



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.129 OF 2014

**MARITHA BOCHERE OBONGO
PLAINTIFF**

VERSUS

OBONGO OGARO 1ST DEFENDANT

CHARLES GETWAMBU 2ND DEFENDANT

TABAKA OBONGO 3RD DEFENDANT

**MARCELINA NYAMOTAI 4TH
DEFENDANT**

**DISTRICT LAND REGISTRAR, KISII..... 5TH
DEFENDANT**

**NATIONAL LAND COMMISSION..... 6TH
DEFENDANT**

JUDGMENT

1. The 1st defendant is a polygamist. He has three (3) wives, Kwamboka Onchari Obongo, Maritha Bochere Obongo (“the plaintiff”) and Consolata Moraa. The plaintiff is the 1st defendant’s second wife. It is not clear from the record as to the relationship that exists between the plaintiff and the 1st defendant on the one hand and the 2nd to 4th defendants on the other hand. The dispute herein revolves around the ownership of eight parcels of land namely **LR No. Nyansiongo Settlement Scheme/174 (“Plot No. 174”), LR No. Nyaribari Masaba/Bomobea/3196 (“Plot No. 3196”), LR No. Transmara/Moyoi/480 (“Plot No. 480”), LR No. Transmara/Moyoi/282 (“Plot No. 282”), LR No. Nyaribari Masaba/Bomobea/2517 (“Plot No. 2517”), LR No. Nyaribari Masaba/Bomobea/2518 (“Plot No. 2518”), LR No. Nyaribari Masaba/Bomobea/2519 (“Plot No. 2519”) and LR No. Nyaribari Masaba/Bomobea/2520 (“Plot No. 2520”).** The plaintiff has claimed that upon her marriage to the 1st defendant, she acquired Plot No. 174 and Plot No. 3196 on which she settled with the 1st defendant. The plaintiff has claimed that she has her homestead on Plot No. 174 on which she has also planted blue gum trees and tea. The plaintiff has claimed that although Plot No. 174 and Plot No.3196 were registered in the name of the 1st defendant as the owner thereof, the same were acquired through her hard work and effort.

2. The plaintiff has claimed that the 1st defendant and the plaintiff's co-wives without any lawful cause caused the plaintiff to be evicted from Plot No. 174 and Plot No. 3196 aforesaid on a date the particulars of which are not given in the plaint. The plaintiff has claimed that apart from Plot No. 174 and Plot No. 3196, Plot No. 282 and Plot No. 480 were also acquired through her contribution. The plaintiff has claimed that she caused a caution to be registered against the titles of Plot No. 174 and Plot No. 3196 to protect her interest on the same. However, without her knowledge or consent, the 1st defendant caused Plot No. 3196 to be subdivided into four (4) portions the said caution notwithstanding which portions were registered in the names of the 1st to 4th defendants. The cautions that the plaintiff had sought to register against the titles of Plot No. 282 and Plot No. 480 were however not registered. The plaintiff has claimed that in view of the manner in which the 1st defendant has dealt with Plot No. 3196, she is apprehensive that the 1st defendant may similarly alienate the other parcels of land while this suit is pending. The plaintiff has claimed that she is entitled to a share of each of the parcels of land mentioned above and as such there is need to preserve the said properties pending the determination of her interest therein.
3. In her plaint dated 31st March 2014, the plaintiff has sought a declaration that she contributed to the acquisition of Plot Nos. 174, 3196, 480, 282, 2517, 2518, 2519 and 2520 and as such she has acquired and is entitled to equal interest in the ownership of the said parcels of land, a declaration that the 1st, 2nd, 3rd, 4th and 5th defendants have dealt with Plot Nos. 174, 3196, 480, 282, 2517, 2518, 2519 and 2520 contrary to the provisions of the Land Registration Act, 2012, an order for the cancellation of the titles for Plot Nos. 2517, 2518, 2519 and 2520 and the restoration of Plot No. 3196 in the name of the 1st defendant, a permanent injunction to restrain the 1st, 2nd, 3rd and 4th defendants from remaining on, entering into, wasting, damaging, alienating, sub-dividing, mortgaging or charging or in any other manner dealing with all those parcels of land known as Plot Nos. 174, 3196, 480, 282, 2517, 2518, 2519 and 2520, mesne profits from the date of her eviction from Plot No. 174 until the date of her reinstatement thereon, a declaration that the plaintiff and the 1st defendant are entitled to ownership in common of all the parcels of land referred to hereinabove and, damages.
4. The 1st to 4th defendants entered appearance and filed a joint statement of defence and counterclaim against the plaintiff on 10th July 2014. In their statement of defence, the 1st to 4th defendants denied that the plaintiff has any interest in Plot Nos. 174, 3196, 480, 282, 2517, 2518, 2519 and 2520 as claimed in the plaint or at all. The 1st defendant denied that he has in conjunction with his other wives evicted the plaintiff from any of the parcels of land referred to above. As concerns the sub-division and transfer of portions of Plot No. 3196 to the 1st to 4th defendants, the 1st defendant contended that he acted within his rights in doing so. On the cautions which have been registered or which the plaintiff had attempted to register against the titles of aforesaid parcels of land, the 1st to 4th defendants contended that the same are illegal. The 1st defendant contended that he divorced the plaintiff in Kisii CMCC No. 25 of 2000 and as such the plaintiff has no right or interest in the parcels of land in dispute. The 1st defendant denied that Plot No. 282 and Plot No. 480 were acquired through the joint contribution of the plaintiff and the 1st defendant. In their counter-claim against the plaintiff, the 1st defendant contended that the plaintiff was one of his three (3) wives and that she divorced the plaintiff on account of her adulterous escapades (sic). The 1st defendant contended that the plaintiff's claim to half share of his properties has no basis.
5. The 1st defendant contended that he purchased Plot No. 174 through a loan that he obtained from Settlement Fund Trustees and that he acquired Plot Nos. 282, 480 and 3196 singly without any contribution from the plaintiff. The 1st defendant contended that he acquired Plot Nos. 282, 480 and 3196 when the plaintiff was estranged from him. The 1st defendant contended that having divorced the plaintiff, the plaintiff's occupation of Plot No. 174 is an act of trespass. The 1st defendant contended that the plaintiff together with her sons have destroyed large portions of the fence that the 1st defendant had put around Plot No. 174 and also tea bushes that the 1st defendant has planted thereon and unless they are restrained, they will continue with their acts of destruction aforesaid and wastage on the said parcel of land. The 1st to 4th defendants have prayed for; a

- declaration that the 1st defendant is the sole proprietor of Plot No. 2517, 174, 282 and 480 and that the 2nd, 3rd and 4th defendants are the respective bona fide proprietors of Plot Nos. 2518-2520 and, a permanent injunction to restrain the plaintiff from encroaching onto, trespassing upon, alienating, tilling or in any other manner dealing with Plot Nos. 174, 282, 480 and 2517 to 2520.
6. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 31st March 2014 seeking the following orders;
- i. **That the matter be certified urgent and heard ex parte in the first instance.**
 - ii. **That the honourable court be pleased to issue a temporary injunction restraining the 1st, 2nd, 3rd and 4th defendants/respondents, their servants and/or agents or otherwise whatsoever from remaining on, entering or wasting, damaging, alienating, sub-dividing, disposing, mortgaging and charging and/or in any other manner dealing with all those parcels of land known as Title numbers; LR No. Nyansiongo Settlement Scheme/174, LR No. Nyaribari Masaba/Bomobea/ 3196, LR No. Transmara/ Moyoi/480, LR No. Transmara/ Moyoi/282, LR No. Nyaribari Masaba/Bomobea/ 2517, LR No. Nyaribari Masaba/Bomobea/ 2518, LR No. Nyaribari Masaba/ Bomobea/2519 and LR No. Nyaribari Masaba/Bomobea/2520 pending the hearing and determination of this application and/or until further orders of this honourable court.**
 - iii. **That the honourable court be pleased to issue a temporary injunction restraining the 1st, 2nd, 3rd and 4th defendants/respondents, their servants and/or agents or otherwise from remaining on, entering, wasting, damaging, alienating, sub-dividing, disposing, mortgaging and charging and/or in any other manner dealing with all those parcels of land known as Title numbers; LR No. Nyansiongo Settlement Scheme/174, LR No. Nyaribari Masaba/Bomobea/3196, LR No. Transmara/ Moyoi/480, LR No. Transmara/Moyoi/282, LR No. Nyaribari Masaba/ Bomobea/2517, LR No. Nyaribari Masaba/ Bomobea/2518, LR No. Nyaribari Masaba/Bomobea/ 2519 and LR No. Nyaribari Masaba/Bomobea/2520 pending the hearing and determination of this suit.**
 - iv. **That for avoidance of doubt the titles issued by the Kisii District land Registrar, the 5th defendant/respondent herein i.e Title numbers; LR No. Nyaribari Masaba/Bomobea/2517, LR No. Nyaribari Masaba/Bomobea/2518, LR No. Nyaribari Masaba/ Bomobea/2519 and LR No. Nyaribari Masaba/Bomobea/2520 herein be suspended and/or otherwise stayed pending the hearing and determination of this suit and the District Land Registrar is hereby restrained from transferring and/or otherwise dealing with the said titles.**
 - v. **That similarly the titles issued by the Nyamira District Land Registrar and Transmara District Land Registry for title numbers; LR No. Nyansiongo Settlement Scheme/174 and LR No. Transmara/ Moyoi/480 and LR No. Transmara/ Moyoi/282 respectively be stayed and the respective District Land Registrars thereby restrained from transferring and/or otherwise dealing with the said titles.**
 - vi. **That the honourable court be pleased to issue direction regarding the title to and possession of property title numbers; LR No. Nyansiongo Settlement Scheme/174, LR No. Nyaribari Masaba/Bomobea/3196, LR No. Transmara/ Moyoi/480, LR No. Transmara/Moyoi/282, LR No. Nyaribari Masaba/ Bomobea/ 2517, LR No. Nyaribari Masaba/Bomobea/ 2518, LR No. Nyaribari Masaba/Bomobea/ 2519 and LR No. Nyaribari Masaba/Bomobea/2520 between the plaintiff and the 1st defendant/respondent with a further order that the plaintiff/applicant be given her portions of the properties above.**
 - vii. **That upon the grant of prayer 6 above, the 1st defendant be and is hereby ordered to effect the transfer of the portions of the suit properties above to the plaintiff within a period of thirty (30) days and in default the deputy registrar High Court, Kisii to effect the transfer of the same and the transfers filed in the Kisii, Nyamira and Transmara land registries respectively for execution and/or implementation.**
 - viii. **Costs of this application be borne by the defendants.**
7. After filing their statement of defence and counter-claim, the 1st defendant also filed an application by way of Notice of Motion dated 7th July 2014 on 10th July 2014 seeking the

following orders:-

- a. **This application be and is hereby certified urgent and service thereof be dispensed with in the first instance for issue of an order in terms of prayer (b) herein.**
 - b. **Pending interpartes hearing hereof, an interim order of injunction do issue restraining the plaintiff/respondent, either by herself, her agents, assigns, representatives and/or any other person(s) howsoever acting under her directions from (further) trespassing onto, tilling or howsoever interfering with the defendant/applicant's quiet use, possession and enjoyment of the portion of title LR Nos. Nyansiongo Settlement Scheme/174 under his use and occupation.**
 - c. **Pending inter partes hearing and determination of the substantive suit, an order of injunction do issue restraining the plaintiff/respondent, either by herself, her agents, assigns, representatives and/or any other person(s) howsoever acting under her directions from (further) trespassing onto, tilling or howsoever interfering with the defendant/applicant's quiet use, possession and enjoyment of the portion of title LR Nos. Nyansiongo Settlement Scheme/174.**
 - d. **The 1st defendant/applicant be at liberty to apply for such further and/or other necessary orders as may be expedient for the due performance of the orders of this honourable court.**
 - e. **Costs of this application be borne by the plaintiff/respondent in any event.**
8. On 13th October 2014, I directed that the plaintiff's application dated 31st March 2014 and the 1st defendants' application dated 7th July 2014 be heard together by way of written submissions. The 1st defendant filed written submissions in relation to his application dated 7th July 2014 on 9th October 2014. He did not make any submissions with regard to the plaintiff's application dated 31st March 2014. The plaintiff on the other hand made a joint submission on her application dated 31st March 2014 and the 1st defendants' application dated 7th July 2014. Her submission was filed on 24th November 2014. The plaintiff's application dated 31st March 2014 was supported by the affidavit and supplementary affidavit sworn by the plaintiff on 31st March 2014 and 28th August 2014 respectively. In her affidavit sworn on 31st March 2014 the plaintiff reiterated the contents of the plaint that I have highlighted at the beginning of this ruling. In summary, the plaintiff reiterated that Plot No. 174 and Plot No. 3196 were acquired by her through hard work in late 1960's and that the 1st defendant and his other wives have evicted her from her home on the said parcels of land. The plaintiff has not clarified on which of the two parcels of land her home is situated. I presume, it is on Plot No. 174. The plaintiff has contended that she caused cautions to be registered against titles of Plot No. 174 and Plot No. 3196 to protect her interest therein but the 1st defendant proceeded to subdivide Plot No. 3196 into four (4) portions, which he registered in his name and the names of the 2nd to 4th defendants the said caution notwithstanding.
9. The plaintiff has contended that Plot No. 282 and 480 were acquired by her and the 1st defendant through joint contribution. She contended that her application to register a caution against the titles of the two parcels of land was not successful. The plaintiff has contended that having regard to the manner in which the plaintiff has dealt with Plot No. 3196, she is apprehensive that he will unless restrained by the court deal with the remaining parcels of land in a similar manner. The plaintiff has contended that the 1st defendant caused Plot No. 3196 to be sub-divided and portions thereof transferred to the 1st defendant's 1st wife and her children without consulting the plaintiff or taking her interest in the property into account. The plaintiff has contended that the defendants have threatened and intend to continue dealing with the parcels of land in dispute unless restrained by this court. It is on account of the foregoing that the prayers in the application dated 31st March 2014 have been sought. The plaintiff annexed to her affidavit among others, a copy of the caution that was registered against the title of Plot No. 174, copies of cautions that were intended to be registered against the titles of Plot Nos. 480 and 3196, copies of certificates of official search on the titles for Plot Nos. 2517 to 2520 and a copy of a letter addressed to the 1st to 4th defendants by the Kisii County Land Registrar dated 6th March 2014.
10. In their opposition to the plaintiff's application, the 1st to 4th defendants relied on a replying

