



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 75 of 2001

PETER MBURU ECHARIA APPELLANT

AND

PRISCILLA NJERI ECHARIA RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya

at Nairobi (Shields J) dated 27th October, 1993

in

H.C.C.C. NO. 4684 OF 1987 (O.S.)

JUDGMENT OF THE COURT

This is an appeal from the ruling of the superior court (Shields J) dated 27th October, 1993 whereby the superior court declared, among other things, that, the appellant and the respondent who were former husband and wife respectively, were entitled to share Tigoni Farm L.R. No. 6893 comprising of 118 acres in equal shares.

The appellant was employed as a civil servant in 1961 and later joined the Diplomatic service and posted to Moscow where he married the respondent in a civil ceremony on 12th June, 1964. In August 1964 the appellant was posted to Washington D.C. as Charge d' Affairs. In 1967 he was posted to New York (UN) as Head of Mission and in April 1968 he was posted to Addis Ababa as an Ambassador where he worked for 3 years. He returned to Kenya in 1971 and worked as a Deputy Secretary until 1984 when he retired. He was living with the respondent during his service abroad but in view of the appellant's diplomatic status, the respondent was not allowed to work. The appellant bought a house in Langata in 1971 and a plot in Lavington in 1967 on which he constructed a house through a bank loan. He later sold the two properties.

The property in dispute, Twiga Hill Farm in Tigoni, Limuru L.R. No. 6893 comprising of 118 acres was bought in 1972 at a price of Shs.360,000/= . The Loan Agreement dated 10th February, 1972 shows that Agricultural Finance Corporation (AFC) advanced Shs.290,000/= for the purchase of the farm repayable in 30 years but the purchaser had to deposit the balance of Shs.70,000/= with AFC which was to be held in trust until completion. Scanty evidence was given about the payment of the loan at the trial

and during the pendency of the appeal the appellant applied to this Court for taking of additional evidence contained in the affidavit to support the application. The respondent opposed the application and filed a replying affidavit. However, the respondent acceded to the application at the hearing and both the affidavit to support the application and the replying affidavit were deemed as part of the record. The appellant has annexed a statement of account from AFC dated 27th June, 2001 showing that the balance of the loan as at 30th September 1993 (before judgment was delivered on 27th October, 1993) was Shs.94,602.45 which the appellant fully repaid by 30th June, 1996. The respondent annexed a valuation report of the property dated 22nd August, 1995 showing that there is a dwelling house with a swimming pool and outer buildings on the land and that the land under tea is approximately 100 acres (99.80 acres). The property was valued at Shs.60,800,000/= as at 22nd August, 1995.

The respondent holds a degree in social sciences from University of Oregon, U.S.A. The couple was blessed with three children – two born in U.S.A. and the last one born in Kenya. They were all adults at the time the superior court delivered its judgment. After she came back to Kenya, she was employed by the Ministry of Education in 1972 as an Education Officer at a salary scale of ?936p.a. In 1980 she was promoted to Senior Education Officer at a salary of ?2712 p.a. She was briefly employed by Family Association of Kenya. She retired in 1986 to go to self employment as a Management Consultant.

By a plaint dated 9th April, 1987 (*H.C.C.C. No. 1477 of 1987*), the appellant averred that the respondent had on 25th January, 1987 and in the absence of the appellant deserted the matrimonial home taking with her a large quantity of household goods and a motor vehicle. He sought, *inter alia*, declarations that the goods belonged to him and an order of injunction.

In November, 1987 the respondent filed an originating summons under **Section 17** of the **MARRIED WOMEN'S PROPERTY ACT, 1882** (1882 Act) for declarations, *inter alia*, that:

“L.R. 6893 Tigoni Limuru together with the buildings and improvements thereon acquired by the joint funds and efforts of the applicant and the respondent during their marriage and registered in the name of and or in possession of the respondent and are owned jointly by the applicant and the respondent.

2.

3.

4. ***That the said properties (moveable and immovable be sold and the net proceeds be shared equally between the applicant and the respondent (or in such other manner as the court may deem just)***”

The respondent deposed in paragraphs 11 and 12 of the supporting affidavit, thus:

“11. That these purchases were made with the money contributed from both my salary and his and, I claim a 50% share of each properties.

12. That during the period I lived with the respondent as a wife I financially contributed towards the welfare of the family through the purchase of foods, clothing and other expenses which the respondent would otherwise have had to bear alone”.

She disclosed in the affidavit that there were pending divorce proceedings in *Divorce Cause No. 55 of 1987*. On the other hand, the appellant claimed in paragraph 8 of the replying affidavit that:

“8. I bought the Limuru farm for Shs.360,000/= for which I paid Shs.70,000/= from my own savings and borrowed Shs.290,000/= from Agricultural Finance Corporation.

There is still outstanding a total of Shs.205,000/= to AFC which I am still paying. The applicant never paid a single cent towards this transaction”.

In a terse ruling delivered after the date of dissolution of the marriage, Shields J said in part:

“The plaintiff and the defendant are obviously highly educated people, they were both wage earners during the working life, the husband who was Kenyan Ambassador to Ethiopia in the 1970’s probably earned more than his wife. I am however satisfied that the wife (the plaintiff) made substantial indirect contribution or contributions in kind to the family fortune. One of these contributions was the wife taking on the onerous duties of an ambassador’s wife, a task she performed more than adequately as the defendant generously admitted.

In these circumstances, it appears to me that I must apply the Court of Appeal decision in Kivuitu vs. Kivuitu [1991] 2 KAR 241, that is that I must hold that they are entitled to the property in equal shares.

I hold that the subsisting family property that falls for division is the farm at Tigoni No. L.R. 6893, Tigoni a farm consisting of 118 acres or as the farm is mortgaged on equity of redemption therein. The farm is to be divided equally between the parties”.

However, the superior court ordered that Shs.300,000/= being in respect of the value of the goods that the wife had taken from the matrimonial home and Shs.100,000/= being the value of the car taken by the wife altogether in the sum of Shs.400,000/= should be deducted from the wife’s share. The court gave the option to each party to buy the other out and if that could not be achieved, the court ordered the farm to be sold and proceeds shared.

Dr. Kamau Kuria, (a senior counsel) for the appellant has classified the 15 grounds of appeal into four categories. The first category deals with the law applicable in disputes of this kind, particularly the decision of this Court in Kivuitu vs. Kivuitu [1991] 2 KAR 241. The first four grounds of appeal aptly summarises the main legal issue raised in this appeal, thus:

“1. The learned judge erred in embarking on the trial of the suit on the assumption that the obiter dicta of the majority in Kivuitu v Kivuitu 1991 2 KAR 241 were the ratio decidendi of that case.

2. If this Honourable court held in Kivuitu v Kivuitu that equal division of the matrimonial assets is the rule in all cases irrespective of the spouses varying financial contributions direct and indirect in Kenya market economy then the learned trial judge erred in following it as it then was given per incuriam.

3.

4. The learned judge ignored the fact that under the Married Women’s Property Act (1882) the marriage or a marriage has no effect on the spouses property rights.

5. The learned trial judge erred in assuming that a special law of property exists and applied in spouses when they have property disputes”.

Dr. Kamau Kuria intimated before the appeal was heard that he was asking the court to depart from the decision in Kivuitu’s case and thus asked for a bench of five judges in accordance with the practice recommended in Poole v R [1960] EA 62. That is why this bench is so constituted. This Court while normally regarding its own previous decisions as binding is nevertheless free in both civil and criminal cases to depart from such decisions when it is right to do so. (See Dodhia v National & Grindlays Bank Ltd & Another [1970] EA 195. Dr. Kamau Kuria suggested that we should approach the Kivuitu case in either of the two ways; first to hold that for the purpose of the decision in that case, it was not necessary for the court to adopt a course of contribution that does not take into account financial contribution or that if Kivuitu’s case decided that there should be equal distribution then, the court acted in error and this Court should depart from its own decision.

The legal issues raised by Dr. Kamau Kuria make it desirable that we should re-examine **section 17** of the 1882 Act, the construction of the section by the English Courts, the *ratio decidendi* in Kivuitu’s case

and the development of the law in this country.

The Married Women's Property Act, 1882 is of course an Act of general application in Kenya (see I v.1 [1971] EA 278; ***Karanja vs. Karanja*** [1976] KLR 307. **Section 17** of the 1882 Act under which the originating summons was brought provides in the relevant part:

“In any question 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 may make such orders with respect to the property in disputes, and to the costs of and consequent on the application as he thinks fit”. (emphasis ours).

In ***Hine vs. Hine*** [1962] 1 WLR 1124 Lord Denning construed the phrase “as he thinks fit” appearing in **Section 17** of 1882 Act as giving the court absolute discretion to adjust rights of parties to property irrespective of the existing property rights and as if **section 17** was in itself the source of law where the “family assets” were concerned and said at pages 1127, 1128:

“It seems to me that the jurisdiction of the court over family assets under section 17 is entirely discretionary. Its discretion transcends all rights, legal or equitable, and enables the court to make such order as it thinks fit. This means, as I understand it; that the court is entitled to make such order as appears to be fair and just in all the circumstances of the case”.

In ***Pettitt v Pettitt*** [1969] 2 WLR 966 the House of Lords while recognizing that the 1882 Act gave married women full proprietary rights to the properties that they may acquire nevertheless emphatically held that **section 17** of the 1882 Act was purely a procedural provision which did not entitle the court to vary the existing proprietary rights of the parties. It is also clear from that case that the procedure in **section 17** of 1882 Act is not all-embracing for the disputes over property between husband and wife could be resolved by ordinary action (Lord Morris of Borth – Y – Gest at page 976 paragraph C., Lord Diplock at page 994 paragraph H). Lord Up John – at page 989 – paragraph E).

The House of Lords also emphasized that the status of the marriage did not result in any common ownership or co-ownership of the property, and the term “family assets” was devoid of any legal meaning unless it refers to assets separately owned by one spouse. Some excerpts from the Law Lords would make the position very clear. Lord Reid said at page 972 paragraph H.

“I would therefore refuse to consider whether property belonging to either spouse ought to be regarded as family property for that would be introducing a new conception into English law and not merely developing existing principles. There are systems of law which recognize joint family property or *communio bonorum*”.

Lord Morris of Borth – Y – Gest said at page 975 paragraph H:

“One of the main purposes of the Act of 1882 was to make it fully possible for the property rights of parties to the 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, negative any idea that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another”.

On his part, Lord Hobson said at page 987 paragraph B:

“The notion of family assets itself opens a new field involving change in the law of property whereby community ownership between husband and wife would be assumed unless otherwise excluded. This is a matter of policy for Parliament; and I agree that it is outside the field of judicial interpretation of property law”.

Lastly, Lord Upjohn said at page 993 paragraph C.

“My Lords we have in this country no doctrine of community of goods between spouses and yet by judicial decision were this doctrine of family assets to be accepted some such a doctrine would become part of the law of the land”.

All the Law Lords were in agreement, that disputes between husband and wife as to title to or possession of property brought under **section 17** of 1882 Act must be decided by applying settled law to the facts as may be established just as courts do in ordinary suits between other parties who are not so married. The opinion of Lord Upjohn at page 989 paragraph E, F, G comprehensively and more lucidly states the law thus:

“In my view, section 17 is a purely procedural section which confers upon the judge in relation to questions of title no greater discretion than he would have in the proceedings began in any Division of the High Court or in county court in relation to the property in dispute, for it must be remembered that apart altogether from section 17, husband and wife could sue one another even before the 1882 Act over questions of property, so that, in my opinion, section 17 now disappears from the scene and the rights of the parties must be judged on the general principle applicable in any court of law when considering questions of title to property, and though the parties are husband and wife, questions must be decided by principles of law applicable to the settlement of claims between those not so related while making full allowances in view of that relationship.

In the first place, the beneficial ownership of property in question must depend upon the agreement of parties determined at the time of acquisition. If the property in question is land there must be some lease or conveyance which shows how it was acquired. If that document declares not merely in whom the beneficial title is to rest that necessarily concludes the question of title as between the spouses for all time and in the absence of fraud or mistake at the time of transaction, the parties cannot go behind it at any time thereafter even on death or the break-up of the marriage”.

Later at page 991 paragraph H, Lord UPjohn proceeded, thus:

“But where both spouses contributed to the acquisition of property, then my own view (of course in the absence of evidence) is that they intended to be joint beneficial owners, that is so whether the purchase be in the joint names or in the name of one. This is a result of an application of resulting trust”.

Lastly, Lord Upjohn said relying on ***Rimmer v Rimmer*** [1953] 1 QB 63 that whether the spouses contributing to the purchase should be considered to be equal owners or in some other proportions must depend on the circumstances of each case.

The case of ***Gissing v. Gissing*** [1970] 2 All ER 780 was decided by the House of Lords slightly over one year after the decision in ***Pettitt vs. Pettitt***. The facts in that case are not altogether dissimilar to the facts in the instant case. There, the husband during marriage bought the matrimonial home which was conveyed in his name alone. The purchase was financed partly by a loan which the husband obtained from his employer and largely by a mortgage payable by instalments. At no time was there an express agreement as to how the beneficial interest in the matrimonial home should be held. The wife who was earning made no direct contribution to the initial deposit, legal charges or payment of instalments.

The wife however, provided some furniture and equipment. She also paid for her own clothes and her sons' clothes and extras. The husband paid for outgoings on the house and gave the wife a house keeping allowance and paid for the holidays. It was never suggested that the wife's efforts or earnings made it possible for the husband to raise the initial deposit or pay the mortgage instalments. After the dissolution of the marriage, the wife, as can be seen from the speech of Lord Diplock at page 788 paragraphs f – h, claimed one-half undivided share in the house which was the matrimonial house for 10 years. The claim was made not under **section 17** of 1882 Act but by an ordinary originating summons in the Chancery Division. The House of Lords reversed the decision of the Court of Appeal which had allowed the wife's claim holding that on the facts it was not possible to draw an inference that there was a common intention that the wife should have a beneficial interest in the matrimonial house. The House of Lords made it clear that where both spouses contribute towards the purchase of a matrimonial home, but the house is

registered in the name of one spouse alone the question whether the contributing spouse is entitled to a beneficial interest in the matrimonial home is a matter dependent on the law of trust. Lord Diplock expressed the legal position at page 789 paragraph h thus:

“Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based on the proposition that the person in whom the legal estate is vested holds it as a trustee on trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes before the courts the law relating to the creation and operation of ‘resulting implied or constructive trusts’....”

Shortly after the decision in Gissing vs. Gissing the Court of Appeal restated the law in Falconer vs. Falconer [1970] 1 WLR 1333.

That was the state of the English law as at 1970. The case of Kivuitu v. Kivuitu was decided in this Court in 1991. The facts of that case are well known. We only wish to emphasize that in that case the matrimonial property in dispute was bought and registered in the joint names of the husband and wife without specifying the share of each. After the dissolution of the marriage the wife filed an originating summons under **section 17** of the 1882 Act seeking the main order that the matrimonial property be sold and the proceeds be shared equally. The superior court gave the wife one – quarter ($\frac{1}{4}$) share of the property and the husband three – quarters ($\frac{3}{4}$) share of the property. The wife appealed. The husband also cross-appealed contending that as the wife had made no financial contributions, she held the share registered in her name in trust for the husband. This Court found that the parties were entitled to the property in equal shares.

The leading judgment was delivered by Omolo Ag. J.A. (as he then was) who made several observations including the following:

“(i) So that where such a husband acquires property from his salary or business and registers it in the joint names of himself and his wife without specifying any proportions, the courts must take it that such property being a family asset is owned in equal shares.

(ii) Where, however, such property is registered in the name of the husband alone then the wife would be, in my view, perfectly entitled to apply to court under section 17 of the Married Women’s Property Act 1882, so that the court can determine her interest in the property and in that case the court would have to assess the value to be put in the wife’s non-monetary contribution. I can find nothing in Chapman vs. Chapman [1969] 3 All ER 476) Falconer vs. Falconer [1970] 3 All ER 449) or Karanja vs. Karanja [1976] KLR 307) which would force me to the conclusion that only monetary contributions must be taken into account. Any such limitation would clearly work an injustice to a large number of women in our country where the reality of the situation is that paid employment is very hard to come by. The case of Wachtel vs Wachtel [1973] 1 All ER 829 provides full support for the position.

(iii) The wife in the present dispute however, is more than a simple house wife.

(iv) The husband sought to challenge the wife’s title on the ground that the wife was registered as a trustee for himself and the issue of a trust was based on the allegation that the wife had not made any contributions towards the purchase of the land. I have held that the wife in fact made financial contributions towards the purchase of the matrimonial home and the judge’s finding to the contrary was not justified by the evidence.

(v) Even if I had been of the view that the wife had contributed no money at all towards the purchase of the home, I would have gone on to assess her non-monetary contribution as a wife and put a value upon that. As I said earlier it would be extremely cruel to the wife and to the other women in her position that they can only have a share in property acquired during marriage if they can prove financial contribution.

(vi) At any rate this wife made a financial contribution and she and the husband bought the property as a family venture and had it registered in their joint names. They clearly intended to hold in equal shares as a family asset”.

The criticism of *Kivuitu’s* case by Dr. Kamau Kuria is based on two premises or assumptions, firstly, that the decision promulgated the equal division rule without taking into account the proportionate contributions of each spouse; and secondly, that if the court held that non-monetary contributions are to be taken into account in determining the share of each spouse then the decision was reached *per incuriam*. He contended that the applicable principles were correctly stated by this Court in *Kamore vs. Kamore* [2000] 1 EA 80; that actual contribution has to be proved. He asserted that non-monetary contribution by a wife does not entitle her to any share of the property; that this Court cannot recognize non-monetary contribution without usurping the power of the legislature and that any injustice in the law can only be dealt with by the legislature. On his part Mr. Njoroge, learned counsel for the respondent contended that *Kivuitu’s* case has no error. According to him, the *ratio decidendi* in *Kivuitu’s* case is that if there is direct or indirect contribution, the property should be shared equally.

It is not in our view, difficult to decipher the *ratio decidendi* of *Kivuitu vs. Kivuitu*, or the reasons for the decision. We have set out six observations made by Omolo Ag. J.A. in the leading judgment. The ratio is embraced by the observations (i), (iv) and (vi) above. However, it is clear from the judgment of Omolo Ag. J.A. that he awarded the wife a half – share for three reasons. Firstly, the court presumed equal ownership from the fact of registration in joint names, secondly, the wife had made substantial indirect financial contributions towards the purchase of the matrimonial home, and thirdly, the parties had bought the property as a family venture and had intended to hold it in equal shares as a family asset. Masime J.A. made an emphatic finding that the wife made an equal contribution towards the purchase of the property saying at page 244, 2nd paragraph:

“The matrimonial property in issue was clearly purchased as such and on the evidence, both parties contributed towards its purchase and my analysis and evaluation of the evidence at the trial does not lead me to any reason to find that the wife contributed any less to the acquisition of property than the husband”.

On his part, Gachuhi J.A. laid emphasis on the presumption or the legal consequences resulting from the registration as joint tenants. He said at page 243, 2nd paragraph:

“The fact that the property is registered in their joint names means that each party owns an undivided equal share therein”.

And at 3rd paragraph of the same page:

“Because of the conveyance of the property to be held by them as joint tenants, there was a presumption at the time that the intention of the parties was to hold the matrimonial home as joint tenants provided that if one of them died, the other would take the entire ownership”.

The first statement of the law by Gachuhi JA, that in a joint tenancy each party owns an undivided equal share therein is not, with respect, entirely correct. It is in a tenancy in common in equal shares where each tenant owns an undivided equal share in the property. On the contrary, one characteristic of a joint tenancy is that the joint tenants have a unity of interest, that is to say, that, although they have separate rights, the interest of each joint tenant is the same in extent and duration and in reality they are in the position of a single owner. A second characteristic of a joint tenancy is a right of survivorship. On the death of one joint tenant his interest accrues to the other joint tenant(s) by right of survivorship (*jus accrescendi*). However, the joint tenants have a right to sever the joint tenancy in their lifetime in which case the joint tenancy is converted into a beneficial interest in common in equal shares. It is however correct to say that a joint tenancy connotes equality for there is a rebuttable presumption that where two or more people contribute the purchase price of property in equal shares they are in equity joint tenants.

In *PRINCIPLES OF FAMILY LAW* – by S. M. Cretney, 4th Edition 1984, the author summarises the

law at pages 655, 656 thus:

“If the conveyance contains an express declaration of beneficial interests, that is conclusive or (at least) requires a high degree of proof of fraud or mistake if it is to be rebutted. If for example the conveyance states that the parties hold the property upon trust for themselves as joint tenants beneficially, (which presupposes equality), it will be difficult for one of them subsequently to assert that he is entitled to more than 50 per cent, of the sale proceeds”.

In *Kamore vs. Kamore* [2000] 1 EA 81 this Court presumed equality in two properties registered in the name of the husband and wife jointly saying at page 85 paragraph d:

“where property is acquired during the course of coverture and is registered in the joint names of both spouses the court in normal circumstances must take it that such property being a family asset is acquired in equal shares”.

That is of course a rebuttable presumption.

Any doubts as to the *ratio decidendi* in *Kivuitu’s* case were dispelled by Omolo JA himself in *Essa vs. Essa*, Civil Appeal No. 101 of 1995 (unreported) where the learned Judge said in part:

“Since the decision of this court in KIVUITU VS. KIVUITU... the law with regard to the disposal of matrimonial property upon the dissolution of a marriage is fairly well settled. Where property acquired during the subsistence of the marriage is registered in the joint names of the spouses, the law assumes that such property is held by the parties in equal shares. There is of course no presumption and there could not have been any, that any or all property acquired during subsistence of the marriage must be treated as being jointly owned by the parties”.

It is clear that in *Kivuitu’s* case, the court was dealing with a narrow dispute involving the beneficial interest of spouses who are already registered as owners of a property as joint tenants without the registration declaring the beneficial interest of each spouse. There are well defined equitable rights which accrue to each joint tenant from such a registration. Equal contribution results in a joint tenancy unless there is contrary evidence to show that irrespective of the registration there was no equal contribution. In *Kivuitu’s* case, parole evidence was received which justified the finding that the contributions were equal. That case did not lay any general principle of equality applicable to all property disputes between husband and wife as later confirmed in *Essa vs. Essa* (supra). 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”.

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). 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.

On analysis, we have come to the conclusion that ***Kivuitu's*** case was correctly decided both on law and on facts as it is a case where the husband and wife had a joint legal interest and a resultant equal beneficial interest in the property. The court in ***Kivuitu's*** case did not lay any general principle of equal division as suggested. The criticism of the decision on this aspect therefore has no justification whatsoever.

In addition, Dr. Kamau Kuria invites us to find in effect that the decision in ***Kivuitu's*** case that non-monetary contribution by a wife entitles her to a share of property was made *per incuriam* and overrule it on that ground.

It is true that although there was a specific finding in ***Kivuitu's*** case that the wife had made a substantial financial contribution, Omolo Ag. J.A. opined that the wife's non-monetary contributions should be taken into account and a value put on it in these kind of cases. We have already quoted as the second observation what Omolo Ag. J.A. said in ***Kivuitu vs. Kivuitu***.

Dr. Kamau Kuria contended that according to the law, contribution, means financial contribution and that if there is non-monetary contribution, the wife gets nothing. He expressed the view that looking after children, running matrimonial home and such like domestic chores do not constitute financial contribution by the wife.

In ***Nderitu vs. Nderitu*** (supra) Kwach JA concurred with the opinion of Omolo Ag. JA in ***Kivuitu's*** case that the wife's non-monetary contribution should be taken into account and added:

“A wife's contribution and more particularly a Kenya African wife, will more often than not take the form of a backup service on the domestic front rather than a direct financial contribution. It is incumbent therefore upon a trial judge hearing an application under section 17 of the Act to take into account this form of contribution in determining the wife's interest in the assets under consideration”.

Incidentally, Kwach JA in that case considered bearing children as a form of contribution.

It is clear, however, that in that case, the wife was adjudged as having made an equal contribution because the properties in dispute were purchased from income from several businesses which the couple was engaged in and in which the wife was also fully engaged. She was a manager of one wholesale shop.

The first thing to say is that the other members of the court in ***Kivuitu's*** case did not express any view on the issue of the wife's non-monetary contribution. Secondly, what was there said is nothing more than an *obiter dictum*.

Similarly, what Kwach JA said in ***Nderitu's*** case on the status of the wife's non-monetary contribution was not a unanimous decision of the Court and likewise it was an *obiter dictum*.

We have already referred to some speeches of the Law Lords in both ***Pettitt vs. Pettitt*** and ***Gissing vs. Gissing***. It is clear from those cases that when dealing with disputes between husband and wife over property the court applies the general principles of law applicable in property disputes in all courts between all parties irrespective of the fact that they are married. Those principles as Lord Diplock said in ***Pettitt*** are those of English law of trusts. The House of Lords specifically decided so in ***Gissing vs. Gissing***. According to the English law of trusts it is only through the wife's financial contribution, direct or indirect towards the acquisition of the property registered in the name of her husband that entitles her to a beneficial interest in the property.

As Lord Denning explained in his book ***“The Due process of Law”***, 1980, and as the court observed in ***Wachtel vs. Wachtel*** [1973] 1 All ER 829 at page 839 paragraph g, a wife who had made other important non-financial contributions such as staying in the house, keeping it clean, bringing up the children etc was

left without a remedy until the enactment of **The English Matrimonial Proceedings and Property Act 1970** (1970 Act) which came into force on 1st January, 1971 and which empowered the court to make property adjustment orders. That power was re-enacted in **section 24** of **The Matrimonial Causes Act 1973**. In particular, **Section 5 (1) (f)** of the 1970 Act gave court power in considering whether to make a transfer of property to have regard, among other things, to –

“the contributions made by each of the parties to the welfare of the family including any contributions made by looking after the home or caring for the family”.

The ***Wachtel’s*** case (supra) was cited by Omolo Ag. JA. in ***Kivuitu’s*** case as supporting the view that the wife’s non-monetary contributions was to be taken into account and value put on it. It is clear however, that the court was in ***Wachtel’s*** case interpreting the provisions of the English 1970 Act which Act as the court said at page 836 paragraph f, was not merely a codifying statute but a reforming statute designed to facilitate the granting of ancillary relief in cases where marriages had been dissolved. It seems that the 1970 Act rendered applications under **section 17** of 1882 Act unnecessary for the court said at page 837 paragraph d:

“Before the 1970 Act there might have been much debate whether the wife had made financial contributions of sufficient substance to entitle her to a share in the house. The judge said that it “might have been an important issue”. We agree. But he went on to say that since the 1970 Act it was “of little importance” because the powers of transfer under section 4 enabled the court to do what was just having regard to all the circumstances. We agree. We feel sure that registrars and judges have been acting on this view: because whereas previously we had several cases in our list each term under section 17 of the 1882 Act: now we have hardly any”.

The ***Wachtel’s*** case was decided when matrimonial law had already been enacted in England to govern the property rights of husband and wife and when the courts no longer had to resort to the principles of resulting trust which largely governs disputes under 1882 Act. The decision of the majority in ***Burns vs. Burns*** [1984] 1 All ER 244 which was decided under the 1882 Act but after the 1970 Act came into force is a useful illustration of the application of the two regimes of the law. There, a woman who had lived with a man as husband and wife for 17 years and begot two children claimed beneficial interest in the house bought by the man by reason of her contributions to the household over the 17 years they had lived together. Fox L.J. when discussing whether performing domestic duties in the house and looking after the children should be taken into account said at page 254 paragraph b:

“The court has no jurisdiction to make such orders as it might think fair; the powers conferred by the Matrimonial Causes Act 1970 in relation to property of married persons do not apply to unmarried couples. The house was bought by the defendant in his own name and, prima facie, he is the absolute beneficial owner. If the plaintiff or anybody else, claims to take it from him, it must be proved the claimant has, by some process of the law, acquired interest in the house. What is asserted here is the creation of a trust arising from common intention of the parties. The common intention may be inferred where there has been a financial contribution, direct or indirect, to the acquisition of the house. But the mere fact that parties live together and do the ordinary domestic tasks is, in my view, no indication at all that they thereby intended to alter the existing property rights for either of them”.

May L.J. was more emphatic. He said at page 265 paragraph c:

“Finally, when the house is taken in the man’s name alone, if the woman makes no “real” or “substantial” financial contribution towards either the purchase price deposit, or mortgage instalments by means of which the family home was acquired, then she is not entitled to any share in the beneficial interest in that home even though over a very substantial number of years she may have worked just as hard as the man in maintaining the family, in the sense of keeping house, giving birth to and looking after and helping to bring up the children of the union”.

Lord Diplock had earlier said much the same thing in ***Gissing vs. Gissing*** (supra) at page 793 paragraph h:

“where the wife has made no initial contribution to the cash deposit and legal charges and no direct contribution to the mortgage instalments, nor any adjustment to her contribution to other expenses of the house half of which it can be inferred was referable to the acquisition of the house, there is in the absence of evidence of express agreement between the parties, no material to justify the court in inferring that it was a common intention of the parties that she should have any beneficial interest in the matrimonial home conveyed into the sole name of the husband merely because she continued to contribute out of her own earnings or private income to other expenses of the house hold. For such conduct is no less consistent with a common intention to share the day-to-day expenses of the household, while each spouse retains a separate interest in capital assets acquired with their own moneys or obtained by inheritance or gift”.

This Court had occasion in ***Kamore vs. Kamore*** (supra) to clarify the law applicable in disputes of this kind. What this Court said at page 89 paragraph b is worth repeating:

“We would like to add our observations, that is to say, that until such time as some law is enacted, as indeed it was enacted in England as a result of the decision in *Pettitt vs. Pettitt* and *Gissing vs. Gissing* to give proprietary rights to spouses as distinct from registered title rights section 17 of the Act must be given the same interpretation as the Law Lords did in the said two cases. Such laws should be enacted to cater for the conditions and circumstances in Kenya. In England the Matrimonial Homes Act of 1967 was enacted which was later replaced by the Matrimonial Proceedings and Property Act of 1970. The Matrimonial Causes Act of 1973 also made a difference”.

In ***Pettitt v. Pettitt*** (supra) Lord Hobson was of the view that some injustices that may exist in property rights between husband and wife involve matters of policy which is outside the realm of judicial interpretation and which can only be corrected by the Parliament (see page 987 para. B and particularly para. G where he said:-

“I do not myself see how one can correct the imbalance which may be found to exist in property rights as between husband and wife without legislation.”

In the light of those authorities, it is our respectful view that both Omolo Ag. JA. and Kwach JA., though, undoubtedly guided by a noble notion of justice to the wife were ahead of the Parliament when they said that the wife’s non-monetary contributions have to be taken into account and a value put on them.

It is now about seven years since this Court expressed itself in ***Kamore v Kamore***, but there is no sign, so far, that Parliament has any intention of enacting the necessary legislation on matrimonial property. It is indeed a sad commentary on our Law Reform agenda to keep the country shackled to a 125 year-old foreign legislation which the mother country found wanting more than 30 years ago! In enacting the 1967, 1970 and 1973 Acts, Britain brought justice to the shattered matrimonial home. Surely our Kenyan spouses are not the product of a lesser god and so should have their fate decided on precedents set by the House of Lords which are at best of persuasive value! Those precedents, as shown above, are of little value in Britain itself and we think the British Parliament was simply moving in tandem with the times. Human rights issues, and in particular women’s rights issues, took centre stage on the global theatre from the 1960’s. There were, for example, **International Conventions** on “**Civil & Political Rights**” and “**Economic, Social and Cultural Rights**” which were adopted in 1966 and came into force in 1976; the “**Convention on the Elimination of All Forms of Discrimination against Women**” (CEDAW) which came into force in 1981; and the “**African Charter on Human & Peoples Rights**” which was adopted in 1981. Kenya has ratified all those international instruments and they therefore provide a source of law which, in appropriate cases, the courts in this country may tap from. It is in that light that the *obiter dicta* expressed by Omolo Ag. JA (as he then was) and Kwach JA in the two decisions we alluded to above should be viewed. Rather than being villified as Dr. Kuria submitted, they are progressive notions and a useful pointer to the future.

We now turn to the consideration of two other categories of the grounds of appeal which relate to the superior court’s error in failing to evaluate the exact proportion of the respondent’s contribution towards the acquisition of the property; the erroneous application of ***Kivuitu vs. Kivuitu***; failing to make a

determination of which party was to redeem the charge and generally failing to weigh the evidence. This appeal relates to only one property, the Twiga Hill Farm, Tigoni, on which the matrimonial home stands. It is common ground that the suit property was bought by the appellant in 1972 at a price of Shs.360,000/=. There is also no dispute that the initial deposit of Shs.70,000/= was raised through sale of another property in Langata which the appellant had bought in 1971. The balance of the purchase price of Shs.290,000/= was financed by AFC and secured by a charge over the property in the name of the appellant repayable in 30 years time.

The appellant claimed that he bought the Langata house from his own savings. The respondent claimed that she contributed financially towards the purchase of the farm. We have the duty to reconsider the evidence, evaluate it and draw our own conclusions bearing in mind that we have neither seen nor heard the witnesses and giving due allowance for this (*Selle vs. Associated motor Boat Company Ltd.* [1968] EA 123).

Although the appellant through his counsel concedes that the respondent who was in paid employment between 1972 and January 1987 did make indirect contributions (financial) towards the acquisition of the property, he contended that the respondent's contribution was minimal, about 10% but agreed that she could be awarded 20% share as indicated in the memorandum of appeal. The basis of his computation is that the appellant paid directly 70,000/= which was the deposit plus Shs.196,507/= which was the outstanding balance of the loan as on 30th June, 1987 when cohabitation came to an end, a total Shs.266,607/= which is 74% of the purchase price. He contended that it was only 26% of the purchase price which was paid during cohabitation and recommended that 14% of that percentage be attributed to the appellant and 10% to the respondent. Mr. Njoroge for the respondent on his part submitted, among other things, that forbearance by respondent to work for 8 years when she was living abroad with appellant and the rearing of the children was substantial indirect contribution to the acquisition of the property and that the appellant paid the instalments of the mortgage between 1993 and 1996 from the proceeds of the farm which was acquired.

The learned Judge made a finding that the respondent made substantial indirect contribution or contributions in kind to the family fortune one of such contributions being that of the wife taking on the onerous duties of an ambassador's wife.

We would readily agree that the learned Judge misdirected himself in several respects.

Firstly, he erroneously took into account the period between 1964 and 1971 before the property in dispute was acquired. The relevant period was from 1971 when both Langata property and the suit property were purchased. Secondly, the learned Judge took into account the status of being an ambassador's wife as indirect contribution towards the acquisition of the property. 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 (see eg. *Pettitt vs. Pettitt*, *Burns vs. Burns* (supra) *Button vs. Button* [1968] 1 WLR 457).

In the *Burns* case (supra) Fox LJ talking of the nature of the contributions referable to acquisition of a house said at page 252 paragraph h:

“If there is a substantial contribution by the woman to the family expenses, and the house was purchased on a mortgage, her contribution is, indirectly referable to the acquisition of the house since in one way or another, it enables the family to pay the mortgage instalments.

Thus a payment could be said to be referable to the acquisition of the house if, for example, the payer either:

- (a) Pays part of the purchase price, or***
- (b) contributes regularly to the mortgage instalments, or***

(c) pays off part of the mortgage, or

(d) makes a substantial financial contributions to the family expenses so as to enable the mortgage instalments to be paid”.

That list is not of course exhaustive.

Thirdly, the learned Judge misapprehended the decision of Kivuitu vs. Kivuitu and erroneously applied it, as the property in dispute was not registered in the joint names of the appellant and the respondent. Thus, since the appellant and respondent have no joint legal interest, it is erroneous to presume that they have an equal beneficial interest in the property.

Fourthly, the court failed to determine the ultimate rights and liabilities of the parties in the mortgaged property and to give appropriate directions.

Those are serious misdirections resulting in an error of principle and hence an erroneous determination of the contribution of each spouse to the purchase price of the property.

The farm was purchased in the name of the appellant. The husband alone executed the loan agreement and he alone paid the instalments of the loan. The appellant is in the circumstance, prima facie, entitled to the whole of the legal interest and whole of the beneficial interest in the suit property. Although the wife claims to have made both direct and indirect contributions towards the acquisition of the farm, the evidence does not support that she made any direct financial contribution. It is manifestly plain that, the loan agreement was entered into on 10th February, 1972 and there is documentary evidence that the deposit of Shs.70,000/= was raised by the appellant through the sale of Langata property and that by 17th March, 1971 the appellant had already raised the deposit.

It has been shown that the Langata property was bought in 1971 when the respondent was not employed. She had not been employed for the eight years that she was living abroad with the appellant. She was employed for the first time in or about April, 1972. The evidence supported the appellant's contention that he bought the Langata property from his own savings without any direct contribution from the respondent. It must follow therefore that it is the respondent alone who paid the deposit of Shs.70,000/= through the sale of his own property.

It has been shown to us that, the loan had not been fully repaid by 27th October, 1993 when the judgment was delivered. The respondent in her evidence admitted that Shs.200,000/= was outstanding. However, the appellant in his affidavit evidence deposed that Shs.205,000/= was outstanding. The statement of loan account issued on 30th June, 1987 verifies that Shs.196,507 was due. There is no dispute that the loan was paid fully on 30th June, 1996 apparently before the expiry of the stipulated 30 years. The learned Judge, with due respect, did not direct how this liability would be discharged.

The appellant claimed to have paid the outstanding loan by himself, but respondent contends that the money was raised from the proceeds of income of the farm. The respondent failed to provide documentary or concrete evidence to verify that assertion or that the income from the farm is attributable partially to her efforts. The Shs.196,207/= is a significant proportion of the purchase price of Shs.360,000/= and the payment justifies appropriate adjustment to the interest of the parties in the property. We agree with the computation by the appellant's counsel that the appellant should be credited with the payment of the initial deposit (Shs.70,000/=) and the balance of loan (Shs.196,507) after the cessation of cohabitation – Shs.266,507 in total.

In our view, the only contribution towards the acquisition of the property that the respondent could have made was by payment of monthly instalments of the loan from the time the property was purchased in 1972 to about January, 1987 when cohabitation ceased – a period of about 15 years. The loan agreement shows that the loan was repayable by monthly instalments of Shs.400/= from 30th June, 1972, for which the appellant was required to provide a banker's order.

There is no bank statement to show how much was paid during the 15 years period. However, at Shs.400/= per month the sum paid for 15 years would be approximately Shs.72,000/= which is about one – fifth (1/5) or 20% of the purchase price of Shs.360,000/=. The appellant was admittedly earning more than the respondent. But if they are considered to have contributed equally to the monthly instalments then the respondent’s total contribution would be Shs.36,000/= or 10% of the purchase price. If we assume in favour of the wife that she contributed indirectly to the payments of all instalments during this period, then her total contribution would be Shs.72,000/= or 20% of the purchase price of the property.

It is apparent from the above analysis that the respondent’s indirect financial contribution towards the purchase of the property could not have been equal to that of the appellant. The respondent’s contribution is realistically much less. The most benevolent decision in favour of the respondent would be to credit her with the payment of all loan instalments during the 15 years duration. The total contributions for that period could have been slightly more than the Shs.72,000/= or 20% of the purchase price.

It is just to increase her share of contribution to 25% equivalent to one-quarter of the purchase price which entitles her to one - quarter (¼) share of the property. The farm measures 118 acres and her ¼ share would be approximately 30 acres.

The appellant’s counsel relying on *Kamore vs. Kamore* (supra) submitted that the court has no jurisdiction under **section 17** of the **1882 Act** to order transfer of proprietary interest from one spouse to another and asked us to instead order the appellant to pay the respondent the value of her share. In *Muthembwa’s* case which was decided two years after *Kamore’s* case, the court said that its jurisdiction was not limited to merely making declaratory orders and that it had jurisdiction to make orders as it considers appropriate on the facts and circumstances of the case before it. The court said in part:

“So if a courts powers were limited to only making declaratory orders, we doubt whether the dispute between parties would ever come to an end soon enough as envisaged by the provisions of section 17.

.....

So unless the court is able to order a sale or make such orders as it considers appropriate on the facts and circumstances of the case before it, then the mischief, the legislature intended to remedy will persist and the object of the enactment will be defeated”.

That, with respect, is the correct interpretation of the court’s jurisdiction. 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. That this is the correct position is clear from the following passage from the speech of Lord Morrison of Borth-Y-Gest at page 978 paragraph d:

“There would be room for the exercise of discretion in deciding a question as to whether a sale should be ordered at one time or another but there would be no discretion enabling a court to withdraw an ascertained property right from one spouse and grant it to the other”.

(See also *Cobb vs. Cobb* [1955] 1 All ER 781).

Section 17 of the 1882 Act gives the courts discretion to grant appropriate remedies upon ascertainment of the respective beneficial interest in a disputed property. The same remedies as are available in law in property disputes in ordinary actions are also available in disputes between husband and wife under **section 17**. The court has jurisdiction after the adjudication of the dispute, to allocate shares of the disputed property as it may deem just and order the transfer of the share to the rightful beneficial owner to give effect to its decision. In this case it is just that the respondent should retain her beneficial share of

the farm if she so wishes.

That finding does not however entirely resolve the dispute between the parties. There is a potential dispute about the fair demarcation of the farm. Although tea occupies about three-quarters of the farm, one portion of the farm is developed with a large farm house which has a swimming pool and several outer buildings. The farm house and outer buildings were valued by M/S Lloyd Masika – Valuers & Estate Agents in 1995 at **Sh.6,300,000/=**. The respondent has been living in the farm house since about 1996. The appellant left the farm. It is just in the circumstances that the respondent should keep the farm house and the outer buildings. However, it is equitable that her **30 acres** share of the farm should be reduced by the value of the farm house and the outer buildings and added to the share of the appellant as compensation. We estimate that the value of the farm house and the outer buildings is equivalent to the value of **5 acres** of the farm. Accordingly, we reduce the share of the respondent from **30 acres to 25 acres**.

On costs of the suit, this has been a protracted dispute. The superior court directed that the costs be paid by both parties equally. That should be the appropriate order of costs in this appeal.

For those reasons, we allow the appeal but with no order as to costs. The orders of Shields J. dated 27th October, 1993 and all subsequent and consequential orders thereto are set aside. We substitute therefor a declaration that the appellant and the respondent holds beneficial interest in **Tigoni L.R. No. 6893** in the proportion of **three – quarters (3/4)** and **one – quarter (1/4)** respectively. But for reasons stated above, we order that **Tigoni L.R. No. 6893** be sub-divided and the appellant do transfer **25 acres** to the respondent. The respondent’s share shall be demarcated on the portion of the farm where the farm house and outer buildings stand and shall include the matrimonial home and access to it. The parties shall pay the sub-division and transfer charges equally.

These shall be our orders.

Dated and delivered at Nairobi this 2nd day of February, 2007.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR