THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Elizabeth Musoke, Muzamiru M. Kibeedi & Christopher Gashirabake, JJA]

CIVIL APPEAL NO. 0100 OF 2015

AMBAYO JOSEPH WAIGO :: APPELLANT

VERSUS

ASERUA JACKLINE :: RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala before Bamugemereire, J (as she then was) dated 31st March, 2014 in Divorce Cause No. 10 of 2012)

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

Background

This appeal concerns the handling of matrimonial property by courts of law when a marriage breaks down and the parties part. This is a critical subject with far reaching consequences for the marriage institution and its future.

The facts leading to this appeal are that the appellant and respondent started cohabiting in 1989 when the appellant was aged about 24 years, while the respondent was aged about 19 years. At the time of this judgment the respondent is about 52 years of age, while the appellant is about 57 years.

As usually happens in matters which have now been baptised "*early marriages*", the respondent at the time she started cohabiting with the appellant had not completed her formal primary level education. But the appellant supported and financed her return to formal schooling and the respondent make very commendable formal academic gains. She completed Primary Education from Nakasero Primary School, obtained a Certificate in tailoring and a Diploma in designing and

dress making. She also obtained driving skills. By the time the divorce proceedings were instituted she was self-employed as a seamstress, tailor, and baker.

During the cohabitation the parties also sired two daughters in the years 1992 and 2001, and two sons in the years 1990 and 1995. It was during that period that the vacant plot on which the contested matrimonial house stands was purchased, and most of its development into a family home done. The parties moved in and started living there as a family around 2002. The plot on which the matrimonial house stands is unregistered/untitled; but the purchase agreement for the plot was written in the sole names of the appellant as the purchaser. The contribution of each party to the property purchase and development are the subject of the dispute between the parties.

After cohabiting for a period of about 16 years, the parties solemnised their marriage in 2005 from Our Lady of Africa Church, Mbuya, Kampala in accordance with the traditions of the Roman Catholic Faith as recognised by the Marriage laws of this country. In 2007, the parties appear to have started onto the journey of developing the differences that eventually led to the irretrievable breakdown of their marriage. In 2012 the appellant commenced divorce proceedings against the respondent in the High Court of Uganda, Family Division, at Kampala, seeking the dissolution of the marriage on the grounds of adultery, cruelty, and desertion, to wit: Divorce Cause No. 10 of 2012. The respondent opposed the Petition and cross-petitioned for dissolution of the marriage on the grounds of cruelty, desertion, and irretrievable breakdown of the marriage. At that time, the appellant was employed by Verona Fathers as a Maintenance technician for vehicles, generator, plumbing and electrical work. He also did some consultancy works.

When the matter came up before the trial court, the parties partially settled the dispute by consent and the trial Judge issued a decree *nisi* dissolving their marriage. Further, court granted an order for the joint custody of the children who were still minors. What remained contentious thereafter was the issue of the respondent's contribution to the matrimonial home.

After hearing the evidence of both parties, the trial Judge, Hon. Lady Justice Catherine Bamugemereire, J (as she then was), held that whereas the contract upon which the matrimonial home stands was in the appellant's names alone, the house nonetheless belonged to the couple jointly in equal shares. She ordered that the house should be sold, or it should be valued, and fifty percent of the value granted to the respondent "*who worked so hard to acquire it*".

The appellant was dissatisfied with the decision of the trial Judge and appealed to this court.

Grounds of Appeal

The appeal is based on five grounds of appeal which were set out in the Memorandum of Appeal as follows:

1. ***The learned trial Judge erred in law and fact when she found that the Appellant's property is matrimonial property thereby occasioning miscarriage of justice.***
2. ***The learned trial Judge erred in law and fact when she held that the Respondent contributed to the acquisition of the Appellant's property thereby occasioning miscarriage of justice.***
3. ***The learned trial Judge erred in law and in fact when she held that the Appellant's property be sold or valued and 50% of the proceeds be given to the Respondent thereby occasioning miscarriage of justice.***
4. ***The learned trial Judge was manifestly biased in favour of the Respondent during the trial and disregarded the Appellant's evidence on the acquisition of his property.***
5. ***The learned trial Jude erred in law and fact when she failed to properly evaluate the evidence on record concerning acquisition, ownership and distribution of Appellant's property thereby occasioning a miscarriage of justice.***

The appellant prayed to this court to allow the appeal, set aside the judgment of the High Court, and make provision for costs of the appeal.

The respondent opposed the appeal.

Representation

At the hearing, Ms. Candiru Noelynne, learned counsel, represented the appellant while the respondent was represented by Mr. Okello-Oryem Alfred, assisted by Mr. Ojang Rogers, both learned counsel.

Written submissions filed for either side were adopted at the hearing and have been considered in this judgment.

Appellant's written submissions

Counsel for the appellant argued grounds 1, 2, 3 and 5 jointly, followed by ground 4 independently.

Counsel submitted that grounds 1, 2, 3 and 5 raise an issue of whether the learned trial Judge erred when she found that the suit property was matrimonial property. She referred to the case of *Rwabinumi vs. Bahimbisomwe, Supreme Court Criminal Appeal No. 10 of 2009 (unreported)* as establishing the proposition that all property acquired prior to marriage is the separate property of the spouse who purchased it. Counsel submitted that the suit property was acquired before the parties in the present case got married and was therefore not matrimonial property.

Counsel advanced a further proposition that matrimonial property is property whose purchase both husband and wife make monetary and/or non-monetary contributions. She contended that the respondent's evidence on her monetary contribution to the purchase of the suit property was not credible and was filled with inconsistencies in several aspects like the actual amount that she contributed, the purchase price of the suit property and how the purchase money was delivered to

the seller. Counsel submitted that the inconsistencies in the respondent's evidence were major and ought to have resulted in the rejection of her evidence, and therefore the learned trial Judge erred when she relied on it. Counsel cited the cases of *Tajar vs. Uganda, EACA Criminal Appeal No. 167 of 2009* and *Tinkamalirwe vs. Uganda, Supreme Court Criminal Appeal No. 27 of 1989* (both unreported) for the proposition that major inconsistencies going to the root of a party's case should lead to rejection of evidence.

Counsel urged this Court to instead accept the appellant's evidence of the purchase of the suit land which she stated to be cogent and credible. She submitted that the appellant testified that in 1998, he was introduced to Makubuye Kasolo, the vendor of the suit land, by his gate keeper one Musisi Gustas. The vendor agreed to sell him the suit land at Ug. Shs. 4,000,000/= which he paid in full as evidenced by the suit land sale agreement, Exhibit P1. It was further the appellant's evidence that in 1999 he was introduced to the Local Council leaders and he paid development fee of Ug. Shs. 200,000/=. Counsel submitted that this Court ought to find that the respondent made no monetary contribution to the purchase of the suit land.

Furthermore, counsel contended that the learned trial Judge erred when she took into account non-monetary contributions that the respondent made during cohabitation but before the parties' marriage. Counsel pointed out that the land on which the suit property was constructed was purchased in 1998 before the parties' marriage in 2005. She further contended that the law and decided cases on the subject of matrimonial property are silent on whether a partner's non-monetary contributions to development of property acquired during cohabitation but subsequently brought into the marriage entitles him/her to a share in the property upon dissolution of the marriage. However, in the present case, the learned trial Judge took into account the respondent's contributions to development of the suit property which was acquired before the parties' marriage, and her decision, according to counsel, amounted to a re-statement of the existing law. Counsel contended that the learned trial Judge ought to have followed the statements in the *Rwabinumi case (supra)* to the effect that property bought by a spouse prior to a marriage is separate

property. Counsel concluded by praying this Court to resolve the issue arising out of grounds 1, 2, 3 and 5 in the appellant's favour.

With regard to ground 4 of the appeal, Counsel submitted that the learned trial Judge, during the hearing and determination of the parties' suit, exhibited bias in favour of the respondent. Counsel pointed to notes that the learned trial Judge made during the trial proceedings, such as, writing that **"witness (respondent) appears to have a penchant for dates and good memory and gets into detail"** and that **"witness (respondent) appears to know exact dates"** which in her view were unjustified. She further contended that the learned trial Judge, in her notes, recorded comments imputing evidence that was not given by any witness at the trial, and in this regard, counsel referred to an instance where the learned trial Judge stated that certain tiles bought by the respondent were roof tiles from Kajjansi and not from Nakasero. Counsel also referred to other instances where the learned trial Judge appeared to answer certain issues in favour of the respondent without hearing the appellant, such as when she appeared to conclude that the suit property was matrimonial property.

Counsel contended that because of the bias in favour of the respondent, the learned trial Judge's comments while the appellant testified were unduly skeptical of the appellant's evidence. The learned trial Judge doubted the appellant's evidence that he paid in full the price of Ug. Shs. 4,000,000/= to purchase the suit land noting **"this (the evidence) sounds too good to be true"**. When the appellant testified that Sister Maria Theresa did not make a contribution to the purchase of the suit land, the learned trial Judge commented **"really?"** and when the appellant stated that he did take a salary loan to purchase the suit land, the learned trial Judge again commented **"really?".** Counsel contended that the above comments showed that the learned trial Judge had made up her mind to decide the case in favour of the respondent. Counsel also contended that the learned trial Judge, in her judgment, used words to magnify the respondent's contributions to the development of the suit property while adopting demeaning words against the appellant. The learned trial Judge said that the respondent was "a vivacious woman who could do all" that the

respondent exquisitely picked the floor tiles and buying furniture that adorned the sitting room" and also that the respondent made tireless contributions to the building of the matrimonial home. Counsel pointed out that on the other hand, the learned trial Judge made comments unfairly criticizing the appellant for alleged inhumane treatment of the respondent and that the appellant locked the mother of his children out of the matrimonial home for years when the appellant's evidence was that it was the respondent who left the matrimonial home. Counsel also mentioned that the learned trial Judge stated that the appellant had been disrespectful to the respondent's opinion on childbearing, yet the Court had not made any findings in that regard as the parties' divorce matter had been settled by consent. Counsel prayed this Court to find that the learned trial Judge was, during the hearing and determination, biased against the appellant.

Respondent's submissions

Counsel for the respondent argued the grounds in the manner adopted by the appellant.

With regards to grounds 1, 2, 3 and 5 Counsel contended that there was no merit in the submission that the respondent's evidence was filled with major inconsistencies.

Counsel argued that difference in the purchase price stated by the respondent was most likely an innocent slip of the tongue. Nonetheless, counsel pointed out that the respondent's evidence proved that her total contribution to the purchase of the suit land was Ug. Shs. 4,700,000/=.

Counsel denied the existence of any inconsistences in the evidence as to the delivery of the money to the seller. He argued that the true meaning of the words used should be understood in context that the acquisition of the suit land was a joint project which the respondent undertook with her then partner, the appellant.

On whether the suit property was matrimonial property, counsel submitted that on the basis of the case of Muwanga *vs. Kintu, Divorce High Court Appeal No. 135 of 1997* (unreported) a matrimonial home is that which the parties chose to call home. Counsel also referred to the

English cases of *Chapman vs. Chapman [1954] AC 429* and *Falconer vs. Falconer (1970) 3 ALLER 449* for the proposition that where the law makes no explicit provision for sharing of property, the Court has to ascertain whether there exists any applicable resulting or constructive trust. Counsel contended that the English cases established a general rule of existence of an intention to share property acquired by persons who intended to live together in a stable relationship. In counsel's view, the proper test for determining whether property is matrimonial property is whether the couple jointly contributed to its purchase and/or development. Counsel submitted that the intention of the parties in this case was to purchase the suit land develop a matrimonial home thereon following their marriage.

Counsel also submitted that as recognized in the *Rwabinumi case* (supra), courts recognize the respective monetary and/or non-monetary contributions when apportioning the share each spouse will take in a matrimonial home. Thus, in the present case, it was the non-monetary contributions of the respondent like scouting for the land on which the matrimonial property stands and also physically participating in the building of the matrimonial property that entitled the respondent to an equal share although she made less monetary contributions. In counsel's view, the fact that the respondent's contribution was made before marriage was irrelevant. Counsel further contend that for this court to hold that the suit property was the sole property of the appellant would cause grave injustice and would create a dangerous precedent that overlooks contributions made before marriage. Counsel urged this Court to sustain the learned trial Judge's finding that the suit property was matrimonial property.

Further, counsel supported the learned trial Judge's decision to order the parties to share the suit property equally. Counsel submitted that the submission for the appellant that the suit property having been acquired before marriage was the sole property of the appellant should be rejected considering that the respondent's evidence was that she contributed to the construction and development of the suit property from the time of purchase to completion. Counsel referred this Court to the case of *Bernard vs. Joseph [1982] 3 ALL E.R. 162* where two people in an unofficial

domestic partnership jointly purchased a house and lived there like a married couple. The Court held that each person was entitled to a beneficial interest in the house and that the apportionment of shares was to be done using the principles for a married couple. The Court also held that it was necessary to determine whether the parties had a degree of commitment similar to that of a married couple. Counsel contended that applying the said authorities to the present case, the appellant and respondent conducted the relationship prior to their marriage as would be expected of a married couple. They even had children and were committed to each other before getting married, and eventually got married. As such, argued Counsel, the principles articulated in the *Bernard case (supra)* are applicable.

Counsel also submitted that there arises a rebuttable presumption in favour of equal division of matrimonial property at divorce as articulated in the case of *Muthembwa vs. Muthembwa [2002] 1 EA 186*.

Counsel further contended that the appellant's argument that monetary and/or non-monetary contributions by the respondent to the purchase and development of the suit property were irrelevant because they were made prior to the parties' marriage, and could not turn the property into matrimonial property, was not raised before the trial Court and cannot be sustained in this appeal.

With regard to ground 4, Counsel refuted the appellant's submissions alleging bias against the learned trial Judge. He contended that the instances alleging bias in the learned trial Judge's notes of the proceedings were merely recordings of the impressions the learned trial Judge took of the witnesses as she saw them testify. Counsel also refuted the submission that the learned trial Judge considered the respondent's evidence but disregarded the appellant's evidence and contended that the learned trial Judge considered the appellant's evidence but did not believe it.

As for the submission that the leaned trial Judge unfairly found the appellant to have thrown the respondent out of the suit property, counsel submitted that the statements in this regard were just a matter of concern made *per curiam* and did not taint the decision of the trial Court.

Appellant's submissions in rejoinder

Counsel for the appellant, in rejoinder to the respondent's submission, stressed the statement in the *Muwanga case (supra)* that matrimonial property, being property to which each spouse is entitled is that property which the parties chose to call home and to which they jointly contribute to. Counsel maintained that the respondent was not a spouse of the appellant at the time the land for constructing the suit property was purchased, and merely because she contributed did not make her a spouse nor did it entitle her to the property.

On the respondent's submission that the respondent contributed to the purchase of the relevant land before and after the marriage, counsel rejoined that this was incorrect as the respondent's evidence was that her alleged contribution was made prior to the marriage.

As for the respondent's reliance on the *Bernard case (supra)*, counsel submitted that the facts of that case were distinguishable, and the principles articulated inapplicable to the present case. Counsel also submitted that the *Muthembwa case (supra)* concerned property acquired during marriage and was for that reason distinguishable from the present case which concerns property acquired before marriage.

With regard to the submission that the appellant was raising a new issue that the suit property was not matrimonial property because the respondent contributed to its development before her marriage to the appellant, counsel for the respondent rejoined that the issue was canvassed in evidence in the trial Court and was therefore not a new issue.

On the respondent's submission that the learned trial Judge's comments did not show bias but were just a recording of demeanour, counsel rejoined that the comments went beyond mere expression of demeanour and gave a reasonable appearance of bias.

Duty of the court as a 1st appellate court

As a 1st appellate court, it is the duty of this court to re-appraise all evidence that was adduced before the trial court and come to its own conclusions of fact and law while making allowance for the fact that the court neither saw nor heard the witnesses. (See *Rule 30 (1)(a) of the Judicature (Court of Appeal Rules) Directions*, S.I 13-10, *Fredrick Zaabwe vs. Orient Bank Ltd Civil Appeal No. 4 of 2006).*

Similarly, in *Kifamunte Henry vs. Uganda SCU Cr. Appeal no. 10 of 1997* the Supreme Court of Uganda held that:

> *"The first appellate court has a duty to review the evidence of the case, to reconsider the materials before the trial judge and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."*

It is with the above principles in mind that I will proceed to resolve the appeal starting with ground 1. Then I will consider grounds 2,3 and 5 jointly and end will ground 4 separately.

Resolution of the Appeal

Ground 1 - Status of property Acquired before marriage

The appellant's first ground of appeal is that the trial Judge erred in holding that the suit property is matrimonial property. The appellant argued that he purchased the property before marrying the respondent in 2005, developed it single-handedly and the respondent made no contribution to its purchase and development since she had no income generating activity at the time and was busy schooling.

There is no doubt that what amounts to a "*matrimonial property*" is not an issue which can be resolved with scientific precision; it depends on the circumstances of each case. The Supreme Court in *Rwabinumi v Bahimbisomwe, Supreme Court Civil Appeal 10 of 2009 [2013] UGSC 5* adopted the formulation made by Bbosa J. (as she then was) in *Muwanga v. Kintu, High Court Divorce Appeal No. 135 of 1997,* (Unreported), as a good starting point. In that case (the *Muwanga case* above), Bbosa J., stated as follows:

> *"Matrimonial property is understood differently by different people. There is always property which the couple chose to call home. There may be property which may be acquired separately by each spouse before or after marriage. Then there is property which a husband may hold in trust for the clan. Each of these should, in my view be considered differently. The property to which each spouse should be entitled is that property which the parties chose to call home and which they jointly contribute to."*

A review of the evidence on the court record reveals that the appellant and respondent while still cohabiting experienced the challenges of renting and shifting from one rented house after another and wanted to settle as a family in their own family house. They went ahead to acquire an undeveloped plot of land for purposes of constructing on it their family home. There are varied testimonies of the role of each party in the process of acquisition of the plot. The property was thereafter developed over a period of time and the family eventually went to settle and live there as its family home. Even after the solemnization of the marriage between the appellant and the respondent in 2005 the family continued living in the property as its family home. Even if the purchase and the bigger part of the development of the property into a family home took place before the solemnization of the marriage of the appellant and respondent, I am satisfied that the intention of the parties was having the property as a family home. This overriding character of the property continued even after the solemnization of their marriage in 2005. In the circumstances, I would find that the acquisition of the suit property before the parties were formally married, and the property purchase agreement being written in the sole names of the appellant did not by themselves disqualify the contested property from being treated in the same manner as a matrimonial property which parties acquire after marriage. Ground one would accordingly fail.

Spousal Contribution

The gist of the appellant's complaint in grounds 2, 3 and 5 of the appeal is about how the trial Judge evaluated the evidence about the respondent's contribution to the matrimonial property and arrived at the conclusion that the respondent was entitled to a 50% share in it.

From the evidence of the respondent, her contribution to the matrimonial home was made in both monetary and non-monetary terms and spread over a period of time starting from the stage of acquisition of the vacant plot on which the matrimonial house was built, through developing the empty plot into a matrimonial house and furnishing the house. During the examination-in- chief, the respondent testified that her contribution at the purchasing stage as follows: That with the help of a land broker she identified the plot for purchase at Ugx 4,700,000/=. She then contributed cash amounting to Ugx 400,000/= towards the purchase price; while the appellant paid Ugx 1,300,000/=. The balance was paid using funds given to the appellant and respondent by a Catholic priest. The respondent also contributed Ugx 270,000/= towards the fencing of the plot.

At the construction stage, the respondent stated that with the funds given to her by the appellant, she bought the bricks for construction of a pit latrine. She fed or paid the workers who did the ground levelling of the plot in readiness for construction of the main house to commence. She contributed Ugx 200,000/= towards purchase of concrete stones. She participated in collection of the stones and bricks purchased for the foundation of the house. Thereafter, she kept going to the site to supervise the works; prepared and/or bought food for the workers using funds from the appellant. On diverse occasions she bought cement, timber and other building materials for the construction works still using funds from the appellant. Together with the appellant, they personally cast the ceiling of the dinning and sitting rooms in response to the high labour prices which their workers wanted to charge them.

The respondent further testified that when they entered the house in 2002, she furnished it. That she lived in the house upto 2009 when the appellant locked her out and she had to sleep in her workshop as a refugee.

In cross examination, the respondent stated that construction started in 1998. The couple had four children all born before the solemnisation of the marriage. She had two maids, and she shared the housework chores with them. That the appellant did not take the children to school every day. That the appellant did not construct the matrimonial house alone. Her contribution was in part financial and in part physical. That she was forced out of the matrimonial home by the appellant. That the appellant was skilled in construction.

On his part, the appellant testified that he was employed by Verona Fathers as a Maintenance Technician. He also does consultancy work. He denied that the respondent made any contribution to the suit property. He testified that at the time of the construction of the suit house, the respondent was totally dependent on him. They sired four children and he paid for their school fees. He solely paid the bills for renting, water, electricity, food, and medical care for the family. He tendered into court the bank deposit slips and other documentary evidence of payment of the fees, water and electricity bills.

The appellant further testified that he also paid for what he termed the "late education" of the respondent at Nakasero Primary School and the subsequent studies she undertook leading to the award of a Certificate in tailoring and the Diploma in designing and dress making. He paid for the house helpers as they were the ones who cooked food, washed clothes, and looked after the children since the respondent had started schooling.

With regard to the purchase and construction of the suit property, the appellant stated that the appellant did not participate in any of the stages involved. The appellant testified that he bought the vacant plot of land from Makubuye Kasolo at Ugx 4,000,000/= which he paid in cash in one lumpsum. The appellant tendered into the evidence the purchase agreement. That he got to know

of the availability of the land for sale from the seller's brother who was also the appellant's gate keeper, a one Musisi.

The appellant testified that he had workers who did the different tasks at the different stages of construction of the suit house. That cooking for the workers was done by a one Evaristo and not the respondent. Evaristo was one of the workers on the site and paid by the appellant. That he did the purchase of the building materials himself and would go to inspect the works during lunch and evening. The appellant tendered in evidence the receipts for some of the materials purchased which included Kajjansi tiles. The appellant denied the respondent's claim to have supervised the construction works and stated that she went to the site "as a spectator or for tourist purposes". The appellant acknowledged that the respondent went once to purchase building material with one of the appellant's workers, a one Simon.

The appellant stated that he personally installed the water and electricity in the house.

Lastly, the appellant said that he took the respondent to the driving school. It was while learning how to drive that she met one of the instructors, a one Onencan Patrick, with whom she eloped.

The trial Judge believed the respondent's evidence in preference to that of the appellant and concluded thus:

> *"While the contract for the land upon which the matrimonial home stands is in the name of Mr. Joseph Waigo Ambayo alone, I find that the house nevertheless belongs to the couple jointly and in equal share".*

It is not very clear as to how the trial Judge computed the respondent's contribution in the suit property and determined it as equal to fifty percent. But what is clear is that this case resurrects the perennial debate about the rights of spouses in matrimonial property upon the breakdown of the marriage.

The law on apportionment of matrimonial property

Before the enactment of the Constitution of the Republic of Uganda,1995, the property rights of married persons in Uganda in respect of the matrimonial property were governed by the Married Women's Property Act, 1882 of England which we inherited as a Statute of general application, and the persuasive judicial interpretation of that law. This continued to be the situation in Uganda upto 1995 despite the fact that in England itself the legal regime regarding married persons' property had been revised by their Parliament to cater for the changing times and aspirations through the following legislations: The Matrimonial Homes Act. 1967, The Matrimonial Proceedings and Property Act, 1970 and The Matrimonial Causes Act, 1973.

After the enactment of the 1995 Constitution of Uganda, decisions regarding the property rights of married persons are now governed by Article 31(1)(b) of the Constitution of the Republic of Uganda,1995 which provides for equal rights of spouses in the following terms:

> *"A man and a woman are entitled to marry only if they are each of the age of eighteen years and above and are entitled at that age…to equal rights at and in marriage, during marriage, and at its dissolution."*

The Constitution also set out the other more general principles which court should always be mindful about when dealing with property rights of spouses namely: the supremacy of the Constitution (***Article 2***); equality and non- discrimination of all persons ***(Article 21)***; the right to private property ***(Article 26)***; rights of the family ***(Article 31)***;affirmative action in favour of groups marginalised on the basis of gender, age, disability, or any other reason created by history, tradition or custom ***(Article 32***); rights of women ***(Article 33)***;rights of children ***(Article 34)***; the general rules of international law and Conventions ratified by Uganda as part of our law ***(Article 123)***; and the values, norms and aspirations of the people of Uganda ***(Article 126(1)***.

The Court of Appeal of Kenya at Nairobi *(Waki, Azangalala, & Kiage, JJA)* in *P N N Versus Z W N, Civil Appeal No. 128 of 2014* had occasion to consider at length Article 45 (3) of the Constitution of the Republic of Kenyan, 2010 which is in ***pari materia*** with Article 31(1)(b) of the 1995

Constitution of Uganda and held that the equality of spouses guaranteed by the Constitution is not synonymous with equal proprietary entitlement and does not give automatic half-share in matrimonial property to a spouse whether or not he or she earns it.. That propriety entitlement of a spouse is dependent on his/her contribution towards the matrimonial property. Kiage, JA, put it thus:

> *'...while I take cognizance of the marital equality ethos captured in **Article 45 (3)** of the Constitution, I am unpersuaded that the provision commands a 50:50 partitioning of matrimonial property upon the dissolution of a marriage. The text is plain enough;*
>
> > ***"45(3) Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage."***
>
> *To my mind, all that the Constitution declares is that marriage is a partnership of equals. ...*
>
> *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 would repeat what we said in **Francis Njoroge Vs. Virginia Wanjiku Njoroge,** Nairobi Civil Appeal No. 179 of 2009;*
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> > ***" ... a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the Court of Appeal of Singapore in LOCK YENG FUN v CHUA HOCK CHYE [2007] SGCA 33:***
> >
> > ***'It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and, by its very nature cannot be – e precise mathematical exercise'."***

The rationale for aligning a spouse's property entitlement with his/her respective contribution was stated by Kiage, JA, in the case of *P N N Versus Z W N (ibid)* thus:

> *"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."*

I agree that the decision in *P N N Versus Z W N (ibid)* is a good statement of the law. But I hasten to add that the spousal contribution to the matrimonial property can be direct or indirect; monetary or non-monetary provided it enables the other spouse to either acquire or develop the property in question. See: *Rwabinumi v Bahimbisomwe (supra).*

Spousal contribution is a question of fact. Courts recognise that the evaluation of the evidence of each spouse's contribution is no mean task. The House of Lords in *Pettitt V Pettitt [1969] 2 ALL ER 385 (HL)* stated that the extent of the share of each spouse is a question of fact in each case, and the mere fact that evaluation of the respective shares may be difficult for want of clear evidence does not justify the wholesale application of the maxim "equality is equity". The court can draw inferences from the conduct of the spouses. Such conduct may include contribution towards purchase, mortgage repayments *et cetra*.

It is with the above principles in mind that I now proceed to reappraise the evidence of the respondent's contribution to the suit property as presented to the trial court.

Evidence of the respondent's Contribution

The evidence in this case was largely oral; it consisted of the respondent's word against the appellant in many aspects.

From her oral testimony, the respondent's contribution towards the matrimonial home was both monetary and non-monetary. The detailed testimony of the respondent has already been set out earlier on in this judgment that I find no need to reproduce it here. However, I take special note of the respondent's claim that she participated in the construction of the suit property through cooking food for the workers, sourcing for building materials and delivering them to the construction site and supervising the construction of suit property. The respondent denied the participation of the respondent as claimed. The respondent stated that save the one occasion when the respondent went on a lorry with one of his workers, Simon, the respondent was not involved in the purchase of materials. The appellant denied that the respondent was involved in feeding the workers on the site and inspection of the suit property. The appellant stated that he did the materials' purchases himself and did the supervision of the construction himself through checking daily on the works.

As I have already stated, the trial judge believed the respondent's testimony in preference to that of the appellant. No reasons were set out in the judgment for the preference.

The challenge before the trial judge of extracting the truth from falsehood contained in oral evidence of the parties is no mean one for any judicial officer. The challenge is even higher in such cases as the instant one where all the witnesses were not only interested parties, but the subject matter resurrects highly emotional issues and memories commonly associated with broken matrimonial relationships like betrayal, unmet expectations and, at times, a feeling of a shuttered future on the part of the belligerents or any one of them.

In the face of conflicting oral testimonies, one of the tools used to extract the truth from falsehood is ascertaining whether the evidence of a particular witness in respect of any particular fact or set of facts is in conformity with real life experience and collateral circumstances. If the testimony tallies with what happens in real life in the given situation, then the probability is that it is truthful. Where the testimony deviates from what ordinarily happens in real life, then the probability is that

it is untruthful unless a reasonable explanation is given to account for the deviation. The above principle is set out in Sarkar's Law of Evidence, 14th Edition, 1993 Reprint, Volume 1, at page 924 – 925 thus:

> *"There is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and examine which of the two cases best accords with these facts, according to the ordinary course of human affairs and the usual habits of life. The probability or improbability of the transaction forms a most important consideration in ascertaining the truth of any transaction relied upon [Bunwari V. Hetmarain, 7MIA 148; see Ramgopal V. Gordon Stuart & Co., 14 MIA 453; See Leelamund v. Bassiroonnissa, 16 WR 102]."*

In the instant case, the couple was constructing its matrimonial home in Mutungo, Nakawa Division in Kampala to escape the challenges of renting. In real life, this is a very important milestone in the life journey of any couple as it ordinarily brings psychological safety and security for the family. Further, a matrimonial house, especially of the type in issue, which was stated to be made of Kajjansi tiles, is ordinarily a product of high personal sacrifice and discipline through lifetime savings or postponed gratification or a mortgage. On this account, construction of a matrimonial house, especially as a first-time project, is in the ordinary course of human affairs valued very highly. This is the overall context in which the testimony of the witnesses is to be evaluated.

The respondent stated that she purchased the building materials and also supervised the works. On the other hand, the appellant rejected the respondent's claims and stated that he was the one who used to personally purchase the building materials and do the supervision of the construction works. That the respondent was involved only once when she went to purchase the building materials with one of their workers, Simon. Faced with the two versions, which one is more probable according to the ordinary course of human affairs and the usual habits of life?

In seeking to establish whose version was more in conformity with reality, the starting point is an examination of the capabilities needed to do what they claimed to have done in a real life

situation. The appellant was a practicing technician and had experience in construction. This fact was acknowledged by the respondent herself during cross examination when she stated that her "husband is *skilled in construction*". On the other hand, the respondent was a Primary Seven graduate who did not demonstrate before the trial court any skills or experience of having previously supervised or worked on any construction project. In those circumstances, it is not logical, in the ordinary course of human affairs, for the appellant, who is knowledgeable and skilled in construction, to let the respondent, who has no known skills, knowledge and experience, buy materials and supervise such a highly treasured project and then the project materialises without mention of any hitch. In the real world, where an unsuitable person is placed in a position to supervise the construction of a valuable project he/she is not qualified to do, hitches are bound to arise right from sourcing materials to the other aspects. Supervision which qualifies as a contribution to the construction of the suit property would involve checking that what is being constructed at the site is in accordance with what was planned, or that the employees at the site and their supervisors are doing their job as agreed. All these require some basic knowledge, or skills or experience none of which the respondent possessed.

Even the purchase of construction materials required some working knowledge, skills, or experience which were not demonstrated by the respondent before the trial court. In the real life situation, construction materials as ordinary as sand and concrete are diverse and/or of different types. And so are the tiles. Decisions as to which particular type of material to be purchased require some basic knowledge or experience or skills.

In the circumstances the appellant has a valid complaint about the valuation of the evidence by the trial court. That is why the appellant's evidence that the only time the respondent went to purchase materials for the site, she went with one of the site employees, a one Simon, on the lorry appears more probable and credible. Presence of the employee of the site when the respondent was going to buy some building materials insulated the respondent against the skills and knowledge gap on her part.

However, I am also mindful that in real life, it is also true that construction of a home raises excitement and a sense of achievement on the part of a spouse and other family members irrespective of the knowledge and experience they possess in the sector. Each step attained in the construction process ordinarily is exciting and each development witnessed on any visit stimulates the interest to come back and see what is going on. As such, in the ordinary course of affairs, it is highly probable and believable for the respondent to visit the sight regularly to witness of the achievements being registered. But in my view, such visits by themselves do not contribute to the value of the project unless accompanied by some other action which progresses the project. Needless to add, the excitement is self-rewarding in the sense that happiness and excitement generated improve one's health and life span.

One of the circumstances under which the appellate court can overturn a finding of fact of the trial court based on demeanour notwithstanding that the appellate court did not have the opportunity to observe the demeanour of the witness, is where it is shown that the trial judge failed to appreciate the weight or bearing of circumstances admitted or proved. See: *Peters v Sunday Post Limited [1958] EA 424*.

In the instant case, the failure of the trial judge to appreciate the significance of real-life experience and collateral circumstances when accepting the truthfulness of the respondent's evidence would justify this court not to allow the trial judge's finding that the respondent contributed to the suit property by purchasing building materials and supervising its construction.

As regards cooking, it likewise does not conform to real life possibilities. At the material time the respondent was schooling and/or starting to put in practice the practical skills learnt from school. At home, two maids had to be employed to assist her in the execution of the house chores like cooking, washing, and looking after the children. In those circumstances, it beats ordinary logic why the respondent would be deployed by the appellant to cook for the site employees in preference to letting her focus on schooling and acquiring her tailoring skills.

However, I accept the trial judge's findings that the respondent was on some occasions the pay master of the site employees using funds given to her by the appellant. I would also accept that the respondent contributed to the purchase of the suit plot and its fencing.

And this takes me to the next aspect about the valuation of the respondent's contribution by the trial Judge, namely: quantification of the non-monetary contribution of the respondent towards the matrimonial property.

Valuation of the non-monetary contribution

As already stated in this judgment, the respondent's contribution was both in monetary and non-monetary forms. The details of the respondent's contribution have already been set out in this judgment. The total sum of both the monetary and non-monetary contribution was, in the finding of the trial Judge, equal to 50% of the value of the suit property.

There is no doubt that the non-monetary contribution of spouses is valuable and of great economic significance at the family and national or macro level. At the global level, the non-monetary contribution of spouses is part and parcel of what is termed as the "*unpaid care and domestic work*". The expression "*unpaid care and domestic work*" is used to cover all forms of work not compensated by way of wages which women and men carry out on a daily basis. It includes caring for the children, elderly and the sick members of the family, household chores like laundry, grocery shopping, cooking, cleaning, construction and repairs, cultivating food for the family subsistence, fetching water and firewood et cetra. The International Labour Organisation (ILO) estimates the value of unpaid care and domestic work to be as much as 9 percent of global Gross Domestic Product GDP (USD 11 trillion), with women's contribution at around 6.6 percent of GDP compared to men's at 2.4 percent of GDP. See: *https://www.apec.org/publications/2022/03/unpaid-care-and-domestic-work-counting-the-costs*

The aforesaid notwithstanding, the issue before this court is about quantum assessment or giving a monetary value to the non-monetary contribution made by the respondent towards the matrimonial property so that the court can acknowledge it appropriately without any discrimination against her on the basis of her gender and/or in furtherance of the principles of equality. And this raises a very pertinent question: Are monetary principles of any relevance when court is establishing the value of the non-monetary contribution of a spouse to the matrimonial property?

In *Rimmer Vs Rimmer [1952] 2 All E.R. 863*, the Court of Appeal of England appears to have advocated for courts being less strict when considering rights between married persons than when considering rights between strangers. Lord Justice Romer stated the caution at page 870 thus:

> *"It seems to me that...cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to purchase of property..."*

Whereas I agree with the differential treatment of married persons in disputes relating to the property rights between themselves (*inter se*), I believe that monetary value principles cannot completely be ignored when the court is ascertaining the value of the non-monetary activities which it accepts as proved by any particular spouse as being the spouse's non-monetary contribution to the matrimonial property. A common principle in determination of the unit value or cost of labour or services in the world of employment (otherwise termed as "remuneration of labour") is the Knowledge, skills and attitude/character (KSA) possessed by the labourer or service provider. It is on this account that *inter alia,* in the usual state of affairs in the construction sector the unskilled labourers (also commonly known as "porters") will be paid for their labour at a rate different from that of a foreman or supervising architect even if they are all contributing to the construction of the same building for the same amount of time.

The other common principle in the world of money which determines the value of any service rendered is the value or cost of similar or substitute services available on the labour or service market.

In the instant case, the respondent having set out in detailed terms the activities which constituted her contribution to the matrimonial property, the trial court, after assessing the credibility of the evidence before it, ought to have borne at the back of its mind the money's worth of such activities while not losing sight of the fact that the dispute involves rights of spouses *inter se* and warrants less strictness than that exercised by a court when considering the dealings between "strangers" which are ordinarily at "***arm's length***". Then an appropriate discount ought to have been made on that account in conformity with the principle of according less strict consideration of the evidence of proof of contribution and valuation in cases involving spouses *inter se*. Instead, the trial Judge appears to have taken the easier route summarised in the equity maxim, "*equality is equity*". In *Gissing Vs Gissing [1970] 2 All E.R. 780 (HL)*, Lord Reid stated the risk in such an approach at page 783 thus:

> *"I think that the high sounding brocard 'equality is equity' has been misused. There will of course be cases where a half is a reasonable estimation, but there will be many others where a fair estimate might be a tenth or a quarter or sometimes even more than a half."*

Non-monetary compensation for non-monetary contribution

A review of the trial record indicates that the appellant started cohabiting with the respondent when she was about 19 years old and had not attained the Primary Leaving Certificate level of education. The appellant paid for the respondent's fees and saw her study primary level education from Nakasero Primary School, and rise through the Certificate level in tailoring, up to the stage of acquisition of the Diploma in designing and dress making. She also obtained driving skills. However, it is not shown anywhere in the judgment of the trial court took into account these uncontested facts when evaluating the respondent's final stake in the matrimonial property.

Whereas it is common in marriages for spouses to render "unpaid care and domestic work", it is also not uncommon for the spouse who has been the beneficiary or recipient of the "unpaid care and domestic work" to reciprocate or otherwise reward the other in monetary and/or non-monetary terms as they go along their marriage journey. In the matter before this court, the appellant enabled the respondent to acquire formal education up to the Diploma level from an unknown level which was below primary seven level. The cost of this venture can be evaluated in terms of the school fees and other money spent by the appellant towards tuition and other scholastic requirements of the respondent. This cost is usually easy to quantify. But the cost or value of the education venture can also be evaluated in terms of what the respondent was disabled from contributing towards the family good as she spent (or invested) her time, presence, and resources at school. This is what economists term as being the "opportunity cost" of the education venture.

There is also another angle to education, namely: its transformative value. Ordinarily, education transforms the individual and their world outlook. In the matter before us, the respondent was transformed from an individual who was totally dependent on the appellant at the time they started cohabiting, into an individual who was self-employed as a seamstress, tailor, and baker at the time the marriage broke up.

The transformative aspect of education may take the form of increasing one's life opportunities which include one's peers and circles of interaction.

Nelson Mandela, the first Post-Apartheid President of South Africa, stated the transformative nature of education in the following terms:

> *"Education is the most powerful weapon which you can use to change the world...*
>
> *Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that the son of a mine worker can become the head of the mine, that a child of farm worker can become the president of a great nation. It is what we make out of what we have, not what we are given, that separates one person from another." See: https://borgenproject.org/nelson-mandela-quotes-about-education*

In my view, by the appellant investing in the respondent's education, he was in a sense paying her and thereby reduced on the quantum of her claim for the unpaid care work. The trial Judge erred not to have taken into account this mode of payment. Indeed, one of the immediate trigger events of the divorce proceedings was the suspicion by the appellant that the respondent had developed an inappropriate relationship with one of her driving instructors at the time the appellant had sent her to the driving school to acquire skills for driving vehicles. Whether the suspicion was founded or not is not the issue at this stage. To me, it simply shows that the different levels of education through which the respondent was exposed widened her world and granted her diverse people with whom to interact, refine and redefine her next stage in her life journey.

The importance of networks was aptly summarized by Porter Gale in his quotation which summarizes his book thus: "*Your network is your net worth.*" See: *https://www.amazon.com/Your-Network-Net-Worth-Connections*

The upshoot of the above analysis of the law and evidence of the respondent's contribution is that I would allow grounds 2,3 and 5 of the appeal.

Ground 4 – Bias

I have noted the appellant's allegations of bias against the learned trial Judge, but I am not satisfied that the claim of bias has been made out against the learned trial Judge on the basis of the notes alluded to in the appellant's submissions. I think that those notes represented the learned trial Judge's assessment of the credibility of the evidence given by both parties and did not indicate bias. I would also disallow ground 4.

Remedies

1) I would reject ground one of the appeal.

2) I would allow grounds 2, 3 and 5 of the appeal with the consequence that the order of the trial Judge awarding the respondent 50% share in the suit property would be set aside.

3) I would likewise dismiss ground 4 of the appeal.

4) Having allowed grounds 2, 3 and 5 of the appeal, it becomes incumbent upon this court to determine the respondent's share in the suit property. This is pursuant to Section 11 of the Judicature Act which grants this court the same powers as the High Court when resolving an appeal from the High Court. Section 11 of the Judicature Act provides as follows:

> *"**11. Court of Appeal to have powers of the court of original jurisdiction.***
>
> *For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated"*

After re-evaluating the evidence before the trial court and trying my best to weigh the peculiar circumstances of this case, while not losing sight of the principles which I have discussed in detail herein above, I would declare that the respondent is entitled to 20% share in the suit property.

5) I would consequently order that the suit property be valued by the Chief Government Valuer within three months of this judgment.

6) The appellant shall within six months of this judgment pay the respondent 20% of the value of the property as established by the Chief Government Valuer, failing which execution shall issue at the cost of the appellant.

7) As far as costs are concerned, I would order each party to bear its costs in this court and the High Court. The reason for this is that this being a family matter whose resolution has so far taken approximately 10 years to resolve through our court system, this court should not

contribute to a continuation of its non-closure by way of proceedings for taxation and recovery of costs.

Dated at Kampala this 15th day of Nov 2022.

MUZAMIRU MUTANGULA KIBEEDI

Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0100 OF 2015

AMBAYO JOSEPH WAIGO::APPELLANT

VERSUS

ASERUA JACKLINE::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala before Bamugemereire, J. (as she then was) dated 31st March, 2014 in Divorce Cause No. 10 of 2012)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA
HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the advantage of reading in draft the judgment prepared by learned brother Kibeedi, JA. I agree with it and for the reasons given therein, I would partially allow the appeal and make the orders he has proposed.

As Gashirabake, JA also agrees, the Court, by a unanimous decision, partially allows the appeal and enters judgment for the appellant on the terms stated in the judgment of Kibeedi, JA.

It is so ordered.

Dated at Kampala this ..... day of.....2022.

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ELIZABETH MUSOKE

Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
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HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA

I have had the advantage of reading in draft the judgment of my learned brother Kibeedi, JA. For the reasons he gives, with which I agree, I too would allow the appeal, in part, and make the orders he proposes.

Dated at Kampala this .....15th..... day of.....Nov.....2022.

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Christopher Gashirabake

Justice of Appeal