IN THE SUPERIOR COURTS OF THE GAMBIA

IN THE COURT OF APPEAL OF THE GAMBIA

CIV. APPEAL NO: GCA 27/2013

BETWEEN:

MATTY FAYE ..... APPELLANT

AND

DAWDA JAWARA ..... RESPONDENT

CORAM: THE HON. MRS. JUSTICE N. SALLA – WADDA JCA PRESIDING

THE HON. MRS. JUSTICE A. BAH JCA.

THE HON. MR. JUSTICE E.F. M'BAI JCA

REPRESENTATION:

COUNSEL ABSENT

APPELLANT AND RESPONDENT BOTH PRESENT

DATED THE 14TH JULY 2016

LEAD JUDGMENT BY HON. JUSTICE N. SALLA – WADDA JCA.

This is an appeal against part of the decision of the High Court per Hon. Justice B.V.P. Mahoney delivered on the 21st day of January 2013 wherein the trial judge in that suit gave judgment to the Respondent on a suit commenced by way of an originating summons filed on the 8th of September 2011 and issued on the 4th of October 2011 wherein the Applicant sought for the following orders:

1. A declaration that the Applicant Matty Faye is entitled to an equitable share of the joint matrimonial property in accordance with Section 43 of the Women's Act 2010.
2. An order declaring the said share of the matrimonial property.
3. Further and other orders as the Court deems fit.

At the conclusion of the case at the court below, the learned trial judge held in his judgment at page 146 of the record of proceedings as follows:

> *"Applying the principle that equity is equality, both parties are entitled to one half share of the value of the development; the Applicant is thus entitled to a beneficial interest in the property to the value of D152, 773. In conclusion, it is hereby declared that the Applicant has an equitable share in the Respondent's property bearing serial registration number K33/1986 to the value of D152, 773. The Respondent holds the said share on trust for the Applicant. The Applicant is entitled to remain in the property until such time as she is paid the value of her equitable share. I award costs of D30, 000 in favour of the Applicant."*

It is against part of this decision of the learned trial judge that the Applicant being dissatisfied with that part of the said decision that she now instituted this appeal on the 18th of April 2013 appealing, I

must emphasize against only a part of the said judgment of the court below on the following single ground of appeal to wit:

GROUNDS OF APPEAL:

1. The Learned Trial Judge misdirected himself on the facts when he found that both parties contributed towards the substantial works carried out on the matrimonial home amounting to D305, 546 despite the evidence that only the Appellant herein contributed all of the said amount.

PARTICULARS OF MISDIRECTION:

(a) The learned trial judge didn't avert his mind to the fact that the valuation report which costed the works at D305, 546 was exhibited by the Appellant herein as the value of the works she carried out on the property.

(b) Having concluded that there was no evidence to controvert or attack the value of development as exhibited to her further affidavit in reply by the Appellant herein, the learned trial judge the held that the Appellant is only entitled to half share of this said value.

RELIEF SOUGHT FROM THE GAMBIA COURT OF APPEAL:

To vary and substitute the sum of D152, 773 for the sum of D305, 546 as the value of the Appellant's equitable share in the Respondent's property.

This being the ground of appeal filed herein, may I also say that this is also an application being brought to this Court pursuant to Sections 12 and 43 of The Women's Act 2010.

The parties were ordered to file and exchange briefs of argument on the 14th of March 2016. Each counsel was asked how long they required to write their briefs of arguments. Counsel for the Appellant

Ms. Neneh Cham requested for twenty – eight (28) days to file their arguments whilst counsel for the Respondent asked this Court to grant him twenty – one (21)days to file their arguments. The Appellant was granted a further period of seven (7) days to file a reply on points of law if they needed to do so. The matter was then adjourned to Thursday the 19th of May 2016 for the adoption of the said briefs.

However, on the 19th of May 2016 when the matter came up for adoption of briefs, only the Appellant herein had dutifully filed her brief of argument. The Respondent on the other hand had nothing before this Court; that is the Respondent had neither filed a brief of argument to argue this appeal as ordered by the Court nor has he even filed an application for enlargement of time to file his brief as at the 19th of May 2016 accompanied by a brief albeit filed out of time. In disobedience of this Court's order of the 14th of March 2016, this Court at that point of the adoption of briefs asked the Appellant to adopt her brief of argument whilst the Respondent was deemed to have waived his right to file a brief of argument in this matter.

The facts of this case as elicited from the record of appeal are that the parties herein were married for 26 years which union was blessed with three children. At some point in the marriage, the couple lived in the matrimonial home in Kanifing East Layout. At the time they moved into the said property, it was an incomplete structure. It is in evidence that the Appellant is gainfully employed as a store Manager whilst the Respondent has been unemployed for over fifteen years. The Appellant contends also that she has a property in Tallinding where she built a three bedroom self contained house over fifteen years ago which she had rented out after selling half of that property. It is the Appellant's version that she personally extended the building with the addition of a master bedroom, an outside kitchen, a store and two flush toilets and that she plastered,

painted and tiled the entire structure and the walkway outside as the sand outside was muddy and that she also fenced the compound which had a dwarf fence at the time that they were moving in. The Appellant also claims to have installed electricity to the property as she brought an electrical meter from her mother's house in Gloucester Street when they moved in. The Appellant further claims that the total cost of her contribution towards the matrimonial home exceeded over D500, 000.00. The Appellant further contends that when she moved into the property, she had to build the ceiling of the house because the Respondent had only put up a corrugated roof. It is in evidence on record that the Appellant was able to produce numerous receipts for building materials that she purchased during the construction of the said property. It is further the Appellant's contention that all the contributions she made towards the construction of the matrimonial home were made on the clear understanding between herself and her husband that this was their joint matrimonial home and that the Respondent herein had always given her his full consent to proceed with the execution of such works.

The Appellant further claims that the Respondent's last place of work was with the defunct G.P.M.B. where he has since ceased to work and as such he has not been able to secure any gainful employment for over fifteen years and this included the period when the Appellant was engaged in the construction and finishing of the matrimonial home. It is further the Appellant's case that she had since the Respondent became unemployed was solely responsible for the maintenance of her family including the feeding, maintenance and the payment for the education of the three children. The Appellant avers that it was only in 2010 that she was summoned by the Respondent herein to the Kanifing Islamic Court seeking for a divorce and that the Cadi at the said Court advised her to move to another bedroom within the matrimonial home to

await the period of abstinence known as “Idda”. The Appellant also submits that in August 2011, the Respondent locked her out of the property and that she only regained entry into the property when she reported the matter to the Police which led the Respondent to summon her to Kanifing Magistrates' Court on an application to evict her from the property. It is on this basis that the Appellant now seeks to have an equitable share in the matrimonial home.

The Appellant contended that it was through her efforts and assistance that the Respondent was able to travel to the USA and the Respondent would send him a US$100 from time to time which amount she spent towards the payment of bills incurred at the matrimonial home. The Appellant averred that upon the Respondent’s return from the USA, he was very sick and she had to take six months to take care of him. That the Respondent’s behaviour subsequently was very unreasonable towards her and he had even locked her out of their matrimonial bedroom.

The Respondent claims that he got married to the Appellant in 1985 and that they were divorced in 1987 after having had a son in the marriage and that during this time, they lived in a rented accommodation in Latrikunda. The Respondent also claims that he and the Appellant remarried in 1998 and he was allocated a plot of land at Kanifing East Layout in 1986 where he erected a dwarf fence on all its four sides. The Respondent avers furthers that he obtained a loan from his former employers and started building the house which was completed in 1993. That upon his remarriage with the Appellant, she begged him to let them use the house as their matrimonial home to which he reluctantly agreed to and thus they moved to the house in 1999. It is clear on the Respondent’s affidavit in opposition on record, paragraph 12 thereof that he concedes that it was the Appellant who erected a gate to the property. At paragraphs 13 of the same affidavit in opposition, the Respondent conceded that the

Appellant has done some works on the tiling on the property. The Respondent avers that he travelled to the USA in the year 2000 and was sending the Appellant an allowance every month.

The Respondent also conceded that whilst in the USA, the Applicant had informed him that she wanted to extend the master bedroom and widen the veranda because their son was older and needed more space, but that he told her that he would do the work on his return from the USA, but because of her persistence, he finally agreed to allow her to proceed with the said works on the matrimonial home. The Respondent avers that he financed these works because at the time he was working for Delta Airlines at the Airport and was able to remit monies to the Appellant periodically to finance these works. I must however say as at this point that the Respondent has not provided any evidence of the remittances he claims to have been sending to the Appellant or any evidence that he worked with Delta Airlines in the USA. The Respondent further avers that he has had no understanding of any sort with the Appellant that the property in question was to be their joint matrimonial home. That when he returned from the USA in 2007, all the construction works were now complete and as he had started encountering marital problems with the Appellant, he filed for divorce which he obtained on the 17th of August 2010. The Respondent avers that he tried to get the Appellant to leave the matrimonial home, but she had refused. That the Appellant has a property in Tallinding which she had started to develop and the receipts exhibited by the Appellant were purchases of building materials toward that project and those materials were not for the construction of the matrimonial house at Kanifing East Layout. The Respondent avers that the Appellant has no rights over his property and ought not to live there anymore. He therefore sought from the Kanifing Magistrates' Court for an eviction order from the said property.

The Appellant has formulated two issues for determination to argue this appeal as follows:

a) *Is the learned trial Judge's conclusion that the Respondent also contributed to the extensions and renovations carried out by the Appellant supported by any evidence?*
b) *Did the Respondent discharge the burden that shifted on him to prove that he paid for the completion of the renovations and extensions carried out by the Appellant on the matrimonial home?*

I have carefully considered the two issues for determination as formulated by the Appellant herein. Nevertheless, looking at the sole ground of appeal filed herein, it is my considered view that although I would wish to adopt the issues for determination as formulated by the Appellant, I will also wish to add one more issue which I think looking at the totality of the matters arising in this appeal, it will be pertinent to make a determination of this issue for reasons of public policy. I will therefore for these reasons adopt the issues for determination as formulated by the Appellant herein and add a third issue as follows:

ISSUES FOR DETERMINATION:

1) Is the learned trial Judge's conclusion that the Respondent also contributed to the extensions and renovations carried out by the Appellant supported by any evidence?
2) Did the Respondent discharge the burden that shifted on him to prove that he paid for the completion renovations and extensions carried out by the Appellant on the matrimonial home?
3) Is the Appellant entitled to a share of the property in issue and if so how, what is the extent of her share.

ISSUES 1 & 2:

IS THE LEARNED TRIAL JUDGE'S CONCLUSION THAT THE RESPONDENT ALSO CONTRIBUTED TO THE EXTENSIONS AND RENOVATIONS CARRIED OUT BY THE APPELLANT SUPPORTED BY ANY EVIDENCE?

AND

DID THE RESPONDENT DISCHARGE THE BURDEN THAT SHIFTED ON HIM TO PROVE THAT HE PAID FOR THE COMPLETION RENOVATIONS AND EXTENSIONS CARRIED OUT BY THE APPELLANT ON THE MATRIMONIAL HOME

Like the Appellant, I chose to consider issues 1 and 2 together given their relationship. It is the contention of the Appellant that the holding and conclusion of the learned trial judge that the Respondent also contributed to the extensions and renovations carried out on the matrimonial property were not supported by the evidence on record especially after the learned trial judge had held severally to the contrary. The Appellant cited several instances in their brief of argument how the trial judge had held on many instances how and why the Appellant; Applicant therein had satisfied the evidentiary burden of proof to shift the burden of proof on the Respondent to prove that it was he who had paid for all the developments on the property.

I seem to agree with the Appellant that the learned trial judge had perhaps made a detour from his findings in his judgment as I see on the record by the evidence adduced therein which were perhaps in conflict with his subsequent holding and conclusion. Given the fact that the learned trial judge after having seen the affidavit evidence filed by both parties and after having heard the oral testimony of both parties during cross examination, drew the conclusion that the Appellant had satisfied the evidential burden of proof to shift the burden on the Respondent to prove that it was he who paid for all

the developments on the property. See pages 143 and 144 of the record where it is held thus:

> *"From the totality of the evidence, notwithstanding the contradictions of the Applicant concerning her claim that she bought materials for the property in 2010 when the Respondent has already filed for divorce and her evidence concerning her property in Tallinding as indicated in the preceding paragraph, I believe the Applicant has satisfied the evidential burden of proof to shift the burden to the Respondent to prove that it was he who paid for all the developments on the property. The Respondent has stated that he was working in the USA and sent money to the Applicant and particularly for the extension works on the property. He however did not produce any documentary evidence whatsoever on his income or the transfer of money to the Applicant.*
>
> *On the preponderance of evidence and taking into consideration that the parties were a married couple and cohabiting, and the evidence that the Applicant contributed her own moneys towards the Respondent travelling to USA; on the education of the children and on the payment of bills, I accept that the Applicant also expended her own moneys on the development of the property which going by the extent of the works that were carried out on the house, amounts to a substantial contribution. Having said this, I also believe that the Respondent contributed towards the works carried out on the property when the Applicant was residing in Gloucester Street at the time she was moving into the house and also to the extension of the property when he*

was in the USA. I am however unable to find precisely the proportion of their respective contributions."

This conclusion arrived at by the learned trial Judge is not supported by the evidence on the record of the court below and is at great variance with his finding in the judgment that it was the Appellant who had produced evidence before the trial court of contributions towards the extensions and renovations carried out on the matrimonial home. The trial judge has already held that the Respondent did not adduce any evidence to support his claim of either building or expanding the property in question, how then was he to arrive at such a conclusion. Whilst I agree with the learned trial judge that he may have been unable to find out precisely the exact proportion of their respective contributions, he could not in my view safely hold that the Respondent had made any contributions towards the matrimonial home in the absence of any evidence in support of this proposition.

I therefore find and hold that the learned trial judge was in error in arriving at such a conclusion as there was no iota of evidence adduced by the Respondent to this effect save for what the Appellant did not dispute as to what she found on the property when they sought to move into the matrimonial home.

I similarly did not find on the record before me that the Respondent had discharged the burden that shifted on him to prove as he asserted that he was the one who had paid for the completion of the renovation and extension works that was carried out by the Appellant on the matrimonial home. The respondent herein has not even proved that he carried out any development on the property itself save for having acquired the piece of land which has not been disputed. It is trite that the burden of proof shifted on the Respondent after the Appellant proved the extent of the works that she had effected on the matrimonial property with numerous pieces of

evidence before the trial court. Some of the evidence that the Appellant had produced at the trial court in support of her case included several receipts for the purchases of building materials for the construction as follows:-

1) Receipt from Alfron (G) Ltd dated 21-5-10 for D3, 700 for 20 Bags.
2) Receipt from Jarama dated 4-6-10 for D315 for nails.
3) Receipt from Asamaha Enterprise dated 10 Oct 2001 for D8, 775 for 65 bags of cement.
4) Receipt from Alfron (G) Ltd dated 31-5-10 for D4, 625 for 25 bags.
5) Receipt from Nayondema Hardware Shop dated 4-3-2001 for D7, 870 for plumbing materials.
6) Receipt from Asamaha Enterprise dated 3rd November 2001 for D8, 775 for 65 bags of cement.
7) Receipt from Asamaha Enterprise dated 15 June 2000 for D5, 237 for 58 packets.
8) Receipt from Asamaha Enterprise dated 5th January 2002 for D3, 000 for 2 toilet sets.
9) Receipt dated 15-01-2001 for D40, 000 for bedroom set.
10) Receipt dated 10-02-2004 for D10, 500
11) Receipt from Asamaha Enterprise dated 6th October 2001 for D1, 200 for 16 pieces of rods.
12) Receipt from Ebrima Ceesay dated 20th January ..... for D1, 455 for polish.
13) Receipt from Ebrima Ceesay dated 5th February ..... for D3, 000 for cardboard and nails.

I find that the Appellant had to a very large extent discharged that burden and it was for the Respondent on whom the burden of proof has now shifted to seek to disprove same. But he has woefully failed to do so by not adducing even a single piece of evidence in support

of his case or in his defence. On failure to discharge the onus of proof that is placed on a party in a case; See the Gambian Supreme Court decision in **FATOU BADJIE & 4 ORS V JOSEPH BASSEN (2002 - 2008) 2 GLR 115** which held as follows:

> ***"If a plaintiff in a civil suit failed to discharge the onus on him and therefore was unable to establish a case for the reliefs he sought before the Court, he cannot take cover in the weakness of the case preferred by the defendant. however, if the plaintiff made out a case by his evidence and the defendant remained silent, then if the case as was given by the defendant when he testified amounted to creating weaknesses in the defendant's case, which as it were tended to enure to and support the plaintiff' case, then in such a situation, the plaintiff would be entitled to strengthen his case. KODILINYE V ODU (1935) 2 WACA 336, MARTEY V MECHANICAL LLOYD ASSEMBLY PLANT Ltd (1987 - 88) 2 GLR referred to."***

See also the case of **OUSMAN BALDEH, RAID AZIZ V MOMODOU TIJAN JALLOW (2002 – 2008) 2 GLR 284** where this Court held as follows:

> ***"Pleadings are not tantamount to evidence and only evidence before the Court would be acted upon. [SHELL B.P. & ANOR V ABEDI (1994) 1 S.C. 23; INTERNATIONAL BANK FOR WEST AFRICA LTD V IMANO V ANOR (2001) 5 NSCQR 717 referred to.***
>
> ***Civil cases are decided on a preponderance of probabilities and the onus of adducing evidence is on the person who would fail if such evidence were not produced. The nature of proof in a given case is dictated by the particular circumstances of the available evidence."***

Where a party (Defendant) took no part in a proceeding or offered no evidence in his defence as in the case at hand, the evidence before the court goes one way and there would be nothing on the other side of the imaginary scale or balance against the evidence of the (plaintiff) or other party. [OGUNJUMO V ADERMOLU (1995) 4 NWLR (Pt. 389) 245 and NWABUOKU V OTTIH (1961) 2 SCNLR 232 referred to]

Furthermore **Sections 141, 142 and 143 of the Evidence Act** states as follows on who has the burden of proof in particular cases.

Section 141 (1) of The Act states as follows:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Section 142 of the same Act further provides that:

"The burden of proof in a suit or proceeding lies on the person who would fail if no evidence at all were given on either side."

Section 143(2) provides that:

"If such party adduces evidence which ought reasonably to satisfy the court that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced, and so on successively until all the issues in the pleadings have been dealt with."

On the basis of the foregoing, I therefore solidly find and I so hold that the Respondent herein had failed to prove his case beyond a balance of probabilities and so cannot make claims to the construction and extension of the matrimonial property herein.

Having so failed to prove his case, I have been wondering and left flabbergasted as to what point the learned trial judge had any basis upon which to apportion the value of the development as between the parties herein in the absence of any cogent and or compelling evidence that the Respondent herein had tendered before the trial court. Upon what yardstick or criteria did the learned trial judge rely upon to make this calculation? It was in my view a mere speculation that led the trial court to arrive at such a determination. There is no gainsaying that a court of law cannot make a determination of any matter on the basis of a mere speculation or mere conjecture and it is trite that any determination in a court of law must be based by a presiding judge on the basis of clear facts and or a claim and cogent and compelling evidence in support of that claim or case as the case may be. In the Gambian Supreme Court case of ***MANSONG DAMBELL & ANOR V WEST AFRICAN EXAMINATION COUNCIL – SC Civil Appeal No. 6/2004*** judgment of **Niki Tobi JSC** dated **3rd July 2008,** the Supreme Court had this to say about a Court speculating:

> ***"There are questions galore but I can stop here in the belief that I have made the point that the learned trial judge was merely involved in speculation, a power which he does not possess. The judge that he is. A judge qua judex is an exact human being and he deals with facts in cases with all exactitude or exactness. The learned trial judge with all respect threw overboard this important nature of his function and went into speculation or conjecture clearly***

outside the confines of judicialism by circulating or undulating between 18% and 20%. I do not think* that was *available to him, again the judge that he is."

Having so found and held as above and in any absence of any supporting evidence before the trial court, I reverse and set aside that finding of the trial court that the Respondent is entitled to a share of the value of the development of the matrimonial property herein as held by the trial judge. Having done this, it is my view under the circumstance that the proper and safest thing to do at this stage is to hold that the Respondent is the owner of the piece of land in question and that the Appellant as found by the learned trial judge has paid significantly for the construction and expansion works that was carried out on the matrimonial home. This is following from the holding of the learned trial judge that where it was practically impossible to precisely calculate the proportions of a party's contributions to the matrimonial home to enable a determination of their respective shares, the equitable principle that equity is equality will be applied. In the English cases of **COKER V COKER (1964) LLR.188** wherein the case of **RIMMER V RIMMER (1952) 2 ALL E.R. 863** was referred to, the issue was raised as to whether it was fairly possible to assess the separate beneficial interests of the husband and wife by reference to their contributions to the purchase of a house; it was held in that case thus:

"In this case, both husband and wife were wage earners. They brought a house in the name of the husband as the matrimonial house. The wife provided the deposit for the house. The rest of the purchase money was borrowed on the security of a mortgage from a building society in the name of the husband. Part of the principal of the mortgage money was repaid out of the housekeeping money provided by the husband. The remainder was

repaid by the wife out of her money at a time her husband was on war service. The wife provided all the furniture for the home out of her own resources.

When subsequently, the husband left the wife and the house was sold, the proceeds was shared equally between them on a summons under Section 17 of the Married Women's Property Act 1881 (U.K.). This was because it was not possible fairly to assess the separate beneficial interests of the husband and wife by reference to their contributions to the purchase of the house."

See also the Nigerian Supreme Court decision in **ADAKA AMADI V EDWARD N. NWOSU (1992) LPELR – 442 (SC); (1992) 6 SCNJ 59.**

It is therefore on the basis of all the foregoing that I resolve the sole ground of appeal filed herein in favour of the Appellant.

ISSUE NO. 3:

HOW IS THE EQUITABLE SHARE OF THE APPELLANT TO BE DETERMINED BY THIS COURT:

In determining this issue, let me reiterate that the first two issues for determination having already been resolved in favour of the Appellant herein; let me also say briefly and for purposes of emphasis that the learned trial judge has for valid reasons already found and held that the Appellant herein had acquired a beneficial interest in the property thus making the property a joint property and further that the Appellant was entitled to a share in the property on the basis of her beneficial interest in the matrimonial home. These findings and holdings of the learned trial judge have not been appealed against and as such it is trite law that the part of the judgment that is not appealed against remains valid, subsisting and

binding. See **BOURGI COMPANY LTD V WITHAMS H/V & ANOR (2002 - 2008) 2 GLR 380**. This being the case, the issue that remains unresolved in this case and which in my view ought to be resolved for so many reasons including bringing stability into the matrimonial home, although the couple may be divorced, such a determination would ascertain and lay to rest the issue of the ownership of the property in issue. It is further in my considered view absolutely important for such a determination to be made for public policy reasons as well.

Having said this, it has already been clearly established that the Appellant had contributed significantly to the construction and expansion of the matrimonial home herein on the basis of all the evidence that she had adduced in proving this assertion which has already been accepted by the trial court and which I have no reason to interfere with; for indeed it is well established by a plethora of cases that appellate courts would not interfere with the findings of facts of a trial court; See the Gambian Supreme Court decision in **FATOU BADJIE & 4 ORS V JOSEPH BASSEN (2002 - 2008) 2 GLR 115,** cited supra. See also **ARMANTI GAMBIA COMPANY Ltd V DHL INTERNATIONAL (Gambia) Ltd (2002 - 2008) 1 GLR 194** which held as follows:

> ***"As a general rule the appellate Court does not disturb findings of fact made by a trial court unless it can be demonstrated that the said findings of fact are perverse or are not supported by evidence on record or absurd in that no reasonable tribunal applying itself to the same facts could have reached the same findings."***

Having said this and on the other hand, there is no evidence before this Court or at the court below that the Respondent does not own the piece of land upon which the matrimonial home was constructed, what had remained uncertain before the court below

and before this Court is whether the Respondent has contributed towards the construction of the matrimonial home and to what extent, if at all. There was no evidence whatsoever either on the various affidavits of the parties or even in their oral evidence at the court below. For avoidance of repetition, this has however been resolved supra. However, as the learned trial judge had held that where it was practically impossible to precisely calculate the proportions of a party's contributions to enable a determination of their respective shares, the equitable principle that equity is equality will be applied.

I would on this basis and on the basis of the principle of equity that equity is equality and on the basis of the decision cited and relied upon supra in **COKER V COKER (1964) LLR.188** wherein the case of **RIMMER V RIMMER (1952) 2 ALL E.R. 863** was referred to and on the basis of the Nigerian Supreme Court decision in **ADAKA AMADI V EDWARD N. NWOSU (1992) LPELR – 442 (SC); (1992) 6 SCNJ 59** also referred to supra and further by virtue of **Section 43 of the Woman's Act 2010** which provides as follows:

1) "***Every woman shall enjoy equitable right as men in case of separation, divorce annulment of marriage, subject to personal law.***
2) ***A woman has the right to seek separation, divorce or annulment of marriage.***
3) ***In case of separation, divorce or annulment of marriage, a man and a woman have reciprocal rights and responsibilities towards their children and, at all times, the interests of the children shall be given paramount consideration.***
4) ***In the case of separation, divorce or annulment of marriage, a man and a woman have the right to an***

equitable sharing of the joint property derived from the marriage.

Having said this, may I also add that this Court is vested with the power to make any order that is deemed appropriate in circumstances of a given case to determine the real issues in controversy and to ensure that the rights of the parties are adequately safeguarded. **Rules 35 and 36 of the Rules of this Court** state as follows:

Rule 35 states as follows:

> ***"The Court may from time to time make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the Court below to enquire into and certify its finding on any question which the Court thinks fit to determine before final judgment in the appeal, and may make any interim order or grant any injunction which the Court below is authorised to make or grant and may direct any necessary enquires or accounts to be made or taken and generally shall have as full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Court as a Court of first instance, and may re-hear the whole case, or may remit it to the Court below to be re-heard, or to be otherwise dealt with as the Court directs."***

Rule 36 states as follows:

> ***"The Court shall have power to give any judgment and make any order that ought to have been made, and to make such further or other order as the case may require including any order as to cost. These powers may be exercised by the Court, notwithstanding that the appellant may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision."***

It is therefore on the basis of all the foregoing and the powers vested on this Court that I hold that the parties be jointly entitled to the property in a 50 – 50% share ownership. That is each of the parties owns an equal share to the other of the matrimonial property situated at Kanifing East Layout. They are to peacefully live and co-exist there with their children as the family home for the duration of their lifetime and that of their children.

I therefore set aside the order of the learned trial judge which held that each of the parties is entitled to one half share of the value of the development. I also set aside the order of the sum of D152, 773 being the share of the Appellant awarded by the trial court, she now being entitled to one half share or 50% of the value of the joint matrimonial home situated at Kanifing East Layout whatever the current value may be.

I accordingly so order and hold. This appeal therefore succeeds and is accordingly allowed in its entirety. Cost of Fifty Thousand Dalasis (50,000) is awarded in favour of the Appellant against the Respondent herein.

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HON. JUSTICE N. SALLA – WADDA

JUSTICE OF THE COURT OF APPEAL

14TH JULY 2016.

SUPPORTING OPINION OF HON. JUSTICE AWA BAH JCA

I have had the privilege to read in draft the lead judgment just delivered by my Honourable Sister Salla – Wadda JCA. I agree entirely with the reasoning and conclusions arrived at therein.

By virtue of Rules 35 and 36 of the Rules of this Court, this Court is vested with wide powers to ensure that justice is done in any one particular case. Such powers have been admirably and boldly invoked by my Honourable Sister in her lead judgment in arriving at what is just in this case.

I therefore agree that this appeal succeeds and abide as well with the other as to costs.

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HON. JUSTICE AWA BAH JCA

14TH JULY 2016.

SUPPORTING OPINION OF HON. JUSTICE E.F. M'BAI JCA

I have read in advance the lead judgment by my Learned Sister Hon. Justice N. Salla – Wadda JCA.

I agree with the lead judgment and the order made as to cost.

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HON. JUSTICE E. F. M'BAI JCA

14TH JULY 2016.