to him and the said loans were not connected to the matrimonial property at all.

[26] The appellant in that context argues that, to the contrary, the appellate court failed to take all these facts into consideration noting that the concept of fairness demands that the court ought to have looked into all the material facts ranging from the sources of the monies spent, the actual expenses by each party towards the well-being of the family including sacrifices and investments in the poorer spouse by the spouse that was doing well, financially. The appellant adds that it would be fundamentally unfair that a party which gave all his money to the family including for domestic expenses should be awarded the same proportion of the property as a party which contributed nothing and in fact siphoned the money out.

[27] The appellant further finds fault in the appellate Court's finding of subjecting the matrimonial property to a 50:50 share claiming that the party that contributed more over a longer period of time to the development of the property was unfairly subjected to the same share as a

party that contributed nothing significant. In support of this submission, the decision in ***R.M.M v T.S.M*** [2015] eKLR was relied on where the court held that each party's contribution ought to be assessed and the same ought to form the basis for division.

[28] In conclusion, the appellant submits that this court should allow his appeal with a fairer portion of 10% share of both the matrimonial property and rental units aforesaid being awarded to the respondent.

ii. Respondent's submissions

[29] The respondent's written submissions are dated 21st August, 2020 and filed on 31st August, 2020. In the submissions, she identifies the main issues for determination in regard to the certification granted by the Court of Appeal as being*; (a) whether the appeal as framed is in consonance with the leave granted to appeal*; *(b)whether in a second appeal, this Court should re-evaluate factual issues; (c) whether a matrimonial property cause filed prior to the promulgation of the Constitution should be determined under Section 17 of the Married Women Property Act, 1882 of England and in accordance with the principles espoused in* ***Echaria v Echaria*** *or whether the courts should follow the new regime as at the time of determination by applying the provisions of Article 45(3) of the Constitution and the provisions of the Matrimonial Property Act 2013; (d) whether Article 45(3) of the Constitution can be used as a distribution matrix of matrimonial property and in what ratio* and; *(e) whether the determination by the Court of Appeal was fair and just in the circumstances.*

[30] The respondent firstly submits that the appeal as framed is not in consonance with the leave granted to appeal. That the issues as framed

during certification of the intended appeal as a matter of general public importance laid the four corners within which the appeal should be prosecuted and determined and no party should add to nor deviate from them.

[31] In the above context, the respondent argues that the jurisdiction of this Court in determining appeals (and issues therein) from the Court of Appeal is extremely limited by Article 163(4)(b) of the Constitution and it can only deal with issues of interpretation of the Constitution or issues of general public importance. Citing the case of ***Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others;*** Petition No. 19 of 2018 [2018] eKLR, the respondent submits that it was not open for the appellant to sneak in all his misgivings about the Court of Appeal Judgment in the present Appeal and which misgivings are outside the certified category of issues available for determination. She thus urges that, the extent of her contribution in the acquisition and development of the matrimonial property is not among the issues that received certification for purposes of appeal, nor is the extent of her so called "indirect" contribution thereof.

[32] On the issue of the applicable law, the respondent submits that the Court of Appeal did not apply the law retrospectively, but only recognised that the body of family law had developed exponentially since the promulgation of the Constitution,2010 with the appellate Court noting that the Matrimonial Property Act had augmented the provisions of the Constitution. Further to this, she argues that the Court of Appeal did not apply the Matrimonial Property Act retrospectively but only went on to recite the development of the law on division of matrimonial property and its applicability in Kenya at present.

[33] The respondent furthermore argues that by reciting such history, the Court of Appeal noted that, whether under the old regime or after the promulgation of the Constitution in 2010 and the Matrimonial Property Act in 2013, monetary and non-monetary contribution or direct and non-direct contribution had to be taken into account in distributing matrimonial property. That the Court of Appeal also and only took cognisance of the fact that whichever law was applicable, the trial court was erroneous in its judgment, after which the appellate court proceeded in its analysis and reached its own decision without mentioning either Article 45(3) of the Constitution or provisions of the Matrimonial Property Act.

[34] The respondent has also argued that, after the promulgation of the 2010 Constitution, there was a tectonic shift in the law on division of matrimonial property which dictated that from that date forward, and irrespective of whether a claim had commenced before or after that Constitution, all persons and entities, including Courts, had to ensure that the rights recognised under the Constitution such as Article 45 (3) and all the principles espoused therein particularly under Articles 10 & 159 had to be given full and unqualified effect.

[35] In addition, the respondent argues that retrospectivity of the Constitution is permissible in appropriate circumstances and relies on the Court of Appeal decision in ***Agnes Nanjala William -vs- Jacob Petrus Nicholas Vander Goes, Mombasa CA Civil Appeal No. 126 of 2011,*** where the court found the right to equality to be inherent and indefeasible to all human beings despite the cause of action accruing before the 2010 Constitution.

[36] Further to this and in addition, the respondent submits that the Matrimonial Property Act is also exempted from the general rule on its

prospective application noting that it was one of the laws that were required to be passed under Schedule 5 of the Constitution furthermore arguing that the Act was meant to give effect to Article 45 (3) of the Constitution. The respondent thus submits that the Married Women Property Act,1882 ceased operating upon the commencement of the Matrimonial Property Act. In support of this, the respondent contends that Section 19 of the Matrimonial Property Act provides that '*The Married Women Property Act shall cease to extend to or apply in Kenya*' the argument made being that this transitional clause acts to show that the Married Women Property Act ceased to apply upon commencement of the Matrimonial Property Act and no court could thereafter use it in determining disputes including those filed before its repeal.

[37] In light of the above submission, the respondent argues that Article 45(3) can be used as a distribution matrix of matrimonial property and submits that, under Article 45(3), 'equal' means a party obtaining an equivalent of what he/she has contributed monetarily or otherwise. While also affirming the decision by the Court of Appeal, the respondent maintains that the Court of Appeal was fair in its determination and urges this Court not to interfere with the discretion exercised by the said court.

[38] The respondent has also maintained that the High Court erroneously ignored evidence that proved direct monetary contribution on her part, noting that the Court heavily relied on ***Echaria v Echaria*** and ***Francis Njoroge v Virginia Njoroge*** *(supra)*, which action she claims was erroneous.

[39] In conclusion, the respondent submits that having proved contribution, the Court of Appeal was right in its finding and asks the Court to uphold the appellate court's finding.

iii. 1st Amicus Curiae (FIDA)

[40] The submissions by FIDA are dated 19th January, 2022 and filed on 12th May, 2022. They submit that the term 'equal rights' in Article 45(3) should be given context as it relates to the entire Constitution and should not be limited to that provision alone. In that context, it is their submission that constitutional interpretation is guided by these considerations; text and structure of the Constitution, intention of drafters and the ratifying body as well as prior precedents. Thus, an examination of Article 45(3) through the scope of these guides should allow for a clearer interpretation of the Article. In addition, it is their argument that any other interpretation would offend the entirety and spirit of the constitution, particularly, that several provisions including but not limited to Articles 27 (1) (4), 40 (2) (a) and (b) and 60 (1) (a), (b) and (f) of the Constitution would be in conflict with each other and would not serve the integrated and wholesome nature of equality as envisaged by the Constitution.

[41] It is their further submission that, following the promulgation of the Constitution and before the commencement of the Matrimonial Property Act, courts in Kenya were in agreement on their interpretation of Article 45(3) that, equal rights as provided for under the said Article can only mean a 50:50 division in rights, duties and liabilities within marriage as this was the only interpretation that promoted the principle of equality as enshrined in the Constitution. The cases cited in this regard include the Court of Appeal decision in ***Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes***, Mombasa Civil Appeal No. 127 of 2011 and the High Court cases of ***J.A.O v N.A*** [2013] eKLR and ***C.M.N v A.W.M*** [2013] eKLR.

[42] FIDA furthermore submits that, by dint of Article 2(5) and 2(6) of the Constitution, international law is considered part of Kenyan law, adding that Kenya is a signatory to the Universal Declaration of Human Rights (UDHR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), International Covenant on Civil and Political Rights (CCPR) and African Charter on Human People's Rights (ACHPR) which all espouse an established international principle of equal right of parties in a marriage. FIDA thus urges that, all these Treaties and Conventions have similar import to Article 45(3) of the Constitution that promotes equal rights of parties in marriage. That for that reason, this Court ought to interpret Article 45(3) of the Constitution in the same manner.

[43] FIDA has also made reference to comparative jurisprudence where other courts have interpreted the principle of equality citing the Supreme Court of Canada's decision in ***R v Turpin [1989] 1 SCR 129*** where the Court held that the guarantee of equality before the law is designed to advance the value that all people be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others. FIDA also cited the case of ***Hong Kong Secretary for Justice v Yau Yuk Lung Zigo and Another*** FACC No. 12 of 2006 [2007] 3 HKLRD 903 to argue that equality at its basic, universal form means parity of treatment under parity of conditions and therefore, equality among parties in a marriage denotes all parties to a marriage possessing equal rights and sharing equal burdens. Similarly, the Malawian High Court case of ***Tewesa v Tewesa (Matrimonial Cause Number 9 of 2012) [2020] MWHC 28,*** was cited where it was held that the petitioner had a 50% beneficial interest in the defendant's educational qualification -defined as property -under Section 24 of the

Constitution of the Republic of Malawi which provides that women have the right to full and equal protection of the law, and have the right not to be discriminated against on the basis of their gender or marital status. This position, according to FIDA, is echoed in South Africa's Matrimonial Property Act No.88 of 1984 which, in Section 14, highlights the equality in division of matrimonial property which position also obtains in the United States of America, where the State of California applies the community property approach in the distribution of matrimonial property and grants equal shares to spouses under S.2550 of the California Family Code.

[44] For these reasons, they submit that the position that the Court should take in this appeal is one that promotes the principle of equality of parties as envisaged by Article 45(3) of the Constitution.

iv. 2nd Amicus Curiae (LSK)

[45] LSK, the 2nd *amicus curiae*, relies on its brief dated 24th November, 2020 and filed on 10th May, 2022. While addressing the import of Article 45 (3) as regards apportionment and division of matrimonial property, it is their submission that Article 45(3) of the Constitution as read with Sections 4, 13 and 14 of the Matrimonial Property Act should be the basis for the apportionment of matrimonial property upon dissolution of a marriage with a 50:50 split being a starting presumption capable of being rebutted by evidence showing contribution by either party or intention to identify beneficial interests. They argue that this would ensure that courts render decisions based on the particular facts of each matter, allowing for equitable decisions.

[46] The *Amicus* also contends that the relevant laws to be applied when it comes to matrimonial property remain to be Article 45(3) of the

Constitution as well as the provisions of the Matrimonial Property Act. They argue that upon commencement of the Matrimonial Property Act on 16th January, 2014, the repealed Married Women Property Act ceased to apply and therefore reliance by the appellant on the Married Women Property Act and on the legitimate expectation that the law that was in force at the time of filing of the matter should be the same one to be used to determine the matter, is erroneous. LSK further counter this argument by submitting that there can be no legitimate expectation against clear provisions of the law or the Constitution. In support of this submission, they rely on this Court's decision in ***Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others*** [2014] eKLR.

[47] LSK have furthermore submitted that, what constitutes matrimonial property should be distinguished from separate property acquired during the subsistence of a marriage by respective spouses and this often leads to erroneous judgments with respect to apportionment of matrimonial property upon dissolution of marriage. It is their other argument that though Sections 6 and 9 of the Matrimonial Property Act give a definition of what is matrimonial property, the Court ought to interrogate each case based on its particular facts in order to give life to these provisions. In addition, LSK argues that Sections 13 and 14 of the Matrimonial Property Act provide for the treatment of separate and joint properties in relation to matrimonial property, also submitting that the factors courts should consider in determining beneficial interest in relation to separate and joint properties should be; the parties' intention at the time of registration of the property, their conduct during the marriage and their contribution to the acquisition of the property and subsequent to its registration.

[48] In conclusion, LSK urges the Court to render a firm decision on apportionment of matrimonial property to guide determination of future disputes and cure the divergent and uncertain positions taken by different courts on the issue.

D. ISSUES FOR DETERMINATION

[49] This appeal was certified as one involving a matter or matters of general public importance with the Court of Appeal *(Ouko (P), Warsame, Sichale, JJ. A)* stating:

> ***"We have considered the applicant's grounds in support of certification and in our view, the intended appeal primarily questions the applicable law in the division of matrimonial property where causes were filed prior to the current matrimonial property regime being the Constitution and the Matrimonial Property Act, 2013. In essence, should a matrimonial property cause filed prior to the promulgation of the Kenyan Constitution, 2010 be determined under Section 17 of the old 1882 Married Women Property Act of England and in accordance with the principles espoused in Peter Mburu Echaria vs. Priscilla Njeri Echaria [2007] eKLR or should courts follow the new regime as at the time of determination by applying the provisions of Article 45(3) of the Constitution and the Matrimonial Property Act 2013 which underpin the principles of equality?"***

[50] Further, the court went on to identify the other question for determination by this Court in rendering itself thus:

"More importantly and of concern, is whether Article 45 (3) provides for proprietary rights and whether the said article can be a basis for apportionment and division of matrimonial property without parties fulfilling their obligation of proof [of] what they are entitled to by way of contribution. There is a concern that Article 45 talks about equality and cannot and should not be used as a distribution matrix of matrimonial property. Again, whether Article 45 (3) can be or is a ticket for 50-50 distribution has to be sorted out by the Supreme Court. In our view, the matters raised by the applicant are not only weighty and substantial but completely transcend the dispute between the parties herein. These are so fundamental, that the Supreme Court ought to have a bite."

[51] Having considered the above expressions by the appellate court, the issues arising for our determination as matters of general public importance are:

i. ***What is the applicable law in the division of matrimonial property where causes were filed prior to the current matrimonial property regime being the Constitution and the Matrimonial Property Act, 2013?***

ii. ***Should a matrimonial property cause filed prior to the promulgation of the Kenyan Constitution, 2010 be determined under Section 17 of the Married Women Property Act,1882 and in accordance with the principles espoused in Peter Mburu Echaria vs. Priscilla Njeri Echaria [2007] eKLR or should courts follow the new***

regime as at the time of determination by applying the provisions of Article 45(3) of the Constitution and the Matrimonial Property Act 2013 which underpin the principles of equality?

iii. ***Whether Article 45 (3) provides for proprietary rights and whether the said article can be a basis for apportionment and division of matrimonial property on a 50/50 basis without parties fulfilling their obligation of proving what they are entitled to by way of contribution.***

iv. ***What relief is available to the parties including on the issue of costs?***

We shall address issues i. separately and address issues ii and iii. in two parts; propriety rights, if any, under Article 45(3) and the controversy around the 50/50 division of matrimonial property.

E. ANALYSIS

i. *Retrospective application of the Matrimonial Property Act as well as Article 45(3) of the Constitution.*

[52] Regarding the Court of Appeal's reliance on the Matrimonial Property Act, 2013, the appellant contends that the appellate Court erred in law by failing to apply the Married Women Property Act,1882 which was the applicable law at the time the suit was lodged as that is also when rights, duties and remedies accrued between the parties.

[53] The respondent submits on the other hand that, the Court of Appeal did not apply the law retrospectively, but only recognised that the body of family law had developed exponentially since the promulgation of the 2010 Constitution, with the appellate Court noting that the Matrimonial Property Act had augmented the provisions of the Constitution. Further to this, she argues that the Court of Appeal did not apply the Matrimonial Property Act retrospectively but only went on to recite the development of the law on division of matrimonial property and its applicability in Kenya.

[54] In the above context, the undisputed fact is that the suit before the High Court was brought by way of Originating Summons under Section 17 of the Married Women Properties Act 1882. The High Court applied the provisions of that Act in rendering its decision. The Court of Appeal also remained alive to the fact that the claim was filed under the Married Women Property Act but nevertheless went on to note that the claim was determined after the enactment of the Matrimonial Property Act as well as Article 45(3) of the Constitution. The Court of Appeal's rendered itself as follows:

> ***"11. Although the suit was filed before the above law came into effect, the hearing and determination took place between 2015 and 2017 when the judgment was delivered. It is obvious the learned Judge took note of the above provisions of the law as submissions by respective counsel but did not bring them to bear in her determination which was largely guided by the case of Echaria Vs Echaria and Njoroge Vs Njoroge (supra). It is perhaps opportune to mention that before the promulgation of the Constitution 2010, and the enactment of the Matrimonial Property Act,***

suits filed by spouses claiming a determination of the share of properties acquired during marriage were brought under Section 17 of the 1882 Married Women Property Act of England. Section 3 of the repealed Matrimonial Causes Act gave jurisdiction to the High Court, but such jurisdiction was to be exercised in accordance with the procedures applied in matrimonial proceedings in the High Court of Justice in England."

[55] The Matrimonial Property Act No. 49 of 2013 came into being in 2013, with the Act giving its date of commencement as 16th January, 2014, while the matter before us was filed in 2010, four years before the commencement of the Act. Should the said Act be applied retrospectively?

[56] The **Black's Law Dictionary (6th Edition)**, defines retrospective law as:

"A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred."

[57] Further, **Halsbury's Laws of England,** 4th Edition, Re-Issue Volume 44 (i) para 1433 states as follows on enactments: -

"It is a principle of legal policy that an amending enactment should be generally presumed to change the relevant law only from the time of the enactment's commencement."

[58] This Court has itself previously addressed the question of the retrospective effect of statutes in the ***Samuel Kamau Macharia Case*** where we held:

"(61) As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature."

[59] We also stated in ***Daniel Shumari Njiroine v Naliaka Maroro***, SC Motion No. 5 of 2013; [2014] eKLR that:

"[36] ... it is a general principle that laws, where enacted or promulgated, are progressive in nature. Where the Legislature intends a law to apply retrospectively, it will expressly say so. While the Constitution is not, in its essence, to be interpreted like a statute, if and where it intends a particular provision to apply retrospectively, the makers will expressly have stated so."

[60] We reiterate the above holdings and further note that for legislation to have retrospective effect, the intention must be clear and unambiguous from the words of such statute or legislation. Having perused the Act in

contention and considered the submissions by parties as well as the law as expressed above, we have come to the conclusion that there is no retrospective application of the Matrimonial Property Act and hold that the applicable law to claims filed before the commencement of that Act is the Married Women Property Act,1882.

[61] In finding as above, we have also taken into account the provisions of Section 23(3) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya which provides:

> ***"Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not***
>
> ***-***
>
> ***(a) revive anything not in force or existing at the time at which the repeal takes effect; or***
>
> ***(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or***
>
> ***(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or***
>
> ***(d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or***

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made."

[62] But the issue does not end there because the question of retrospective application of the Constitution has arisen with arguments on whether Article 45(3) of the Constitution was also applied retrospectively. Again, we take cognizance of our finding in the ***Samuel Kamau Macharia Case*** where further to finding that retrospective operation is not given to statutes, we also addressed the question of the retrospective effect of the Constitution. We rendered ourselves as follows on the issue:

"At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not

contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution."

[63] Again, we reiterate this finding and find it most appropriate in resolving the matter at hand. Article 45(3) provides that:

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

[64] In our view, the language used in the Article by itself resolves the question of retrospectivity. The right to equality is one of the fundamental rights and freedoms that are protected by the Constitution, a right that is inherent and indefeasible to all human beings. More fundamentally, as we stated in ***Samuel Kamau Macharia Case***, only the language of the Constitution may act as a guide as to whether a provision in the Constitution applies retrospectively or not.

[65] In that regard, the language of Article 45(3) of the Constitution does not connote that it may not be applied retrospectively. The language plainly provides for the right to equality to all parties of a marriage during the subsistence of such marriage, as well as at the dissolution of such a marriage. The Constitution cannot be subjected to the same principles of interpretation applied to statutes on retrospective application of the law. It is therefore our finding that a reading of Article 45(3) of the Constitution

can only lead to the conclusion that there is nothing that bars its provisions from being applied retrospectively.

[66] Having therefore come to the above conclusion, we are of the view that the principles in ***Echaria*** are good law and remain the basis within which matrimonial property should be distributed for matters filed before the commencement of the Matrimonial Property Act, 2013. We shall address applicability of Article 45(3) in the context of our findings, on this issue, here below.

ii. Whether Article 45(3) provides for proprietary rights

[67] The appellant, while relying on Section 17 of the Married Women Property Act, argues that the appellate Court erred in finding that the respondent had contributed to the acquisition of the contested property and rental units for the reason that she was in occupation of the matrimonial home thereon for a considerable period of time. In this context, the appellant contends that the respondent did not in fact, make any direct financial contribution towards the acquisition and development of the property but he was willing to cede 10% to her nonetheless.

[68] It is also the appellant's case that the High Court was right in relying on the principles set out in ***Echaria*** which principles were reiterated in ***Francis Njoroge v Virginia Wanjiku Njoroge*** *(supra)* in interpreting Section 17 of the Married Women Property Act on contribution and division of matrimonial property. The appellant is furthermore emphatic that the respondent did not contribute to the purchase of the matrimonial property, and for this, cannot be entitled to a 50% share of it. The appellant therefore contends that the Court of Appeal erred in faulting the High Court for relying on the decisions in ***Echaria*** and ***Francis Njoroge v Virginia Wanjiku Njoroge*** *(supra).*

[69] The respondent on the other hand argues that direct financial contribution was proved as she was responsible for running the family expenses, which amounted to direct contribution on her part and therefore supports the finding of the appellate court on the issue.

[70] The High Court, in considering the extent of the respondent's contribution to the matrimonial property found that she had failed to prove direct contribution to the acquisition of the matrimonial property, but went on to also find that she had made indirect non-monetary contribution towards the family welfare. It expressed itself thus:

> ***"It is not in dispute that from the time the parties started cohabiting and prior to their marriage, the applicant was in formal employment and was drawing a salary, there are also loan application forms that showed she borrowed funds to put towards the children's school fees. However, the respondent claims to have purchased and developed the said property solely without any contribution from the applicant. In support of his claim, he has adduced loan application documents that showed he had mortgaged the parcel of land to his then employer to secure funds to develop the same. Though the applicant claims she contributed both monetary and non-monetary there is no evidence that she directly contributed towards the acquisition of the parcel of land or the construction of the property therein despite her alleging to have secured a loan of Kshs. 200,000/- with only Kshs. 183,000/-being approved- a loan the respondent claims no knowledge of- and there is no evidence adduced that he gave the said***

approved sum of Kshs. 186,000/- to the defendant. Guided by the principles set out by this Court (sic) in Echaria v Echaria which principles were summarized by this Court in Francis Njoroge v Virginia Wanjiku Njoroge [2013] eKLR, I find that the plaintiff has not proved her case on the claim that she made direct contribution to the acquisition of the property on Nairobi/Block 97/567 in Tassia Estate, Embakasi. The plaintiff however did make indirect non-monetary contribution towards the family welfare as such she should benefit to some degree as she contributed towards the family."

[71] The Court of Appeal on the other hand noted that a woman's direct and indirect contribution could be taken into consideration during distribution with each case being decided on its merits. In making that finding, the appellate court stated:

"14. We have recited the above history to demonstrate that, even under the old regime, a woman's direct and indirect contribution was taken into consideration and every case was determined on its own merit while bearing in mind the principles of fairness and human dignity. Once a spouse has been in occupation of a matrimonial home for a considerable period of time, where she lived with her children and established herself like the respondent did by even starting a business of selling cereals to support herself after she was retrenched from employment, all these are relevant factors to consider in determining the mode of distribution. On the other hand,

the respondent was able to purchase another residential house on separation and the foremost question was to seek a mode of distribution that will not disadvantage one party and render them destitute."

[72] On our part, the question of whether the provisions of Article 45(3) of the Constitution can vest any proprietary rights in this matter can only be considered on the basis of the provisions of Section 17 of the Married Women Property Act of 1882 which we have held is applicable to the present dispute.

[73] Section 17 of the Married Women Property Act provides in relevant part as follows:

"17. In any question as to between husband and wife as to the title to or possession of property, either party... may apply by summons or otherwise in a summary way to any judge of the High Court of Justice... and the judge of the High Court of Justice ... may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit"

[74] As was decided in ***Pettitt V. Pettitt*** **[1970] AC** 777 by *Lord Morris*, it is an established principle of law that:

"If matrimonial troubles bring the spouses to the courts, there are various statutory powers relating to property

which can be exercised. But if in a question between a husband and a wife as to the title to property recourse is had to the special procedure made possible by section 17, decision must be reached by applying settled law to the facts as they may be established."

[75] Lord Morris went on to further hold:

"...one of the main purposes of the Act of 1882 was to make it fully possible for the property rights of the parties to a marriage to be kept entirely separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this, in my view, negatives any idea that section 17 was signed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to the title to property, the question for the court was whose is this? and not "to whom shall this be given?"

[76] In ***Echaria***, a five-judge bench of the Court of Appeal held that where the property in dispute is registered in the name of one spouse, the beneficial interest of each spouse would depend on the financial contribution by each spouse, either directly or indirectly. The Court held:

"Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has

made a substantial but unascertainable contribution, it may be equitable to apply the maxim "Equality is equity" while heeding the caution by Lord Pearson in Gissing vs. Gissing (supra) at page 788 paragraph c that:

> *"No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one-quarter, I do not think it is helpful or right for the court to feel obliged to award either one-half or nothing".*

[77] We further note that the Court in ***Echaria*** was of the view that where the disputed property is not registered in the joint names of the parties to the marriage, but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective financial contributions, either directly or indirectly in the acquisition of the property. The Court in ***Echaria*** then went on to find that for a wife to be entitled to a share of the property that is registered in the husband's name, she had to prove contribution towards acquisition of that property.

[78] To our minds, the finding in ***Echaria***, was essentially that a spouse does not acquire any beneficial interest in matrimonial property by fact of being married only and that specific contribution has to be ascertained to entitle such a spouse to a specific share of the property. Furthermore, the position taken by our courts following ***Echaria*** is that as much as section 17 of the Married Women Property Act gave courts discretion to do what is just and fair under the varying circumstances before them, it did not entitle a court

to make an order which is contrary to any well-established principle of law on proprietary interests or ownership of property. The Court of Appeal in this regard held:

> ***"The decision of the House of Lords in Pettitt vs. Pettitt that section 17 of 1882 Act is a procedural section and did not entitle the court to vary the existing proprietary rights of the parties has often been misunderstood. All that the House said, in simple language, was that if a spouse indisputably owns property alone before the dispute reaches the court, section 17 of the 1882 Act did not give the courts discretion to take that property right away and allocate it to the other spouse. The House did not say that after the ascertainment of a property dispute between husband and wife, the court did not have any power to make appropriate orders as would give effect to its decision."***

[79] The Court in ***Echaria*** also noted that for one to be entitled to a share of the property, the court should consider the circumstances of each arising case independently in assessing contribution further noting that what amounts to contribution may either be direct and monetary and indirect and non-monetary. The Court's holding in that regard was as follows:

> ***"In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this Court, the court has invariably given the wife an equal share (see Essa vs. Essa (supra); Nderitu vs. Nderitu, Civil Appeal No. 203 of 1997 (unreported), Kamore vs. Kamore (supra);***

Muthembwa vs. Muthembwa, Civil Appeal No. 74 of 2001 and Mereka vs. Mereka, Civil Appeal No. 236 of 2001 (unreported). <u>However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of each case and independently assessed the wife's contribution as equal to that of the husband.</u>" [Emphasis added]

[80] Having considered the law as above, we have no hesitation in finding that Echaria is still good law for all claims made under the Married Women Property Act,1882. Returning to Article 45(3) in that context, we note that, in ***Rwabinumi v Bahimbisomwe (Civil Appeal 10 of 2009) [2013]*** UGSC 5 the Supreme Court of Uganda also considered the question of whether Article 31 (1) of the Ugandan Constitution-the equivalent of our Article 45(3)- may vest property rights to a party upon dissolution of a marriage. *Kisaakye, JSC* noted as follows in that regard:

"In my view, the Constitution of Uganda (1995), while recognizing the right to equality of men and women in marriage and at its dissolution, also reserved the constitutional right of individuals, be they married or not, to own property either individually or in association with others under Article 26(1) of the Constitution of Uganda (1995). <u>This means that, even in the context of marriage, the right to own property individually is preserved by our</u>

<u>Constitution as is the right of an individual to own property in association with others, who may include a spouse, children, siblings or even business partners.</u> If indeed the framers of our Constitution had wanted to take away the right of married persons to own separate property in their individual names, they would have explicitly stated so." [Emphasis added]

[81] We are persuaded by the above reasoning and should only add that the equality provision in Article 45(3) does not entitle any court to vary existing proprietary rights of parties and take away what belongs to one spouse and award half of it to another spouse that has contributed nothing to its acquisition merely because they were or are married to each other. To do so would mean that Article 40(1) and (2) of the Constitution which protect the right to property would have no meaning which would not have been the intention of the drafters in Kisaakye, JSC's language.

[82] While therefore reiterating the finding in ***Echaria,*** we also find that Article 45(3) acts as a means of providing for equality as at the time of dissolution of marriage but such equality can only mean that each party is entitled to their fair share of matrimonial property and no more. Nowhere in the Constitution do we find any suggestion that a marriage between parties automatically results in common ownership or co-ownership of property (hence vesting of property rights) and Article 45(3) was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only.

[83] The guiding principle, again, should be that apportionment and division of matrimonial property may only be done where parties fulfill their

obligation of proving what they are entitled to by way of contribution**.** We thus approve the finding in ***Echaria*** that:

> ***"As the case law currently shows, the status of the marriage does not solely entitle a spouse to a beneficial interest in the property registered in the name of the other, nor is the performance of domestic duties. Even the fact that the wife was economical in spending on house keeping will not do…"***

[84] The Court of Appeal in ***EGM v BMM*** [2020] eKLR also discussed whether Article 45(3) grants property rights upon dissolution of a marriage and found thus:

> ***"With great respect, we find the learned judge's interpretation of Article 45 (3) to be textually and contextually untenable. He failed to appreciate that the sub-Article simply deals with equality of the fundamental rights and freedoms of spouses during and after the dissolution of marriage. There was no basis for reading into the provision what the text does not ordain. <u>Equality of spouses does not involve the re-distribution of property rights at the dissolution of marriage.</u>"*** [Emphasis added]

[85] The above is a correct exposition of the law and the Court of Appeal, in this case and in that context, considered the question of whether the respondent had provided evidence to prove direct financial contribution to the purchase of the matrimonial property as well as the rental units constructed thereon. It was the appellate court's finding that:

> ***"16. We find the above conclusions somewhat problematic as there is a lot of evidence contained in the appellant's***

witness statement and a bundle of documents that she produced which do not seem to have been analysed by the learned Judge. The appellant was working as a secretary in East African Building Society from 1984 to 2005 when she was retrenched; she started cohabiting with the respondent in 1990 therefore she was earning a salary for 15 years until she was retrenched and the marriage subsequently broke down in 2008. Another aspect that was not considered was the fact that at one time the appellant was evicted from the matrimonial home and had to seek a restraining order of injunction against the respondent on 28th May, 2010. The appellant alleged that in the process of eviction, she lost several documents, therefore she was not able to produce the originals and this was overlooked when the Judge faulted her for not producing documents.

17. Another reason why we find ourselves disagreeing with the learned Judge is the dearth of documents that were produced by the appellant in the list of documents filed with the suit. There are no less than a dozen loan application forms from 1993 to 2004. Majority of those loans were for school fees. The appellant also stated that she gave some Ksh. 183,000 the proceeds of one such loan to the respondent when he was constructing the matrimonial home. Indeed, one such application for loan, the appellant applied for a whooping Ksh. 1,065,000 which indicated therein it was for construction of a house. She stated that she used the loan proceeds to build the

rental units within the matrimonial home. However, the learned Judge disregarded this evidence as there were no documents to prove [the same]"

[86] We shall return to this specific issue later but in the context of the issue at hand, it is apparent that the respondent indeed provided evidence to prove direct financial contribution during the subsistence of the marriage and this aligns with our finding that a party must prove contribution to enable a court determine the percentage available to it at distribution and furthermore safeguards against a blanket expectation that the principle of equality will be applied generally in the division of matrimonial property irrespective of contribution. We therefore find that the test to be applied to determine the extent of contribution is ultimately one of a 'case to case basis'-See also *Mativo J (as he then was)* in ***Federation of Women Lawyers Kenya (FIDA) v Attorney General & Another [2018] eKLR.***

iii. Whether Article 45(3) provides for an absolute division of 50: 50 to be used as a matrix in the distribution of property

[87] The learned judge of the High Court, while determining the contribution by the appellant and while also applying the principle enunciated in ***Echaria*** stated thus:

"I find that the plaintiff has not proved her case on the claim that she made direct contribution to the acquisition of the property on Nairobi/Block 97/567 in Tassia Estate, Embakasi. The plaintiff however did make indirect non-monetary contribution towards the family's welfares as

such (sic) she should benefit to some degree as she contributed towards the family…

It is evident though the applicant did not earn much from the employment, she did contribute something towards the upkeep and maintenance of the child this allowed (sic) the respondent to carry on development in the said parcel of land. As such, though the applicant did not contribute much in monetary terms, she definitely has proven she did contribute non-monetary and this court in rendering its decision has to put the same consideration. Am guided by the case of ECHARIA v ECHARIA where the Court cited the English case of BURNS v BURNS [1984] 1 ALL ER 244…"

[88] The Court of Appeal, in arriving at the finding that the matrimonial property should be shared equally between the appellant and the respondent, found:

"18. It is necessary to state that in a marriage union, which is predicated on trust, no spouse anticipates that one day they will have to prove every contribution that they make to the marriage as that would negate the very essence of trust which is the cornerstone of marriage unions. The learned Judge having appreciated the appellant and the respondent were married for 18 years, and 15 of those years the appellant was in gainful employment; she constantly took loans, having found the only property that was acquired with joint efforts was the matrimonial home where the appellant was residing; the

fact that upon separation the respondent was able to purchase another home where he settled. For those reasons, we agree with counsel for the appellant that by virtue of a long period of occupation as a spouse, the appellant acquired beneficial interests therein; we also find for the same reasons the learned Judge erred by awarding the appellant a share of 30% of the house she has been in occupation and a mere 20% of the rental units which are in the same premises."

[89] In the above context, we note that equality of parties to a marriage has largely been interpreted and construed in two ways. On the one hand, an interpretation of Article 45(3) of the Constitution has been construed to mean a division of matrimonial property down the middle through the literal application of the 50:50 division ratio. Proponents of this argument largely opine that since non-monetary contribution cannot be quantified but is equally important, a split right in the middle would be more appropriate. The second approach, supported by the respondent, is that 'equal' as provided for under Article 45(3), means that a party obtains an equivalent of what one contributes, monetarily or otherwise. We have partly resolved this dichotomy above but we now need to address the 50/50 question squarely.

[90] In ***Rwabinumi v Bahimbisomwe*** *(supra)* the Supreme Court of Uganda gave a purposive interpretation of the provisions of Article 31(1)(b) on equal rights to parties in a marriage at its dissolution and *Kisaakye, JSC* determined the question of how a court should determine a spouse's share in a jointly owned property. The Court in that regard noted that the contributing spouse's share is not restricted to a maximum of 50% share

either in the matrimonial home or property that is held jointly. More fundamentally, the Supreme Court found that Article 31(1)(b) does not guarantee that all property acquired during the subsistence of a marriage should be shared equally. The learned judge rendered herself thus:

> ***"So, while I agree that Article 31(1) (b) of the Uganda Constitution (1995) guarantees equality in treatment of either the wife or the husband at divorce, it does not, in my opinion, require that all property either individually or jointly acquired before or during the subsistence of a marriage should in all cases, be shared equally upon divorce. It was therefore erroneous for the Court of Appeal to hold that all individually held property of persons who contract religious marriages under the Marriage Act becomes matrimonial property upon marriage and joint property of the couple and that it should be shared equally on divorce by virtue of their marriage vows and Article 31(1) of the Constitution of Uganda (1995). The Court's holding was irrespective of whether the claimant proves that he or she contributed to the acquisition of the said property either through direct monetary or non-monetary contribution towards payment of the purchase price or mortgage installments or its development; or indirectly through payment of other household bills and other family requirements including child care and maintenance and growing food for feeding the family."***

[91] We are also aware that in the Malawian case of ***Kishindo v Kishindo*** [2015] MWHC 447, the High Court held that in distributing property between spouses upon the dissolution of a marriage, the court should consider the principle of fairness, justice, reasonableness, proportionality, comity, conformity and solidarity that will result in the property being equally divided between the husband and the wife. The Court also discussed the concept of equality and fairness by holding that fairness depends on the circumstances of the case when it comes to disposal of property on dissolution of marriage while equality means that parties in a marriage are entitled to an equal share of the matrimonial property irrespective of the mode of acquisition. The Court held:

> ***"There is no blue print of fairness that fits all. Fairness depends on circumstances on each case. One cannot successfully list all the circumstances. Consequently, decisions of this should be understood as not laying general or broad principles. Each decision is the courts' attempt to be fair in a particular situation…***
>
> ***"Applying all these principles to this case, the correct order in the circumstances is that all property is up to be shared fairly subject to equality. Equality here implies that both husband and wife come on equal footing to property which, from the reasoning above, is jointly held between them and, in respect of the houses, irrespective of the motivation, the mode of acquisition or in whose name it is…"*** [Emphasis added]

[92] The Court of Appeal in ***M E K v G L M [2018] eKLR*** further espoused the meaning of equality as follows:

> ***"Equality in marriage is not a principle to be applied blindly nor is it intended to encourage dependency by one spouse. It is a situation where each party makes a contribution. In other words it is not shifting the burden, but <u>the sharing of responsibilities and benefits taking into account the gender limitations.</u>"*** [Emphasis added]

[93] Article 45(3) of the Constitution underscores the concept of equality as one that ensures that there is equality and fairness to both spouses. Equality and fairness are therefore one and intertwined. Equality also underscores the concept that all parties should have the same rights at the dissolution of a marriage based on their contribution, a finding we have already made and in stating so we recognize that each party's contribution to the acquisition of matrimonial property may not have been done in an equal basis as a party may have significantly contributed more in acquiring property financially as opposed to the other party.

[94] Equity further denotes that the other party, though having not contributed more resources to acquiring the property, may have nonetheless, in one way or another, through their actions or their deeds, provided an environment that enabled the other party to have more resources to acquiring the property. This is what amounts to indirect contribution. Equity therefore advocates for such a party who may seem disadvantaged for failing to have the means to prove direct financial contribution not to be stopped from getting a share of the matrimonial property.

[95] As was pointed out by the Court in the English case of ***Gissing v Gissing*** [1971] AC 886**,** the maxim '*equality is equity'* has never been truer. To our minds, equity is an important principle when it comes to matrimonial property since what is fair as it relates to equity is not a question of the

quantitative contribution by each party but rather the contribution by any party in any form, whether direct or indirect. Any substantial contribution by a party to a marriage that led to acquisition of matrimonial property, even though such contribution is indirect, but nevertheless has in one way or another, enabled the acquisition of such property amounts to significant contribution. Such direct or indirect acts as was discussed by *Lord Justice Fox* in ***Burns v Burns*** [1984] 1 All ER 244 may include:

i) Paying part of the purchase price of the matrimonial property.

ii) Contributing regularly to the monthly payments in the acquisition of such property.

iii) Making a substantial financial contribution to the family expenses so as to enable the mortgage instalments to be paid.

iv) Contributing to the running of and welfare of the home and easing the burden of the spouse paying for the property.

v) Caring for children and the family at large as the other spouse works to earn money to pay for the property.

[96] These considerations are in line with the finding of the Court in the English case of ***White v White*** [2001] 1 AC 596 where *Lord Nicholls of Birkenhead* held that the court should always ensure a fair outcome in considering the contribution of spouses by stating:

> ***"Self-evidently, fairness requires the court to take into account all the circumstances of the case. Indeed, the statute so provides. It is also self-evident that the circumstances in which the statutory powers have to be exercised vary widely … But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for***

discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to the parties' contribution."

This is implicit in the very language of paragraph (f):

> *"the contributions which each ... has made or is likely ... to make to the welfare of the family, including any contribution by looking after the home or caring for the family.'*

If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer."

[97] In this regard our view is that, while Article 45(3) deals with equality of the fundamental rights of spouses during and after dissolution of marriage, we must reiterate that equality does not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither does our

reading of this provision lead to the assumption that spouses are automatically entitled to a 50% share by fact of being married. *Kiage J.A* in his concurring opinion in ***PNN v ZWN***, Civil Appeal No. 128 of 2014; [2017] eKLR discussed the concept of marital equality and whether it is translated to mean that matrimonial property should be divided equally at dissolution of marriage. He succinctly penned his thoughts as follows:

> ***"Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.***
>
> ***The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts…***

I think that it would be surreal to suppose that the Constitution somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say the Constitution gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words "50 per cent."

Thus it is that the Constitution, thankfully, does not say equal rights "including half of the property."

[98] *Kiage JA*'s poetic and graphic finding had earlier found its way into *Tuiyott J's* mind when, while still at the High Court, in the case of ***U M M v I M M*** [2014] eKLR he discussed the right to equality as provided for under Article 45(3) and whether it decrees an automatic 50:50 sharing. He stated thus:

"I take the view that at the dissolution of the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary. The bigger the contribution,

the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property then, the Courts should give it effect. But to hold that Article 45(3 decrees an automatic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property. That surely is oppressive to the spouse who makes the bigger contribution. That cannot be the sense of equality contemplated by Article 45(3).”

[99] We find the above opinions and findings persuasive and it is our finding that the stated equality under Article 45(3) means that the courts are to ensure that at the dissolution of a marriage, each party to a marriage gets a fair share of the matrimonial property based on their contribution. This is best done by considering the respective contribution of each party to ensure no party is unfairly denied what they deserve as well as ensuring that no party is unfairly given more than what he or she contributed.

[100] In making that finding, we are further persuaded by the Supreme Court of Zambia's decision in ***Mathews Chishimba Nkata v. Ester Dolly Mwenda Nkata*** [SCZ Appeal No. 60/2015] where the court held that sharing of matrimonial property should not be done on a fixed formula in law but on the basis of fairness and conscience. The Court held:

“If the basis of sharing family property is that both spouses contributed to its purchase or creation, it should follow that where it can be demonstrated that one spouse

invested nothing (financially or in-kind) in the acquisition of the property, they should technically not be entitled to a share of what was in fact an investment by the one spouse on the basis only that they had entered into a marriage. Our view is that property should be undertaken on the basis of fairness and conscience, not on an unjustified reference to 50:50 dogma. In our opinion, the sharing of matrimonial property should not reside in a fixed formula in law. It should not be a matter of mathematics as simply splitting a piece of land into two equal portions. Equal rights between husbands and wives do not necessarily translate, in every case, into equal portions of family property." [Emphasis added]

[101] Further, in the Canadian case of ***MacLean v. MacLean***, [2005] NSSC 284, the court found that, while the law recognizes equality in the division of property, the same should also not be unfair or unconscionable. The Court held thus on that point:

> ***"[10] The philosophy or underlying principle of the Matrimonial Property Act is that property acquired for the mutual benefit of a couple during marriage is to be divided equally. This principle may be departed from only where one of the parties is able to establish under s. 13 of the Act that an equal division would be unfair or unconscionable."***

[102] Furthermore, in ***Hardwood v. Thomas*** [1981] 4167 (NS CA), the Canadian Court also acknowledged that equality is encouraged in division of property by stating:

"Equal division of the matrimonial assets, an entitlement proclaimed by the preamble to the Act and prescribed by s. 12 should normally be refused only where the spouse claiming a larger share produces strong evidence showing that in all the circumstances equal division would be clearly unfair and unconscionable on a broad view of all relevant factors. That initial decision is whether, broadly speaking, equality would be clearly unfair - not whether on a precise balancing of credits and debits of factors largely imponderable some unequal division of assets could be justified. Only when the judge in his discretion concludes that equal division would be unfair is he called upon to determine exactly what unequal division might be made."

[103] In agreeing with the above decisions, we must note that, in a marriage, the general assumption is that both spouses share everything, and on the face of it, both parties contribute towards the home or family, in one way or another, to whichever extent, however big or small. Again, and further to this, both spouses may also work and earn income, which inevitably, at most instances, always ends up being spent on the family unit. It may be the whole income, or a substantial part of it, but ultimately, a percentage of it goes into the family. This is the essence of Section 14 of the Matrimonial Property Act,2013.

[104] Therefore, in the event that a marriage breaks down, the function of any court is to make a fair and equitable division of the acquired matrimonial property guided by the provisions of Article 45(3) of the Constitution. To hold that Article 45(3) has the meaning of declaring that property should

be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages and *Tuiyott, J* (as he then was) has explained why above. Noting the changing times and the norms in our society now, such a finding would encourage some parties to only enter into marriages, comfortably subsist in the marriage without making any monetary or non-monetary contribution, proceed to have the marriage dissolved then wait to be automatically given 50% of the marital property. That could not have been the intention of our law on the subject.

[105] We should only add that this position is not unique to our realm because the Supreme Court of Zambia in the case of ***Penelope Chishimba Chipasha Mambwe v. Mambwe*** (Appeal 222 of 2015) [2018] ZMSC 317 also questioned the rationale of sharing property at the ratio of 50:50 where a spouse fails to offer any financial contribution with the Court noting:

> ***"In this jurisdiction, as many others in the commonwealth, the prevailing position is that a spouse who contributes either financially or in-kind to the home earns an interest in the property of the family acquired during the subsistence of the marriage. In numerous authorities, the holding has been consistent that family property should be shared on a 50/50 basis...***
>
> ***Although indeed many marriages are built on happiness and mutual support, there are still many others where one spouse may be perpetually wasteful, uncooperative, distant and providing absolutely no warmth of companionship let alone financial contribution. It is debatable whether such spouses should be taken to have***

earned the entitlement to 50% share of the property of the family at dissolution of the marriage."

[106] In light of the above findings, we are of the view that the question of what amounts to a fair and equitable legal formula for the reallocation of matrimonial property rights at the dissolution of a marriage and whether the same can be achieved by a fixed means of apportionment at a 50:50 ratio or whether such apportionment should be done in light of the circumstances of each individual case is one best answered again by the finding by the Court in ***Echaria*** and we have explained why.

(*iv) What relief is available to the parties?*

[107] We have indicated above that the Court of Appeal awarded the respondent 50% of the matrimonial property and 50% of the rental units thereon. We have also set out the law on the subject and found no reason to fault the Court of Appeal on that finding based on its analysis of the evidence placed before the High Court and itself. We thus have no option than to uphold the decision of the appellate court in entirety and reject the submission that the decision of the High Court should be sustained. Like the Court of Appeal we are inclined to agree with the evidence tendered that the Respondent took out loans and contributed substantially to the purchase of the matrimonial property and rental units. The 50-50 division is therefore reasonable in the specific circumstances of this case.

[108] Since costs follow the event as previously decided by this Court in the case of ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others,*** Sup. Ct. Petition No. 4 of 2012; [2014] eKLR, the appellant shall bear the costs of appeal in this Court.

[109] Consequently, the appeal is dismissed.

F. ORDERS

[110] Flowing from above, the final Orders are:

i. ***The Petition of appeal dated and filed on 3rd July, 2020 is hereby dismissed.***
ii. ***The appellant shall bear the respondents' costs.***

DATED and **DELIVERED** AT **NAIROBI** this **27th day** of **January, 2023**

.....
P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME COURT

.....	**.....**
M. K. IBRAHIM	**S. C. WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

.....	**.....**
NJOKI NDUNGU	**I. LENAOLA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA