



When replying please quote
Refand date

REPUBLIC OF KENYA
THE JUDICIARY

THE SUPREME COURT OF KENYA

JOSEPH OMBOGI OGENTOTO v. MARTHA BOSIBORI OGENTOTO

SC PETITION NO. 11 OF 2020

DATE OF JUDGMENT: 27TH JANUARY 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Orders: The Court dismisses this appeal.

Background

The appellant and respondent, were married under Abagusii customary law in 1990 and on 30th August 1995, their union was formalized under the repealed Marriage Act. During the subsistence of the marriage, the appellant and respondent acquired their matrimonial home on Land Reference No. Nairobi/Block 97/564 at Tassia Estate within Embakasi in Nairobi and constructed rental units on the property. In 2008, the marriage irrevocably broke down and the marriage was therefore dissolved. Subsequently, the respondent filed before the High Court, *Civil Case No. 18 of 2010* seeking to have the matrimonial property divided. The High Court, guided by the principles in *Echaria v Echaria [2007] eKLR* awarded the respondent 30% of the share in the matrimonial home and a 20% share on the rental units. The respondent aggrieved by the Orders, appealed to the Court of Appeal, which allowed the appeal. The Court of Appeal while taking note of the provisions Article 45(3) of the Constitution, found that the respondent had acquired beneficial interest in the matrimonial property, having been married to the appellant for 18 years and therefore ordered that the matrimonial property and the rental units in the property be shared equally between the appellant and respondent.

In the appeal before the Supreme Court by the appellant following certification of the matter as one of general public importance under Article 163(4)(b), the Court listed four issues for determination:

- i) The applicable law in the division of matrimonial property for causes filed prior to the current matrimonial property regime being the Constitution and the Matrimonial Property Act;*
- ii) Whether matrimonial causes filed prior to the promulgation of the Constitution be determined under Section 17 of the Married Women Property Act, 1882 and the principles set out in Echaria v Echaria [2017] eKLR or by applying the provisions of Article 45(3) of the Constitution and the Matrimonial Property Act;*
- iii) Whether Article 45(3) of the Constitution provides for proprietary rights and whether the Article can be a basis for apportionment and division of property*

on a 50/50 basis without parties fulfilling their obligation of proving what they are entitled to by way of contribution;

iv) Reliefs available to the parties on the issue of costs.

Upon consideration of the appeal, the Supreme Court has dismissed the appeal holding;

- i. That there is no retrospective application of the Matrimonial Property Act and that the applicable law to claims filed before the commencement of the Matrimonial Property Act is the Married Women Property Act, 1882. However, there is nothing that bars the provisions of Article 45(3) of the Constitution from being applied retrospectively.**
- ii. That the principles in *Echaria v Echaria [2007] eKLR* 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.**
- iii. That the provisions of Article 45(3) on equality do not entitle any court to vary existing proprietary rights of parties but only act as a means of providing for equality at the time of dissolution of marriage with each party being entitled to their fair share of matrimonial property.**
- iv. That a party must prove contribution to enable a court to determine the percentage available to it at distribution of matrimonial property and that the test to determine the extent of contribution is one of a case to case basis.**
- v. That while Article 45(3) of the Constitution deals with equality of the fundamental rights of spouses during dissolution of a marriage, such equality does not mean the re-distribution of proprietary rights or an assumption that spouses are automatically entitled to a 50% share by fact of being married.**
- vi. That what amounts to a fair and equitable legal formula for the reallocation of matrimonial property rights at dissolution of a marriage and whether the same can be achieved by a fixed means of apportionment at a 50:50 ratio should be done in light of the circumstances of each individual case and is best answered by the finding in *Echaria v Echaria [2017] eKLR*.**