affidavit sworn by the 1st defendant on 19th June 2014. The 1st to 4th defendants contended that the orders sought by the plaintiff cannot be granted and that the plaintiff's application is an abuse of the process of the court. The 1st to 4th defendants contended that the orders sought by the plaintiff if granted will lead to their eviction from the disputed properties which they have occupied as of right for over 60 years. The 1st to 4th defendants also contended that some of the orders sought by the plaintiff are in the nature of stay and as such cannot be granted at this stage on the present application. The 1st to 4th defendants have contended that the plaintiff has not taken into account in her application the fact that the 1st defendant has other two wives. The 1st defendant reiterated that he divorced the plaintiff on account of cruelty, adultery and prolonged desertion. The 1st defendant contended that his relationship with the plaintiff was such that there is no way they could have acquired any property together. The 1st defendant contended that there is no way the plaintiff could have contributed to the acquisition of Plot No. 3196 because that parcel of land is a sub-division of the original parcel of land that was known as **LR No. Nyaribari Masaba/Bomobea/929** (hereinafter referred to as "**Plot No. 929**") that was solely registered in the name of the 1st defendant. The 1st defendant reiterated that Plot No. 174 was acquired by him through a loan from Settlement Fund Trustees which loan he is still paying. The 1st defendant has contended that there is no way the plaintiff could have acquired Plot No. 174 through her "hard work" while at the same time the 1st defendant had to take out a loan for the purchase of the same.

11. The 1st defendant contended that he is the one who settled the plaintiff on Plot No. 174 and that the home that the plaintiff has referred to was put up for her by her sons against the 1st defendant's wishes. The 1st defendant has denied that the plaintiff has been evicted from Plot No. 174. The 1st defendant has contended that the plaintiff has been in forceful occupation of Plot No. 174 despite the fact that she has been divorced by the 1st defendant. The 1st defendant has contended that the plaintiff and her children have subjected him to numerous acts of assault aimed at forcing him out of Plot No. 174. The 1st defendant has contended that the plaintiff and her children have also been destroying the tea and trees that he planted on Plot No. 174. On Plot Nos. 282 and 480, the 1st defendant contended that he acquired the same during adjudication process when his relationship with the plaintiff had taken a nose dive and as such there is no way the plaintiff could have made any contribution towards the acquisition of the said parcels of land. The 1st defendant contended that he acquired the suit properties through various economic activities that he was engaged in. The 1st defendant annexed to his replying affidavit among others; the proceedings of the Divorce Cause No. 25 of 2000, a copy of the mutation form for the sub-division of Plot No. 929 into two portions namely, Plot No. 3196 and 3197. Copies of various receipts for the payments made to Settlement Fund Trustees on account of the loan that was advanced for the purchase of Plot No. 174, copies of several demand notices addressed to the 1st defendant by the Settlement Fund Trustees, copies of certificates of verification of tea, copies of P3 forms and a copy of affidavit of one, Mobagi Ogaro sworn on 19th June 2014 together with the annexures.

12. In her supplementary affidavit that was filed in response to the 1st defendant's replying affidavit, the plaintiff denied that she has been divorced by the 1st defendant. The plaintiff contended that the 1st defendant's divorce petition was dismissed by the court on 11th March 2003. The plaintiff denied further that she was involved in adulterous relationships and contended that the tea and blue gum trees that she and the 1st defendant planted on Plot No. 174 enabled them to purchase Plot No. 480 and Plot No. 282. The plaintiff contended that the same properties were registered in the name of the 1st defendant alone because she had no Identity card a document that women were not allowed to own at the time. The plaintiff contended that she contributed towards the purchase of Plot No. 174 through the sale of traditional liquor. The plaintiff contended that the 1st defendant holds the suit properties in trust partly or wholly for the plaintiff the same having been acquired during the subsistence of the marriage between the plaintiff and the 1st defendant.

13. The 1st defendant application dated 7th July 2014 was supported by the affidavit of the 1st defendant sworn on 7th July 2014. In this affidavit the 1st defendant reiterated the contents of his affidavit sworn on 19th June 2014 in reply to the plaintiff's application dated 31st March 2014. I

have highlighted the contents of the said affidavit at length hereinabove and would not wish to reproduce the same here. The 1st defendant has contended that the National Police Service has failed to act on his complaints against the plaintiff and her children who have subjected him to consistent acts of assault aimed at intimidating him and other members of his family to vacating Plot No. 174. The 1st defendant has contended that the police have turned a blind eye to his complaints due to the fact that they have been compromised by the plaintiff and her sons. The 1st defendant has contended that it would serve the interest of justice if the plaintiff is restrained from trespassing on the portion of Plot No. 174 which is in use and occupation by the 1st defendant and also from picking any tea leaves from the 1st defendant's farm and causing any further damage thereon.

14. The 1st defendant's application was opposed by the plaintiff through grounds of opposition dated 25th July 2014 and replying affidavit sworn on 28th July 2014. In her grounds of opposition the plaintiff contended that the 1st defendant's application has no basis and that the 1st defendant's application has not met the conditions for granting a temporary injunction. In her replying affidavit, the plaintiff reiterated most of what she stated in her affidavit and supplementary affidavit filed in support of her application dated 31st March 2014. The plaintiff has contended that the orders sought by the 1st defendant cannot be granted because it would be difficult to ascertain the portion of Plot No. 174 which is occupied by the 1st defendant in terms of size and location. In his supplementary affidavit sworn on 6th August 2014, the 1st defendant contended that his application is properly before the court. The 1st defendant also denied that his divorce petition against the plaintiff was dismissed by the court.

15. I have considered the two (2) applications before me together with the affidavits in support and in opposition thereto. I have also considered the written submissions by the plaintiff and the 1st to 4th defendants' advocates. The two applications are principally seeking a temporary injunction although the plaintiff has sought other reliefs which I don't think are within the scope of her application before the court. I will revert to the same later in this ruling. I will consider the two (2) applications one after the other in the order of filing. This means that the first application to be considered would be the plaintiff's application dated 31st March 2014. In the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**, it was held that;-

- i. **An applicant for interlocutory injunction must show a prima facie case with a probability of success.**
- ii. **An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.**
- iii. **When the court is in doubt it will decide the application on a balance of convenience.**

16. I want to state at the outset that I have been unable to decipher from the material before me the legal basis of the plaintiff's claim against the 1st defendant and by extension the 2nd to 6th defendants. There is no dispute that the plaintiff and the 1st defendant lived together as husband and wife. The plaintiff was the 2nd wife of the 1st defendant who has three (3) wives. It is in dispute whether the marriage between the plaintiff and the 1st defendant is still subsisting. The plaintiff has contended that the marriage is still subsisting while the 1st defendant has claimed that the same was dissolved by the court on 30th October 2001. As I have stated at the beginning of this ruling, the dispute between the parties herein revolves around the ownership of eight (8) parcels of land the particulars of which I have set out above. There is no dispute that these properties were acquired during the subsistence of the marriage between the plaintiff and the 1st defendant. The plaintiff has claimed in her plaint that two (2) of the said properties namely Plot No. 174 and Plot No. 3196 were acquired by herself although the same were registered in the name of the 1st defendant. Plot No. 3196 has since been sub-divided into four (4) portions namely, plot Nos. 2517 to 2520. With regard to the remaining two (2) parcels of land namely, Plot No. 282 and Plot No. 480, the plaintiff has contended that she contributed to the acquisition of the same and as such she is entitled to a share of each of them. In her plaint, the plaintiff has sought a

declaration that she owns a half share in each of the suit properties with the 1st defendant owning the other half-share.

17. It is not clear to me as to why the plaintiff would claim only a half share of Plot No. 174 and Plot No. 3196 which she claims to have acquired through her own hard work. Her claim to a half-share in Plot No. 282 and Plot No. 480 in respect of whose purchase she claims to have made contribution is understandable. The plaintiff has not come out clearly under what legal regime her claim has been brought. In the plaint, the plaintiff seems to have relied mainly on Article 45 of the Constitution of Kenya 2010 as the basis of her case. In her submissions however, the plaintiff has cited the provisions of the Land Registration Act, 2012, The Matrimonial Property Act, 2013 and the Married Women's Property Act, 1882 of England as the basis of her claim. The plaintiff has also looped in the concept of resulting trust. The plaintiff seems not to be clear in her mind as to the nature of the claim that she would wish to advance against the 1st defendant on the available facts. Whereas some of the claims that she has put forward can be sought in the alternative, others are inconsistent with each other. For instance, a claim over the two (2) properties namely, Plot No. 174 and Plot No. 3196 which the plaintiff has claimed to have acquired through her own effort cannot be mounted under section 17 of the Married Women Property Act of 1882 of England. Such a claim does not also lie under section 93 (2) of the Land Registration Act, 2012. The plaintiff's claim over Plot No. 282 and Plot No. 480 in whose acquisition she claims to have contributed can be mounted or hinged on the provisions of the Married Women Properties Act of 1882 of England and section 93 (2) of the Land Registration Act, 2012. Her claim to the two parcels of land which she claims to have acquired singly can only be pursued through ordinary property claim.
18. In view of the reliefs sought by the plaintiff in the plaint, I would presume that the plaintiff's claim to the suit properties is based on her contribution to the acquisition thereof during her marriage to the 1st defendant. In the case of **David M. Mereka –vs- Margaret Njeri Mereka, Court of Appeal at Nairobi, Civil Appeal No. 236 of 2001 (unreported)** the court cited with approval the judgment of Lord Upjohn in the case of **Pettitt –vs- Pettitt [1969] 2 ALL ER 385** at pages 405 and 407. The Court of Appeal stated as follows; **“at page 405 paragraphs F, G, H his Lordship stated as follows:**

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

At page 407 paragraph H his Lordship continued:

“But where both spouses contribute to the acquisition of a property, then my own view (of course in the absence of evidence) is that they intended to be joint beneficial owners and this is so whether the purchase be in the joint names or in the name of one. This is the result of the application of the presumption of resulting trust. Even if the property be put in the sole name of the wife, I would not myself treat that as a circumstance of the evidence enabling the wife to claim an advancement to her; for it is against all the probabilities of the case unless the husband's contribution is very small. Whether the spouse contributing to the purchase should be considered to be equal owner or in some other proportion must depend on the circumstance of each case.”

19. In the said Court of appeal case, the court also referred to the case of **Gissing –vs- Gissing [1970]**

2 ALL ER 780 where the House of Lords stated that where both spouses contribute towards the purchase of a matrimonial home and there was no agreement as to the sharing of the beneficial interest and the spouse in whose name the matrimonial home was purchased evinced no intention that the contributing spouse should have a beneficial interest therein, then the question whether the contributing spouse is entitled to beneficial interest in the matrimonial home is a matter dependent on the law of trusts and there is no distinction to be drawn in law between direct contributions towards the purchase of a matrimonial house and where the contributing spouse makes indirect contributions. In the case of **Peter Mburu Echaria –vs- Priscilla Njeri Echaria [2007] eKLR** the court of appeal stated that:-

“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 –vs- 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.”

20. In the case of **Kamore –vs- Kamore [2000] 1 E. A 81** the court of appeal stated as follows at page 89:

“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, 1970. The Matrimonial Causes Act of 1973 also made a difference.”

In the case of **Peter Mburu Echaria –vs- Priscilla Njeri Echaria (Supra)** the court observed that:-

“It is now about seven years since this court expressed itself in *Kamore –vs- Kamore* but there is no sign, so far, that parliament has any intention of enacting the necessary legislation on matrimonial property.”

21. The decision of the court of appeal in the case of **Peter Mburu Echaria –vs- Priscilla Njeri Echaria (Supra)** was delivered on 2nd February 2007. I believe that the prayer by the court of appeal was answered six years after the said decision when parliament enacted the Matrimonial Property Act, 2013. This statute mitigated the harshness of the law as it existed at the time of the decision in **Peter Mburu Echaria –vs- Priscilla Njeri Echaria (Supra)** with regard to the need for financial contribution before a wife can claim beneficial interest in a matrimonial property registered in the name of the husband. Although the statute retained the requirement that a spouse has to show some form of contribution to the acquisition of a property registered in the name of the other spouse before he/she can be entitled to claim beneficial interest in the same, the nature of contribution has expanded under section 2 of the Matrimonial Property Act, 2013 to include non-monetary contribution such as:-

- a. **Domestic work and management of matrimonial home.**
- b. **Child care**
- c. **Management of family business or property and**
- d. **Farm work.**

Under section 6 of the Matrimonial Property Act, 2013 Matrimonial property has been defined as:-

- a. **The matrimonial home or homes.**
- b. **Household goods and effects in the matrimonial home or homes or**
- c. **Any other immovable and movable property jointly owned and acquired during the subsistence of marriage.**

Section 7 of the Matrimonial Property Act, 2013 provides that ownership of the matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

22. There is no doubt that the suit properties herein fall within the description of matrimonial property. What is in doubt is whether the plaintiff has any beneficial interest in the same. The plaintiff has claimed half share as her beneficial interest in each of the suit properties. The onus was upon the plaintiff to demonstrate on a prima facie basis the nature and the extent to which she contributed to the acquisition of each of the suit properties. In her plaint, the plaintiff claimed merely that she acquired Plot No. 174 and Plot No. 3196 through hard work and that she contributed to the acquisition of Plot No. 282 and Plot No. 480 without providing any details as to the sources of the funds that she used to acquire the first two properties and the nature and extent of her contribution to the acquisition of the latter two. The plaintiff's affidavit does not also contain any information as to how she acquired Plot No. 174 and Plot No. 3196 or how she contributed to the acquisition of Plot No. 282 and Plot No. 480. The first mention of how she acquired or contributed to the acquisition of one of the suit properties was contained in her replying affidavit sworn on 28th July 2014 in response to the 1st defendant's application for injunction dated 7th July 2014.
23. In this affidavit, the plaintiff explained that she contributed to the acquisition of Plot No. 174 through the sale of traditional liquor in which she and the 1st defendant were engaged. She contended further that she made indirect contribution towards the acquisition of the property by raising the defendant's children. In this affidavit, there is no mention of how the plaintiff acquired or contributed to the acquisition of Plot No. 3196, Plot No. 282 and Plot No. 480. The other affidavit in which the plaintiff provided some information on her contribution to the acquisition of Plot No. 282 and Plot No. 480 is the supplementary affidavit sworn on 28th August 2014. In this affidavit, the plaintiff stated that the plaintiff and the 1st defendant planted tea and blue gum trees on Plot No. 174 the proceeds from which they acquired Plot No. 480 and Plot No. 282. Again there is no mention in this affidavit as to how she acquired or contributed towards the acquisition of Plot No. 3196.
24. The 1st defendant's case as I have stated above is that the plaintiff made no contribution towards the acquisition of the suit properties. The 1st defendant contended that he acquired Plot No. 174 from a loan that he secured from the Settlement Fund Trustees. The 1st defendant placed evidence before the court in proof of the fact that Plot No. 174 was actually acquired through a loan from the Settlement Fund Trustees. The 1st defendant has also placed evidence before the court in proof of the fact that he is the one who has been servicing the said loan. I have noted from a certificate of official search dated 7th March 2014 in the plaintiff's bundle of documents that Plot No. 174 is still charged to Settlement Fund Trustees meaning that the loan seems not to have been paid in full. With respect to Plot No. 3196, the 1st defendant has contended that there is no way in which the plaintiff would have acquired or contributed to the acquisition of the same because the said parcel of land is a sub-division of original parcel of land known as Plot No. 929 that was registered in the name of the 1st defendant in the year 1970 and which the 1st defendant subdivided into two (2) portions in the year 2000 giving rise to Plot No. 3196 and Plot No. 3197. The 1st defendant placed evidence in the form of a mutation form dated 10th February 2000 in proof of the fact that Plot No. 3196 is indeed a sub-division of Plot No. 129 and could not have been acquired by the plaintiff as she has claimed. With regard to Plot No. 282 and Plot No. 480 the 1st defendant has contended that the same were acquired solely by him when his relationship with the plaintiff was at its worst. He placed evidence of copies of agreements for sale pursuant to

- which he acquired the two parcels of land. He also placed before the court an affidavit by one, Mobagi Ogaro who was his witness when he purchased the two parcels of land and who confirmed that the plaintiff did not make contribution of any kind towards the acquisition of the two parcels of land.
25. On the material before me, I have found the merit of the plaintiff's case against the defendants doubtful. The evidence placed before me by the 1st defendant to the effect that Plot No. 174 and Plot No. 3196 were acquired solely by him without any contribution by the plaintiff is overwhelming. I have looked at the statutory declaration that the plaintiff swore on 12th February 2014 in support of her application to have a caution registered against the title of Plot No. 174. In the said statutory declaration, the plaintiff stated in paragraph 2 that the 1st defendant is the registered owner/proprietor of Plot No. 174. In paragraph 6 of the said statutory declaration the plaintiff staked a claim to a share of the said property solely on account of her marriage to the 1st defendant. The plaintiff did not mention at all that she had acquired or contributed towards the acquisition of the said property. As concerns Plot No. 3196, the plaintiff's statutory declaration sworn on 5th June 2012 in support of her application to the land registrar to register a caution against the title thereof leaves no doubt that the plaintiff neither acquired the said parcel of land nor contributed to the acquisition of the same. In paragraph 1 of the said affidavit, the plaintiff stated that the said parcel of land is registered in the name of the 1st defendant. In paragraph 2 she stated that Plot No. 3196 is ancestral land and that the 1st defendant holds the said property in trust for the plaintiff and her children and the plaintiff's co-wives and their children.
26. The foregoing declarations are inconsistent with the claims that the plaintiff has put forward regarding Plot No. 174 and Plot No. 3196. They are however consistent and supportive of the 1st defendant's defence to the plaintiff's claim. For Plot No. 282 and Plot No. 480, the plaintiff had stated in her statutory declaration in support of her caution applications that the same had been acquired jointly with the 1st defendant. That is the same position that she has taken in these proceedings. As I have stated above, the 1st defendant has cast serious doubt on the plaintiff's claim that she contributed to the purchase of these parcels of land. The plaintiff has not contested the 1st defendant's claim that he acquired these two parcels of land at a time when his relationship with the plaintiff was at its worst. The plaintiff has also not controverted the contents of the affidavit of Mobagi Ogaro to the effect that Plot No. 282 and 480 were solely acquired by the 1st defendant.
27. I am of the opinion that even if the plaintiff is to be taken to have contributed indirectly to the acquisition of the suit properties through housekeeping and raising of children, the plaintiff who is only one of the 1st defendant's three wives has not demonstrated that such indirect contribution was such that it would entitle her to more beneficial interest in the suit properties than the 1st defendant's other wives. In addition to the prayers for injunction, the plaintiff has also sought in the present application orders suspending the titles for Plot Nos. 174, 480 and 282, directions that the plaintiff be given her share of the suit properties and an order that the 1st defendant do effect the transfer to the plaintiff of her shares in the suit properties within 30 days. These prayers have no basis in the plaint and in any event are beyond the scope of this interlocutory application. The orders can only be granted after plenary hearing of the plaintiff's case and the 1st to 4th defendants counter-claim.
28. As to whether the plaintiff stands to suffer irreparable injury unless the orders sought herein are granted, I am doubtful that that would be the case. I have noted that the plaintiff has registered a caution against the titles of Plot No. 174 and Plot No. 282. I have also noted that the Land Registrar has put a restriction against the titles of Plot Nos. 2517 to 2520 while the title for Plot No. 3196 was closed upon subdivision. In the circumstances, the 1st to 4th defendants are not in a position to deal with these parcels of land in a manner prejudicial to the interest of the plaintiff. I am unable to see how the plaintiff would suffer irreparable injury if the 1st to 4th defendants are not restrained from alienating, sub-dividing, disposing, mortgaging or charging these properties. The plaintiff has also sought an order restraining the 1st to 4th defendants from remaining on, entering, wasting or damaging the suit properties. The 1st defendant is the plaintiff's husband (or former husband) and he is registered as the proprietor of Plot Nos. 174, 282, 480 and 2517. The

- 2nd to 4th defendants on the other hand are registered as proprietors of Plot Nos. 2518 to 2520. From the way the plaintiff's prayer is couched, it seems that the 1st to 4th defendants are in occupation in one way or the other of these parcels of land. The plaintiff has not convinced me that she stands to suffer any irreparable loss or injury if the 1st to 4th defendants remain in possession of the same parcels of land pending the hearing and determination of this suit. The plaintiff has also not placed any evidence before me that the 1st to 4th defendants are wasting or damaging the suit properties. I wonder why they would do so to properties registered in their names. I am not therefore convinced that the plaintiff would suffer irreparable loss and damage arising from wastage and damage of the suit properties if the orders sought are not granted.
29. Having expressed doubt on the merit of the plaintiff's case and the likelihood of the plaintiff suffering irreparable injury if the orders sought are not granted, the plaintiff's application falls for consideration on a balance of convenience. I am of the opinion that the appropriate order to make in the circumstances is one that will maintain the status quo. I do not think that any party would suffer prejudice if things remain as they are pending the hearing and determination of this suit. That being my view of the matter, I would disallow the plaintiff's application dated 31st March 2014 but order that pending the hearing and determination of this suit, the status quo prevailing as at the date hereof as concerns cautions, restrictions, title, possession and use of all those parcels of land known as **LR No. Nyansiongo Settlement Scheme/174, LR No. Transmara/Moyoi/480, LR No. Transmara/Moyoi/282 and LR Nos. Nyaribari Masaba/2517, 2528, 2519 and 2520** shall be maintained by all the parties herein. For the avoidance of doubt, no party shall interfere with possession and use of any portion of the said properties which has been in use or is being used by the other or others pending the hearing and determination of this suit or further orders by the court.
30. I am of the opinion that the 1st defendant's application dated 7th July 2014 has been overtaken by events in view of the orders that I have made above in the plaintiff's application. Orders shall issue accordingly in terms set out above. The costs of the two applications shall be in the cause.

Delivered, signed and dated at KISII this 20th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Bigogo h/b for Arusei for the plaintiff

N/A for the 1st to 4th defendants

N/A for the 5th and 6th defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE