



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CIVIL CASE NO 23 OF 2004 (O.S)
P.M.M.....APPLICANT
VERSUS
S.M.....RESPONDENT

JUDGMENT

1. The Applicant, P.M.M by her Originating Summons dated 27th August 2004, premised on the provisions of **Order XXXVI Rule 1, 7 and 8** of the **Civil Procedure Rules** and **Section 17** of the **Married Women's Property Act** of 1882 seeks amongst others the following Orders;

(i)

(ii)

(iii)

(iv) *That an order do issue declaring that 50% or such other or higher proportion of the properties listed in the application is held by the Respondent in trust and for the beneficial interest of the Applicant.*

(v) *An order do issue declaring that the Respondent is accountable to the Applicant in respect of all the income derived from the said properties and applied to the Respondent's exclusive use.*

(vi) *That an order do issue declaring that the Respondent is accountable to the Applicant for the income derived from the sale of the properties herein being motor vehicles number [...] a Suzuki Vitara, [...], a Peugeot.*

(vii) *That this Honourable Court be pleased to order that the properties and the income aforesaid be settled in proportions aforesaid or as the court may order.*

(viii) *That the Respondent be restrained from evicting the Applicant from HER matrimonial home and or selling, alienating, wasting, damaging and/or otherwise interfering with the aforesaid matrimonial properties until the shares are determined and apportioned.*

(ix) That the costs of the summons be provided for.

2. In her affidavit sworn on 27th August 2004, the Applicant states that her marriage to the Respondent was solemnized in 1995 and that they were blessed with 3 children namely; VWM born on 18th June 1989, PM born on 19th April 1995 and JM born on 22nd November 1997. All these children are now living with the Applicant who was awarded custody by the Family Division of this Court after divorce proceedings were finalised. They are all in school and their education expenses are being met by the Respondent. He also pays Kshs.45,000.00 to the Applicant for the upkeep of the children as ordered by the court in the divorce cause. There is no doubt that he is fulfilling this obligation as ordered.

3. At the time of their marriage, the Applicant was employed as a Secretary with the [PARTICULARS WITHHELD] while the Respondent was a civil servant working with the [PARTICULARS WITHHELD]. At that time, none of them had any immovable property. They started their marriage life in a house allocated to them by the government in Parklands in Nairobi. They were divorced on 1st February, 2007 in **Divorce Cause [PARTICULARS WITHHELD], S.M v P.M.M.**

4. During the course of their marriage, several properties were acquired. These are;

(a) Nairobi/[...]

(b) L.R No. [...]

(c) L.R No. [...]

(d) Motor vehicle registration number [...]- Mercedes Benz

(e) Motor vehicle registration number [...]- a double cabin

(f) Motor vehicle registration number [...]- a Peugeot

(g) Motor vehicle registration number [...]- a Peugeot

(h) Motor vehicle registration number [...]- Grand Vitara (I) Shares in Four Winds Company Ltd

(j) Shares in Check Point Insurance Company Ltd

(k) Shares in Northfield Investment Company Ltd Household goods

5. Apart from the household goods, all the other properties are in the names and possession of the Respondent apart from the Motor vehicle registration number [...]- Grand Vitara. The Applicant contends that she trusted the Respondent enough to have all the properties registered in his name and that they were so registered in the understanding that he held the same in trust for her.

6. The Applicant claims to be entitled to an equal share in the matrimonial properties on the ground that the same were acquired through the joint efforts of the parties. The Respondent on the other hand denies the Applicant's contribution to the purchase or acquisition of the properties. He stated that those properties were bought from his own personal resources and also stated that the Applicant had not participated in any way in the wines and spirits business which issue I will discuss shortly hereafter as it is germane to the whole case.

The Applicant's case

7. The Applicant alleges that she contributed to the purchase of the above properties directly and indirectly in various ways. That when she got married in 1994, she was working with the [...] as a secretary and used to pay school fees for the child, V, who was then attending St. H[.....]. She also used

to pay hospital and electricity bills, clothes and the salary for the house help. Further that when in 1995 she gave birth to the second born child, P, she paid the hospital bill at the Aga Khan Hospital and at that time the Respondent was working with the Ministry of Foreign Affairs in Nairobi and was subsequently posted to Saudi Arabia as a Financial *attache* and the Applicant then resigned from her job at [...] and left in September 1995 for Saudi Arabia. She was therefore paid her pension which was Kshs.100,000.00 which she gave the respondent to utilize as deposit for the purchase of **Nairobi/[...] (Tena House)**.

8. She alleged that while in Saudi Arabia she worked for three months as a Hospital Assistant Secretary in King Faisal Hospital and earned a total of USD 4,500 out of which she gave the Respondent USD 4,000 towards the acquisition of the Tena house. The rest she used to buy food and other basic necessities for the house. She however left employment afterwards as she could not work without a work permit. She resulted to staying at home so as to take care of the children and the Respondent with the occasional assistance of local house helpers.

9. It is the Applicant's case that the Respondent started a business of selling spirits and wines in their house and she managed and watched it thrive. This enabled the Respondent to send money to his advocate in Kenya, M/s. Alice Wahome & Company Advocates to complete the purchase of the house in Tena being Nairobi/ [...] which has many rented units for rental purposes. At the same time she claims they also acquired a house in Avenue Park II being LR. [...] which is now rented out. In the meantime, she gave birth to their last child, J, and at the same time found out that P was autistic and required a lot of care and it was tough for her to manage an autistic child and also a little baby at the same time.

10. In 1999, the Applicant contends, the Respondent was posted back to Kenya and she returned with him. They bought several household goods to bring home which included 2 fridges, 4 TVs, sofa sets and the latest appliances available at the time. They also bought a Mercedes Benz motor vehicle. Upon their return they bought the house in Loresho Crescent, LR No. [...] where they lived and which is the matrimonial home to date. Subsequently, they bought a Suzuki Vitara, [...] and Peugeot [...] which were sold by the respondent without her consent. They also bought a double cabin [...] thereafter.

11. In December 1999, the Applicant got a job with UNICEF again where she works to date and in the years 2001 and 2002, she alleged that she paid J's school fees at Loresho Nursery School and she currently buys food, pays medical bills, salary for the house help, electricity and entertainment for the children. She also buys school books and she maintains that she has contributed a lot to the acquisition of the matrimonial properties despite them being registered in the Respondent's name.

Respondent's case

12. In his response as contained in the Replying Affidavit sworn on 16th September 2004 and Further Affidavit sworn on 23rd January 2009, the Respondent deposed as follows;

13. In relation to the purchase and acquisition of LR No. [...], Tena Estate, he denied receiving Ksh.100,000.00 from the Applicant to utilize it as deposit for that house. He claimed that the process of purchasing the Tena House began in September 1996 and was completed in February 1997 and the Applicant made no contribution at all. As regards the Applicant applying her earnings from King Faisal Hospital for the same purpose, the Respondent contends that the Applicant received those payments between November 1995 and February 1996 long before the Tena House was bought. The Respondent therefore alleged that the total purchase price including the cost of completion of construction of the Tena property was solely borne by him without any contribution, directly or indirectly from the Applicant.

14. Regarding the Wines and Spirits business, the Applicant denies that at any material time while in Saudi Arabia he set up or owned or managed a wines and spirits business at his residence. In any event, he avers that alcohol is considered a drug and it is illegal to trade in alcoholic drinks in Saudi Arabia and particularly for a diplomat like the Respondent was. He claims that he was only involved in the co-ordination, ordering and payment of alcoholic beverages to the diplomatic missions in Riyadh as he used to buy alcohol in bulk in order to ease the clearing process and reduce their costs. In the end, the drinks would be delivered to the respective owners directly upon clearance and they would pay for their

respective drinks and pay him a commission for facilitating delivery thereof.

15. The Respondent also denied working from Monday to Friday (8.00am to 7.30pm daily) as stated by the Applicant and stated that in Saudi Arabia, working days start from Saturday to Wednesday (8.30am to 2.30pm). He therefore alleges that he therefore had enough time to coordinate the purchase and delivery of the alcoholic beverages to the diplomatic missions. In any event, the Respondent claimed that after their son P was diagnosed with autism in 1998, he needed very close attention and care from his mother, thus the Applicant would not have had all the time to concentrate on the alleged wines and spirits business on account of P's condition.

16. As regards the purchase of L.R [...], (the Loresho House) the Respondent claimed that he solely paid for the purchase of the same from his savings from while salary in Kenya, his allowances in Saudi Arabia and the Commissions from the alcoholic beverages coordination. Further, that there was no direct or indirect contribution from the Applicant and indeed none has been shown.

17. With regard to the motor vehicles; i.e. [...], [...] 093V, [...] [...] 605C and [...], the Respondent alleged that he acquired and paid for the same solely without any contribution (direct or indirect) from the Applicant. He stated that he has since sold [...], while [...] was involved in an accident and was written off while [...] 093V has since been acquired and is owned by Four Winds Company Limited which is a distinct legal entity from the Respondent.

18. With regard to the household goods (2 fridges, 4 TVs, sofa sets and the latest appliances available at the time) the Respondent claimed that the same were imported by him on behalf of third parties who had sent him money to purchase the said goods on their behalf and so they are not available to either party.

19. The Respondent denied the allegation that the Applicant was ejected as a shareholder of Four Winds Trading Company and claimed that she has never been a shareholder of that company at any material time.

20. The Respondent also claimed that he has been paying and continues to pay all sums payable in respect of electricity bills, school fees for all the children while the Applicant pays for food and medical bills which are part of her employment benefits.

21. The Respondent further claimed that while his salary in Kenya was Kshs.58,000 per month, which amount was deposited directly into his bank account thus accumulating huge savings, he got a Foreign Service Allowance of approximately Kshs.400,000.00 per month while in Saudi Arabia. He therefore alleges that this kind of money was sufficient for him to acquire the properties aforesaid.

Determination

22. I have read the parties pleadings, submissions and the evidence on record. In my view, there are two issues for determination in this case;

(i) *Whether the Applicant has established that she contributed directly or indirectly to the purchase of the properties in issue and conversely is the Respondent's response in denial, credible?*

(ii) *If the answer to (i) above, is in the affirmative, whether the Applicant is entitled to a share in the matrimonial properties mentioned earlier and if so, to what extent.*

23. This Originating Summons is brought under **Section 17** of the **Married Women's Property Act** of 1882 (*hereinafter the 'Act'*). This Section reads thus;

“In any question between husband and wife as to the title or possession of property, either party may apply by summons or otherwise in a summary way to any Judge of the High Court of Justice and the Judge may make such order with respect to the property in dispute as he thinks fit”.

24. The law in the past was that, for an Applicant to succeed in an application under section 17 of the Act, it was upon her to show that she contributed directly or indirectly towards the acquisition of the properties claimed. In Kivuitu v Kivuitu (1991) LLR 1411 CAK, it was 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 the children and enhancing the family welfare. This indirect contribution was also recognized in Nderitu v Kariuki (1977) LLR 2731 (CAK) where the Court of Appeal stated;

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

25. This decision was later on followed in Kimani v Kimani (1997) LLR 553 which was cited with approval in [...]ore v [...]ore (2000) 1 EA 80 that;

”It was for the Appellant to prove on a balance of probabilities that she directly or indirectly contributed towards acquisition of the properties in respect of which she claimed to be entitled to a share without losing sight of the fact that in regard to indirect contribution, the same was invariably to be considered in its own special circumstances”.

26. I am also aware of the law as more recently contained in the Court of Appeal decision of P Mburu Echaria v Priscilla Njeri Echaria, Civil Appeal No. 75 of 2001, where it was held that a spouse is only entitled to that part of matrimonial property which she can prove that she contributed to the acquisition thereof. The Court stated thus;

“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 indirect towards the acquisition of the property’ (Emphasis added)”.

27. I recall that the Applicant contended that the properties were registered in the Respondent's name on the understanding that he held them in trust for her. Although **Section 17** of the **Act**, gives the Court wide powers, it does not give the court power to substitute title from one spouse to the other or to give a portion of title to one of the spouses. See Pettit v Pettit (1969) 2 ALL ER 385. In Gissing v Gissing, (9171) AC 888 it was held;

“The court does not decide how the parties might have ordered their affairs, it only finds how they did. The court cannot devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had”.

28. It is trite law that where a spouse buys property intended for common use with the other, it cannot *per se* give the other spouse an interest in the property. Where the property is purchased and conveyed into the name of one spouse who did not evince an intention that the other spouse should share in the property, the question of whether the other spouse has a beneficial interest in the property is dependent on the law of trust. See Gissing v Gissing (Supra).

29. The concept of trust is not new in our jurisprudence. A court may presume a trust in case of absolute necessity. But such a trust is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the Articles to create trust must be clearly determined before a trust is implied. See Ayoub v Standard Bank of South Africa (1963) EA 619.

30. In Ndungu v Ndungu (2000) LLR 3497 (CAK) the Court of Appeal held that;

“It was clearly an error on the face of the record when the Learned Judge proceeded to treat a claim

made under an implied or resulting trust as a claim made under section 17”

31. I am wholly guided and in regard to the facts of this case I will apply all the principles as enumerated above.

32. It is not contested that the properties in issue were acquired during the subsistence of the marriage between the Applicant and the Respondent. I shall now examine each of the parties contribution to each of the properties in issue separately.

(i) Nairobi/[...] -Tena House.

33. In her affidavits sworn on 27th August 2004, 28th November 2008 and Further Supplementary affidavit sworn on 14th June 2011, the Applicant contends that she contributed directly towards the acquisition of this property in three ways. First, she gave the Respondent Kshs.100,000.00 being her final pension dues that she received after resigning from her employment with UNICEF in September 1995. Secondly, she worked as a Hospital Assistant Secretary in King Faisal Hospital and earned a total of USD 4,500 out of which she gave the Respondent USD 4,000 towards the acquisition of this house. She also alleged that she managed the Wines and Spirits business whose proceeds were also applied towards the acquisition of this property. However, in her testimony she claimed that she applied her earnings from King Faisal Hospital to buy household necessities and gave the Respondent part of it to buy the Tena House and the Respondent was to contribute the difference 'as part of his family contribution'.

34. The sale agreement for this property was entered into in September 1996 and title issued to the Respondent on 11th November 1996. As regards the Applicant's contribution to this property, I am unable to find that she contributed towards its acquisition. There is no evidence on record that she gave the Respondent her pension from UNICEF of Kshs.100,000.00. And in any event, she failed to produce any evidence that she ever received this money as pension. In saying so, I am aware of reasoning in **Manson v Manson (2008) e KLR** where Maraga J upheld the reasoning in **Balfour v Balfour (1919)2 K.B 571** that in matters involving a husband and wife, meticulous records may not be kept in a manner akin to commercial contracts or transactions.

35. However, I am convinced that, it would have been possible for the Applicant to have documents showing any payment she may received as pension from UNICEF. I say so because, although the Applicant produced her resignation documents, it would also have been possible for her to produce documents as evidence of her allegation of been paid the pension. I am making this finding bearing in mind that the Respondent controverted the Applicant's claim of ever giving him the Kshs.100,000.00 paid to her as pension.

36. In regard to her contribution from her earnings from King Faisal Hospital, the Applicant contradicted herself on how she applied this earnings. It is not clear whether she gave the Respondent USD 4000 towards the acquisition of this property or she bought household necessities or she gave the husband USD 500 for starting the wines and spirits business.

37. It is also clear from the evidence before me that this property was not acquired from the wines and spirits business. Both parties are in agreement that the wines and spirits business started in February 1997 while the Tena property was acquired in November 1996, way before this business was conceived. It would in the circumstances have been the source of income for its acquisition.

38. It is therefore clear to my mind that this property was acquired through the sole efforts of the Respondent. In her affidavit sworn on 28th November 2011, the Applicant produced letters from the Respondent to his bank and from the Respondent to his advocate A.M Wahome & Co. Advocates on how the payments of this house were done. One such letter contains instructions to the Manager Standard Chartered Bank to transfer Kshs.800,000.00 from the Respondent's savings account No. 0150372640900 in favour of A.M Wahome & CO Advocates. I note that in a letter dated 1st October 1996, A.M Wahome & Co. Advocates wrote to the Respondent confirming that they had utilised this amount, Kshs.800,000.00 towards the payment of 10% deposit in the acquisition of the Tena House. In that letter the advocates also

inform the Respondent that they needed Kshs.200,000.00, (USD 10,430) and Kshs.61,300 in order to complete the transaction. This amounts were subsequently paid by the Respondent and this is clear from the letters dated 7th September and 17th September 1996 through which he authorized payments of Ksh. 200,000.00 on each Bank Draft in favour of A.M Wahome & CO Advocates from his savings account No. 034-086-803 held at National Bank of Kenya. There is also a money transfer form exhibited by the Applicant and marked as **PMM-3a** from the Saudi American Bank for USD 10,500 in favour of A.M Wahome & CO Advocates and the transfers made by the Respondent. Accordingly, I find that, the Applicant has failed to prove any contribution towards the acquisition of this property.

(ii) L.R No. [....] (Loresho Property) and L.R No. [....] (Avenue Park Property).

39. The Applicant alleged that both the Loresho and the Avenue properties were bought while they lived in Saudi Arabia and with the proceeds of the wines and spirits business which she managed. However, the Respondent claimed that he solely acquired the Avenue Park property on 29th April 1999 while still in Saudi Arabia and the Loresho property was acquired on 10th November 1999 after he returned to Kenya. He claimed that he used his salary and savings to acquire them because he never had expenditures while living in Saudi Arabia since he was provided with housing, school fees, electricity, water and air tickets during holidays. In addition to that he was being paid Kshs.400,000.00 per month as foreign service allowance although he still had his salary of Kshs.58,000.00 per month in Kenya that was being paid into his National Bank Account.

40. The Avenue House was bought for Kshs.4,000,000.00 and the Loresho house for Ksh.8,000,000.00. Both properties were purchased at Kshs.12,000,000.00 in total and the Respondent alleged that he paid for them in cash as he never received any financing. His salary for the four years he was in Saudi Arabia was Kshs.2,304,000.00. He therefore alleged that the difference between the four years salary and the total purchase price of this properties would be Kshs. 9,696,000.00 which he raised through his foreign service allowance and commissions for the wines and spirits. With that background. I must now consider the allegation that the Applicant managed the wines and spirits business on behalf of the Respondent so as to ascertain any alleged contribution of the Applicant.

(iii) Wines and Spirits business

41. On the one hand, the Applicant alleged that out of her earnings at King Faisal Hospital between November 1995 and February 1996 she gave the Respondent USD 500 allegedly as the start up capital for this business. In her testimony she set out how she single handedly managed the business from their home because of the strict Saudi Arabia rules which prohibited sale of alcohol in public. That customers would go to her house to collect the drinks from their house. She stated further that the Respondent did not play any role in the management of the business because he worked from Monday to Friday 8.00am to 7.30pm. That she handed him over the sales proceeds which he would bank the following morning. She claimed that in a good week she would raise up to Kshs.1.2 million and particularly identified her main customers as Paul and Annette Hoiness. She further contends that she used to get alcohol supply from Turkey, New Zealand and Spain.

42. On the other hand, the Respondent alleged that he did not engage in any wines and spirits business or at all as alleged by the Applicant. That being a diplomat he would not have engaged in the alleged business and more so from his official residence. Nonetheless, he candidly admitted having engaged in coordination of supplies of alcoholic beverages to the foreign missions in Saudi Arabia for a commission and this arrangement was known by the Saudi government and they allowed supplies to be received at the ports of entry and cleared in the normal manner.

43. From the parties submissions it is clear that the business started in February 1997 thus it could not have been true that it was started with part of the money (USD 500) earned by the Applicant from her earnings with King Faisal Hospital, as this amount was earned in February 1996 a year before the business started. In **[...]lore v [...]lore Civil Appeal No. 63 of 1998**, the Court of Appeal stated;

“It is difficult to connect the sum of Kshs.70,000.00 to the purchase of Ngong/Ole Kesasi/35 there is a

clear gap of many years between the period the second loan on Nairobi/Block/32/26 was raised and when Ngong/26 was raised and when Ngong/Ole Kesasi/35 property was acquired”.

44. Further that the supply of wines and spirits came from United Arab Emirates as shown in the annexure marked as **PMM1** where it is exhibited that the Beneficiary of the money transfers was Maritime and Mercantile International LLC of Dubai and the remitter is Steven Muturi (Respondent). There are also transfers made to other agents such as Gulf Ventures whose bank account was Royal Bank of Canada and Poul and Annette Hoiness whose bank was CitiBank Luxembourg.

45. It is also clear from the evidence before me that between July 1997 and May 1999, the Respondent transferred huge amounts of money while in Saudi Arabia to his bank account No. 01503-726409-00 held at Standard Chartered Bank Ltd Old, Mutual Branch, Nairobi This amounts varied between USD 8,000.00 to 25,000.00. He had a transfer of USD 25,000.00 four times in June 1998, April, 1999 and twice in May 1999. The Avenue Park house was acquired on 29th April 1999 while the parties were still living in Saudi Arabia and the Loresho property was acquired on 10th November 1999 after their return to Kenya. This in addition to the money transfers made to his personal bank account, in Nairobi.

46. With the evidence before me I am inclined to believe the Applicant that there was indeed a wines and spirits business in Saudi Arabia and that the profits of that business were transferred by the Respondent to his bank accounts for the purchase of this properties. I say so because the Respondent has failed to explain how he would have raised the money transferred. I note that in one particular month he was able to transfer USD 50,000.00. He stated that he used to earn 10% commission of the total cost of the drinks. I would term this as a mere allegation because he never produced any documents to support the allegation. In the absence of that evidence, I believe the Applicant's case. She produced all the documents to show the money transfer to the supplies and other agents and she also gave a detailed account of how the business was run.

47. From the evidence on record, it is therefore clear that there was a wines and spirits business and that the Applicant managed and or participated in it because the Respondent was working full time at the Kenya high Commission in Riyadh. I am therefore satisfied that she made a contribution to the money being transferred home for the acquisition of the properties in issue and is entitled to them in equal shares with the Respondent.

48. It is also clear that the Loresho house was bought with the intention of having it as the matrimonial home since it was acquired upon their return from Saudi Arabia and they proceeded to move in there. In determining to whom this house should be allocated, I must say something about the child, P. PM is an autistic child who is in the custody of the Applicant. P. has a structured programme which he follows everyday and he is constantly checked by an assistant. He is also severally impaired in language and social skills. The structure of the house has been changed severally in order to accommodate this child's condition. I am therefore in agreement that this house should be retained by the Applicant for the sake of this child's needs. It offers a peaceful environment for P. because he is accustomed to living in there. It would therefore not be in the best interest of this child to interrupt his life as the parties fight over properties.

49. That leaves the Avenue Park Property. Considering that the Applicant has retained the Loresho House, it follows that the Respondent must have the Avenue Park Property in addition to the Tena Property which is his.

(iv) Motor vehicles

50. I now turn to consider the issue of motor vehicles registration number [...] Mercedes Benz, [...] a double cabin, [...] a Peugeot, [...] a Peugeot and [...] Grand Vitara. The Applicant alleged that these motor vehicles were brought from the proceeds of the wines and spirits business and were registered in the Respondent's name save for [...] which is registered in the Applicant's name. On his part, the Respondent testified that he acquired and paid for these motor vehicles solely without any contribution

direct or indirect from the Applicant. He claimed that he has since sold [....]; [....] was involved in an accident and was written off while [...] 093V has since been acquired and is owned by Four Winds Company Limited which is a distinct legal entity from the Respondent.

51. The latter evidence was not controverted and it therefore follows that the only motor vehicles available for distribution are [....]- Mercedes Benz and [....]- Grand Vitara which is in the possession of the Respondent although registered in the Applicant's name. The Applicant claimed that she purchased a Toyota Corolla [...] for her use since the Respondent would not allow her to use the other cars. This is the car she uses to date with the children. However, the Respondent failed to produce any evidence that she purchased it for her. I have seen the Bill of lading produced in evidence and it has the names of the Applicant.

52. For avoidance of doubt, the motor-vehicles, it is my finding, were also purchased from the proceeds of the wines and spirits business and in need not repeat my reasoning on that matter. In the circumstances, since the Applicant has [...], let the Respondent retain motor vehicle registration number [....]- Mercedes Benz. And since the [....]- Grand Vitara is already registered in the name of the Applicant, I will let her have it alongside Toyota Corolla [....]. The Respondent also to me did not seem to have any interest in this motor vehicle and so, I will let matters rest there. In any event, the Respondent sold the motor vehicle registration number [...], without the consent of the Applicant and the [...] 093V has since been acquired by the Four Winds Company Ltd in which he has interests in, so no prejudice would be caused in the circumstances.

(v) Household goods

53. With regard to the household goods (television sets, fridges, dinning tables, satellite dishes, home theater, beddings, generators, driers, security system, children's games, cutlery, fax machine, printer) the Applicant alleges that they were bought while they lived in Saudi Arabia in order to bring them to Kenya for their use. The Respondent claimed that the same were imported by him on behalf of third parties who had sent him money to purchase the said goods on their behalf. The Respondent failed to produce any evidence that he bought the household goods for his friends who had sent him. Since I am convinced that these goods are still at the Loresho house, I order that they remain in the custody of the Applicant and in the use of the children.

(vi) Shares in Four winds Company Ltd, Check Point Insurance Company Ltd and Northfield Company Ltd.

54. The Court of Appeal has settled the law in respect to shares held in limited companies which are claimed as part of matrimonial property for purposes of distribution. In **Muthembwa v Muthembwa EALR (2002) 1EA 186** the Court held;

“The trial judge erred in taking into account as matrimonial property the two vehicles registered in the name of Kyaleka Properties Ltd as the company was not a party to the suit. Likewise, the order directing the division and distribution of properties owned by the limited liability companies was erroneously made and the trial court decree would be varied by excluding it”.

55. Similarly in **Mbugua v Mbugua (2001) 2 EA 445 Visram J** quoted the court of Appeal decision in **Mungai v Mungai (1995) LLR 405** where the court reversed the High Court decision and held; that;

“The application under section 17 of the Act could only deal with property held by the Respondent as a husband. It could not cover shares held by the Respondent in a limited company”.

56. I am wholly guided. The Applicant alleged that her name was removed from the list of shareholders of Four Winds Company Limited. However, she failed to substantiate her allegation by providing evidence as to her shareholding, when she was removed and by whom and if the changes had been made and registered the Registrar of Companies. That notwithstanding, the law is settled that shares held in a limited liability company cannot form part of matrimonial property for distribution. I further

agree with the reasoning of Koome J in a ruling in this matter at the interlocutory stage where she refused to grant restraining orders in respect to these shares and stated thus;

“...I decline to issue the order in respect of shares in the company which I believe can be determined under the Companies Act”.

57. I also decline to issue any orders in respect of these shares for the same reasons. The Applicant can only use the procedures and mechanisms established under the **Companies Act, Cap 485 Laws of Kenya** for establishing any claim she may have on the shares held in these companies.

58. In the end therefore, I shall distribute the properties as follows;

- (i) Nairobi/[...] -to the Respondent***
- (ii) L.R No. [...] -to the Applicant***
- (iii) L.R No. [...] -to the Respondent***
- (iv) Motor vehicle registration number [...] - Mercedes Benz-To the Respondent***
- (v) Motor vehicle registration number [...] - a double cabin (to be dealt with in accordance with the Company's Act)***
- (vi) Motor vehicle registration number [...] - Grand Vitara-To the Applicant***
- (vii) Motor vehicle registration number [...] - Toyota Corolla-To the Applicant***
- (vii) Shares in Four Winds Company Ltd- be dealt with in accordance to the Company's Act.***
- (viii) Shares in Check Point Insurance Company Ltd-be dealt with in accordance to the Company's Act.***
- (ix) Shares in Northfield Investment Company Ltd-be dealt with in accordance to the Company's Act.***
- (x) Household goods-to the Applicant.***

59. Each party to bear its own costs.

60. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF JANUARY, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Applicant present

Mr. Onyango holding brief for Mr. Miller for Applicant

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE