



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NUMBER 25 OF 2005 (OS)

MNM. PLAINTIFF

VERSUS

SMK..... DEFENDANT

J U D G M E N T

In this suit instituted by the Plaintiff by originating summons, the plaintiff sought: -

- a. *A declaration that that the Applicant/Plaintiff is entitled to at least half share of proceeds of the property known as*
 - i. *Nairobi/Block 140/77, valued at Ksh.3,400,000/-*
 - ii. *Dagoretti/Riruta/T.177, valued at Ksh.9,680,000/-*
- b. *Any other or further orders.*

The undisputed facts show that the applicant was married to the Respondent from the year 1995. They got two children who are now adults. The Respondent worked with *[Particulars withheld]* in Nairobi, Kosovo and Israel at various times. While in Nairobi they lived in Eastleigh from 1995 - 1996 and Dandora in 1997. They thereafter allegedly lived in Pangani Girl's High School in the applicant's institution house, in respect of which the Applicant was responsible of payment of monthly rents, although the Respondent denied this fact.

In 1999 the Respondent worked in Kosovo while the applicant lived in Nairobi, taking care of their children. In 2000 the couple acquired the land, L.R. No. *[Particulars withheld]* at Embakasi under a Tenant-purchase arrangement through National Social Security Fund. In 2003 they acquired a developed L.R. No. *[Particulars withheld]* which was producing Ksh.120,000/- per month when this suit was filed.

In July, 2003 the couple lived in Jerusalem, Israel because the Respondent worked with *[Particulars withheld]* until 2004 when they visited Kenya and the Respondent alone returned to Israel. In the same year, 2004 the Respondent transferred the Embakasi Property to his father and the Dagoretti property to his mother, although apparently he retained a power of Attorney to manage the properties.

On 18th January, 2007 the parties herein were divorced under Nairobi High Court Cause No. 105 of 2005 after legal separation in 2004.

The Applicant/Plaintiff's case is that the two properties were matrimonial properties whose purchase they both contributed to directly or indirectly. That she accordingly was entitled to half share and that the properties should be sold and she be paid half the value by orders of court. While she did not claim to

have financially directly contributed to the purchase of the properties, she nevertheless claimed that

- a. **The properties were purchased while they lived together as husband and wife.**
- b. **She contributed to the purchase in kind. She financially contributed to obligations which required finance like looking after and educating their children, paying rent to the house in which they lived, taking care of the Respondent as her husband inclusive of granting him conjugal rights and comfort etc.**

The Respondent on the other hand argued that he purchased the properties alone from his own funds without any kind of contribution from the Applicant who cannot therefore be entitled to any share in the properties. He conceded that he transferred the properties to his parents as pleaded but that such transfers were not tainted with collusion, fraud or illegality as alleged.

I have carefully perused the record. It shows that although the Respondent filed his defence or reply to the Applicant's claim, he neither offered evidence nor filed responding submissions notwithstanding the fact that he was served with each of the relevant case process. It can rightly be concluded therefore that the Respondent did not oppose the applicant's claim by any evidence. I will accept as true the following main facts and circumstances. That is to say: the parties herein got married in 1955 and lived together as husband and wife until 18th January, 2007 when they legally divorced. That during the marriage the respondent acquired two properties, L.R. No. [Particulars withheld] at Nyayo Estate in Embakasi and [Particulars withheld] and each was registered in the name of the Respondent, SMK.

Taking into account the fact that the Applicant and the Respondent were at the time when the properties were acquired, co-habiting as such husband and wife and that the Applicant, although not contributing to the purchase directly, was taking care of other family obligations, the court comes to the conclusion that such Applicant's contributions were money's worth. Other contributions were such that they enabled the Respondent to live comfortably to enable him raise the funds that went towards the purchase of the properties.

For example, the Applicant looked after the children by either paying for the house help or paying school fees or bought clothes and other items using money. She also claimed that at the relevant period, the two lived together in her school institution house at [Particulars withheld] where she was a [Particulars withheld] and was paying the monthly rents for the house. She also claimed that some of the funds were obtained by the Respondent while he worked in Kosovo while she looked after their children here in Kenya. She claimed that the Nyayo Embakasi NSSF funded mortgage, house was paid across several years while the Applicant took care of other finance demanding family obligations. The Respondent did not deny those facts although he insisted that funds came from his sources solely, which was also not denied.

The Applicant brought this claim under the Section of the English Married Women property Act of 1882 which applied to Kenya until the 2010 Kenya Constitution was promulgated. In Article 45(3), the Constitution states: -

“Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage”.

The Court of Appeal having in mind the above provision stated as follows **AGNES NANJALA WILLIAM Vs JACOB PETRUS NICOLA VANDER GOES** in Civil Appeal No. 127 of 2011 (unreported): -

“... Fully aware that the appellant is entitled to equal protection of inherent right to own property similar to that of her husband, this court has an obligation to uphold not only the tenets of the constitution but also the specific rights to equal treatment and equal benefits of the law by ensuring that she gets her deserved share of the suit premises”.

As this court understands it, therefore, married spouses who for one reason or another wish to share properties acquired during their co-habitation will do so in accordance with the shares each contributed towards the acquisition of such property directly or indirectly. Such share will therefore be a matter of fact to be investigated and established by the trial court upon the evidence adduced by either party. That is to say, as this court understands it, that the principles upon which the court will share such matrimonial property have basically not changed much in English Common and Kenyan law over the years.

In **Echaria Vs Echaria [2007] eKLR**, the court put the principle as follows: -

“... where the disputed property is not 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 contributions either directly or indirectly towards the acquisition of the property.”

In **Kivuitu Vs Kivuitu [1991] LLR 1411**, the Court of Appeal held that even where the wife had made measurable financial contribution to the family income and property, the court should also consider her substantial indirect contribution in paying for household expenses, food and clothing, schooling of children and enhancing the family welfare. That is to say that list of such contribution is not closed and the same, even if indirect, can be given a kind of financial evaluation however indeterminate. To that end the Court of Appeal stated thus in **NDERITU VS KARIUKI (1977) LLR 2731**: -

“... wife’s contribution and more particularly a Kenyan African wife, will more often than not take the form of back-up services 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.”

In this case, the Respondent denied that the Applicant deserves any share or equitable or legal interest in the proceeds of either of the two properties acquired during their marriage. He even said that the Applicant’s emoluments went towards the purchase of her individual properties whose shares the Respondent is not interested in claiming but showed no evidence to that end.

The Respondent did not deny the fact that the Applicant was a working wife who earned a salary of her own. He did not either deny the facts that his wife rendered him and the family direct and indirect services in the nature of those discussed above. This court is, therefore of the view that although the applicant did not make direct contributions in the form of money towards the purchase of the L.R. No. *[Particulars withheld]* and *[Particulars withheld]*, she is held to have indirectly participated in the purchase of the said properties notwithstanding that both the properties were purchased by and registered in the sole name of the Respondent herein. This is because the applicant’s contribution towards the purchase of the said properties included domestic work and management of the matrimonial homes, child care of their two children, her companionship to him, including conjugal rights, and her management of the family affairs during the absence of the Respondent while abroad from time to time.

The Applicant claimed in her evidence that her indirect contribution was as important as the direct contribution of her husband, the Respondent herein. The Respondent adduced no evidence or no persuasive evidence to hold otherwise. The court accordingly finds and holds that the Applicant’s contribution was 50% of the whole.

Finally, since the Applicant did not from the evidence make any direct contribution to the purchase money and her claim arises from the fact that the court has under the law got to or imply a trust in equity, then the trust which the court implies must be and is constructed from the facts of the case. Such a trust must be a constructive trust.

In conclusion, the court makes the following orders: -

ORDERS

1. The proceeds of sale of L.R. No. [Particulars withheld] and [Particulars withheld] shall be divided equally.

2. Valuation of both properties is hereby ordered and in the alternative, liberty is given to the parties to agree on the value of each property with liberty to either spouse to retain any of the properties by buying out the other spouse.

3. Costs to be shared equally.

Dated and delivered at Nairobi this 16th day of September, 2014.

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D A ONYANCHA

JUDGE