



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC CIVIL SUIT NO. 422 OF 2011 (OS)**

**N W K..... PLAINTIFF**

**-VERSUS-**

**J K M.....1<sup>ST</sup> DEFENDANT**

**W T.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT OF THE COURT**

The suit herein was commenced by way of an originating summons dated 18<sup>th</sup> August 2011 filed by the Plaintiff, wherein she was seeking the following orders:-

1. That an order of injunction do issue stopping and/or restraining the sale purchase, disposal of and/or alienation of the whole or any part of L.R. No. 5900/1 by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant.
2. That a declaration does issue that L.R. No. 5900/1 situate South East of Limuru Town in Kiambu District jointly bought but registered in the name of the 1<sup>st</sup> Defendant is partly held in trust for the Plaintiff.
3. That a declaration does issue and the Court be pleased to assess the Plaintiff's share of the said piece of land as 50% in light of her contribution to the purchase of L.R No. 5900/1.

The originating summons was supported by Plaintiff's affidavit sworn on 18<sup>th</sup> August 2011 and annexures thereto. The 1<sup>st</sup> Defendant entered appearance on 2<sup>nd</sup> December 2011 and filed a replying affidavit sworn on 30<sup>th</sup> November 2011. A. H. Malik & Company Advocates entered appearance for the 2<sup>nd</sup> Defendant in a Memorandum of Appearance dated 6<sup>th</sup> September 2011 filed on 7<sup>th</sup> September 2011. When the case was mentioned for directions on 17<sup>th</sup> July 2012, the court directed that hearing be on the basis of filed affidavits and submissions. The cases put forward by the respective parties as summarized from the pleadings and affidavits filed hereby follow.

**The Plaintiff's Case:**

The Plaintiff in her verifying affidavit sworn on 18<sup>th</sup> August 2011 stated that she got married to the 1<sup>st</sup> Defendant on 12<sup>th</sup> February 1972 under the provisions of the African Christian Marriage and Divorce Act, (Cap 151 of the Laws of Kenya) at Catholic Church Mareira in Murang'a District. The Plaintiff annexed copies of the marriage certificate and birth certificates of SM, GW and GW being the surviving children borne of the marriage as evidence.

It is the Plaintiff's evidence that on 24<sup>th</sup> October 2008, the 1<sup>st</sup> Defendant entered into a Sale Agreement with the 2<sup>nd</sup> Defendant for the sale of 7 acres which was to be excised from L.R. No. 5900/1. Further, that simultaneously with the transfer, the said agreement whose copy was attached, provided that the 2<sup>nd</sup> Defendant would lease about 10.6 acres of the same parcel for a period of 9 years.

The Plaintiff deponed that they had taken a loan for the purchase of the said property, and that after its acquisition she left her job as a teacher to farm on the land to enable pay off the loan. The Plaintiff averred that she engaged in horticulture, general farming and cow-rearing, activities which enabled them completely pay off the loan in addition to being a supplemental source of income in their retirement. However, that she was not consulted on the sale of the property and was not included in the sale agreement as part owner.

It is the Plaintiff's case that she had been informed that the property was to be sub-divided for purposes of taking a mortgage, which has not been taken, and learnt of the sale transaction after stumbling on the sale documents in the house. The Plaintiff stated that she lodged a caveat, with the Registrar of Lands on 14<sup>th</sup> April 2011 to prevent further dealings with the land before her interest and A copy of the caveat was exhibited. The Plaintiff has claimed that she has a beneficial interest in the property based on the law of trusts and insists that the 1<sup>st</sup> Defendant is not entitled to deal with the property in a manner that is detrimental to her interest and welfare.

In her supplementary affidavit sworn on 14<sup>th</sup> December 2012, the Plaintiff reiterated that she did not know about the sale between the Respondents since Land Control Board Consent dated 10<sup>th</sup> September 2009 was in respect of subdivision of LR No. 5900/1 into two parcels and that one of the sub-divided parcels was to be mortgaged and not to be sold. The Plaintiff has attached evidence of the consent dated 10<sup>th</sup> September 2009 as well as a letter from the District Officer Limuru dated 27<sup>th</sup> November 2012 stating that the 1<sup>st</sup> Defendant had appeared before the Land Control Board held in Limuru Division on 10<sup>th</sup> September, 2009 seeking consent to subdivide the land into 2 portions.

The Plaintiff averred that the mortgage of LR. 5900/1 by Agricultural Finance Corporation indicates that the loan was paid over a period of 20 years to which she substantially contributed, and therefore, that her direct contribution besides trusteeship bestows on her more ownership rights. The Plaintiff annexed a copy of the mortgage dated 17<sup>th</sup> September 1975 between the 1<sup>st</sup> Defendant and Agricultural Finance Corporation, and averred that when the Agricultural Finance Corporation threatened to foreclose the mortgage, she stepped in and cleared the arrears.

The Plaintiff's counsel in submissions dated 20<sup>th</sup> August 2012 argued that LR No 5900/1 which was registered in the 1<sup>st</sup> Defendant's name with the understanding that it was joint venture and a family asset. The counsel argued that immovable property acquired during the subsistence of the marriage are jointly owned, should be shared equally, and decisions regarding the property should be made jointly.

Reliance was placed on the case of **Charles Cherutich & another -vs- Sally Towett & 10 others (2008) eKLR** where the court held that the 1<sup>st</sup> Defendant would have succeeded in their suit had they filed an originating summons under section 17 of the Married Women Property Act as against the 2<sup>nd</sup> Plaintiff and demonstrated to the court her contribution to the purchase of the suit premises.

It was further submitted that due to the Plaintiff direct and indirect contribution to the repayment of the loan secured by LR 5900/1 the 1<sup>st</sup> Defendant became a beneficial owner and the 1<sup>st</sup> Defendant became a constructive trustee. Counsel for the Plaintiff relied on the case of **Onyango Omoke -vs- John Omoke Civil Appeal No. 10 of 1981 (Kisumu)** as well as an excerpt from the treatise **Equity and the Law of Trusts** by Philip H. Pettit, 4<sup>th</sup> Edition at page 46 in this regard.

Reliance was also placed in the case of **Hussey -vs- Palmer (1972)3 ALL ER 744**, where the court defined a constructive trust as one imposed by law whenever justice and good conscience require it.

Counsel argued that since the Plaintiff was the wife of 1<sup>st</sup> Defendant and the mother of his 3 surviving children, the ends of justice would be served if the 1<sup>st</sup> Defendant was not allowed to sell LR 5900 or any portion thereof without the consent.

Counsel for the Plaintiff further argued in supplementary submissions dated 16<sup>th</sup> January 2013, that section 28(a) of the Land Registration Act recognises spousal rights over matrimonial property as being an overriding interest over registered land. Reliance was also placed on section 93(2) of the Land Registration Act which recognised rights gained by contribution of the spouse whose name is not on the register as well as section 93(3)(b) which enjoins a transferee to inquire of the transferor whether the spouse has consented to the transfer in cases where a spouse who holds land or a dwelling house in his name individually undertakes disposition of the same.

Counsel reiterated that the Plaintiff had contributed directly towards the loan repayment as well as tended to the suit property, keeping it in good condition and undertaking farming thereon in order to supplement their household needs, and was therefore entitled to an equal share in the property.

The Plaintiff's counsel relied on the case of Z.W.N -vs- P.N.N(2012) eKLR where the court observed that the principle of law set by the court in Echaria -vs- Echaria (2007) 2EA 139 stemmed from provisions of a legislation subordinate to constitutional provisions enshrining the principle of equality when it comes to distribution of matrimonial property, and held that the Plaintiff was entitled to half share beneficial interest in the matrimonial properties. Counsel further relied on the case of Mereka -vs- Mereka CA No. 236 of 2011 where the Court of Appeal refused to disturb an award of half interest issued by the superior court in favour of the respondent, following her application under section 17 of the Married Women's Properties Act 1882.

### **The 1<sup>st</sup> Defendant's Case**

The 1<sup>st</sup> Defendant in his replying affidavit sworn on 30<sup>th</sup> November, 2011 stated that he was the registered owner of all that parcel of land known as Limuru L.R. No. 5900/1, and admitted to having entered into a sale agreement with the 2<sup>nd</sup> Defendant for sale of a portion of the said land. The 1<sup>st</sup> Defendant further stated that he started the process of sub-division of the suit parcel so that he could process the documents for the portion he was selling to the 2<sup>nd</sup> Defendant. However, that he never transferred the parcel to the 2<sup>nd</sup> Defendant for reasons that the agreement provided that transfer was only possible after completion. According to the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant failed to avail the relevant company documents to facilitate application of the Land Control Board consent in accordance with clause 8.3 of the sale agreement, which rendered the agreement null and void under the provisions of the Land Control Act.

Further, that on the same day the sale agreement was executed, they entered into a lease for the remainder of the other parcel of land by way of a tenancy agreement which was an addendum to the sale agreement. A copy of the Sale Agreement entered into by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 27<sup>th</sup> October 2008 as well as the lease were exhibited as evidence. According to the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant continued to pay rent for the property pursuant to the tenancy agreement, However, that due to opposition by family members and the disharmony caused by the proposed sale, he instructed his advocates to write to the 2<sup>nd</sup> Defendant rescinding the agreement which had also become void in law pursuant to the provisions of the Land Control Act. A copy of the rescission letter dated 26<sup>th</sup> August 2011 from Gitonga Mureithi & Company Advocates addressed to Raffman Dhanji Elms & Virdes has been exhibited.

The 1<sup>st</sup> Defendant denied that the 2<sup>nd</sup> Defendant had a cause of action against him stating that he did not intend to proceed with the sale in view of the objections raised by his family as well as want of consent of the Land Control Board. Further, that in view of the rescission of the agreement, the suit against him was misconstrued, premature, unnecessary and liable for dismissal against him.

The 1<sup>st</sup> Defendant admitted the lease entered with the 2<sup>nd</sup> Defendant for a portion of Limuru L. R. No.

5900/1 and denied having signed any transfer form. He averred that the 2<sup>nd</sup> Defendant continued to pay rent as a tenant. The 1<sup>st</sup> Defendant annexed a bundle of petty cash vouchers issued in the name of Molly Flowers Ltd on 02.04.07, 02.07.07, 02.04.08, 01.07.08, 05.10.09, 02.01.09, 04.07.11, 24.01.11, 11.10.10, 08.04.10 each for Kshs 218,400.00 as evidence. He denied handing over possession to the 2<sup>nd</sup> Defendant, and stated that the 2<sup>nd</sup> Defendant had not paid the full consideration and possession could not therefore be implied.

The 1<sup>st</sup> Defendant further stated that he had pursued sub-division of the subject property until the sale agreement became void for lack of consent. In support of this averment, the 1<sup>st</sup> Defendant annexed the consent of the Land Control Board to subdivide the property dated 10<sup>th</sup> September 2009, as well various correspondence from the relevant local and land authorities stating that there were no objections to the proposed subdivision of LR 5900/1.

The 1<sup>st</sup> Defendant indicated that he is no longer interested in selling the subject parcel of land to the 2<sup>nd</sup> Defendant, who is aware of the discussions on this issue with his family. The 1<sup>st</sup> Defendant attached evidence of letters dated 20<sup>th</sup> July 2011 and 25<sup>th</sup> August 2011 from Raffman Dhanji Elms & Virdee Advocates addressed to G. Kamonde Advocates in this respect. According to the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant's remedy, if any, is in damages as investments carried out the 2<sup>nd</sup> Defendant were pursuant to the lease and not the sale agreement. Further, the 1<sup>st</sup> Defendant contends that the 2<sup>nd</sup> Defendant cannot draw any rights from an agreement which is void for all intents and purposes.

The 1<sup>st</sup> Defendant's counsel in submissions dated 17<sup>th</sup> December 2012 stated that it is not in dispute that the Plaintiff contributed to the acquisition of the subject property, as the 1<sup>st</sup> Defendant did not raise any objections to the Court making an order for percentages in terms of the Plaintiff's entitlements. The 1<sup>st</sup> Defendant however stated that since the Plaintiff had filed the suit for reasons that the 1<sup>st</sup> Defendant had entered into an Agreement with the 2<sup>nd</sup> Defendant for the sale of the property, the substratum of the suit had been lost since the 1<sup>st</sup> Defendant was unable to complete the sale for lack of the Land Control Board consent.

The 1<sup>st</sup> Defendant counsel refuted the allegations by the 2<sup>nd</sup> Defendant that the 1<sup>st</sup> Defendant and the Plaintiff were colluding to deny him the suit property. He submitted that the 2<sup>nd</sup> Defendant is currently operating on a lease for a portion of the property measuring approximately 10.6 acres which will expire in the year 2017 and further, that the 2<sup>nd</sup> Defendant was paying rent for the portion previously intended for sale measuring approximately 7 acres.

Counsel for the 1<sup>st</sup> Defendant submitted that the sale transaction had become a nullity by virtue of the provisions of section 6 of the Land Control Act for want of consent of the Land Board. He relied on the case of **Leonard Njonjo Kariuki -vs- Njoroge Kariuki Nairobi Civil Appeal No. 26 of 1979** . Counsel contended that the originating summons against the 1<sup>st</sup> Defendant ought to be dismissed as sale transaction which was the subject matter of the suit herein had been overtaken by events and cancelled.

### **The 2<sup>nd</sup> Defendant's Case**

The 2<sup>nd</sup> Defendant response to the Plaintiff's Originating Summons is in his replying affidavit sworn on 20<sup>th</sup> September 2011. The 2<sup>nd</sup> Defendant stated that he entered into a sale agreement with the 1<sup>st</sup> Defendant for subdivision and purchase of a portion of LR 5900/1 as well a lease of a portion of 7 acres hived from LR 5900/1 for a period of 9 years beginning from 24<sup>th</sup> October 2008. The 2<sup>nd</sup> Defendant contended that the purchase price for the property was Kshs 12,950,000.00 and in compliance with clause 2.1 of the agreement, he paid Kshs 1,295,000.00 being 10% of the purchase price to the 1<sup>st</sup> Defendant's advocates. The 2<sup>nd</sup> Defendant has alleged that pursuant to clause 8.2 of the agreement, the 1<sup>st</sup> Defendant was required to deliver to his advocates the completion documents which included the Land Control

Board Consent before the completion date which he failed to do.

It is the 2<sup>nd</sup> Defendant's case that he took possession of the leased portion of the property where he carries out the business of flower farming where he has invested nearly Kshs.20,000,000/= in installation of flower processing equipment and buildings. The 2<sup>nd</sup> Defendant has averred that that the 1<sup>st</sup> Defendant was acting in collusion with his wife with the intention of defeating his claim, and was buying time to enable his wife file the instant suit. The 2<sup>nd</sup> Defendant has annexed evidence of a letter dated 20th July 2011 from Raffman Dhanji Elms & Virdee Advocates addressed to G. Kamonde Advocates as well as a letter dated 1<sup>st</sup> August 2011 from G. Kamonde Advocates to Raffman Dhanji Elms & Virdee Advocates indicating that the 1<sup>st</sup> Defendant was consulting with his wife. The 2<sup>nd</sup> Defendant has also exhibited a copy of the rescission letter authored by Gitonga Mureithi & Company Advocates addressed to Raffman Dhanji Elms & Virdes Advocates dated 26<sup>th</sup> August 2011 which sought to rescind the agreement 6 days after the filing of the instant suit.

It the 2<sup>nd</sup> Defendant's contention that the Plaintiff and her children have no basis in law to challenge the 1<sup>st</sup> Defendant's exercise of rights over the suit property as the absolute proprietor. The 2<sup>nd</sup> Defendant maintains that the purported dispute between the Plaintiff and the 1<sup>st</sup> Defendant is illusory and a red herring calculated to eventually defeat the sale agreement. According to the 2<sup>nd</sup> Defendant, the suit as filed under section 17 of the Married women's Property Act (1882) discloses no cause of action against him and ought to struck out in its entirety.

Counsel for the 2<sup>nd</sup> Defendant in his submissions dated 27<sup>th</sup> September 2012, argued that an originating summons taken out under the Married Women's Property Act 1882 is between a husband and wife yet in the instant case, it sought to target the 2<sup>nd</sup> Defendant. Counsel reiterated that the 1<sup>st</sup> Defendant in his response and submissions has blamed the 2<sup>nd</sup> Defendant for failure of the sale agreement instead of addressing the Plaintiff's complaints against him.

It was submitted for the 2<sup>nd</sup> Defendant that the agreement giving rise to this suit was entered into in September 2008, and that law governing the parties rights, interests and obligations over the suit property is the Registration of Titles Act Cap 281 (now repealed) as the law under which the suit property was registered. Counsel submitted that the repealed statute is applicable in the present suit pursuant to the transitional clauses in Section 1 of the Land Act, Number 6 of 2012 and Section 107(1) of the Land Registration Act Number, 3 of 2012 and that Sections 23 of the Registration of Titles Act finds application to the suit property. The counsel in this respect relied on the decisions in **Muriuki Marigi – vs- Richard Marigi Muriuki and 2 others (1997) eKLR** and **Jacinta Wanjiku Kamau –versus- Isaac Kamau Mungai & Ndirangu Gitigi (2006) eKLR** on the rights of the registered proprietor of land.

Finally, the counsel argued that the Plaintiff's claim against the 2<sup>nd</sup> Defendant in so far as it is hinged on the provisions of the Married Women's Property Act 1882 is bad in law, and further, that the 2<sup>nd</sup> Defendant was not a proper respondent in an Originating Summons under the Married Women's Property Act and urged the court to dismiss the summons against the 2<sup>nd</sup> Defendant.

### **The Issues for Determination**

Arising from the pleadings and submissions made, the court finds that there are various issues arising for determination as follows:

1. What is the applicable law with respect to the Plaintiff's claims?
2. Whether the 1<sup>st</sup> Defendant hold the property known as L.R No 5900/1 situated in Limuru Town as trustee for the Plaintiff?
3. Whether the Plaintiff has made a contribution to the acquisition of L.R No 5900/1 in Limuru Town, and if so what is the share of the said property?
4. Whether the Plaintiff is entitled to an injunction to restrain the alienation of L.R No 5900/1

(hereinafter referred to as the suit property) in Limuru Town by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant?

## **The Findings and Determination of the Court**

The findings and determination of this court on each of the issues identified are as follows.

### **a. The Applicable Law**

The Plaintiff's Originating Summons is brought under the provisions of section 17 of The Married Women's Property Act and Order 37 of the Civil Procedure Rules. The Married Women's Property Act of 1882 is an English Act of general application that applies in Kenya by virtue of section 3 (1) (c) of the Judicature Act (Chapter 8 of the Laws of Kenya), and section 17 thereof provides as follows:

**“In any question as to between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, ...and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit...”**

It is clear that section 17 of the Married Women's Property Act applies when the question sought to be determined is the beneficial interests of a husband and wife in any property acquired during the marriage, or held by third party associations or bodies. The 2<sup>nd</sup> Defendant is not a bank, corporation, public body or society that has stock, shares or funds belonging to the Plaintiff and/or 1<sup>st</sup> Respondent, but is a third party who has acquired certain interests over the suit property. While the Plaintiff's claim to title or possession of the suit property under section 17 of the Married Women's Property Act can therefore only be principally sought as against the 1<sup>st</sup> Defendant, the Court is still given wide powers under the section to make such orders as regards that property as it thinks fit, including the ancillary relief sought of an injunction as against third parties who may be in possession of the suit property. The 2<sup>nd</sup> Defendant is therefore in my opinion properly joined as a party under section 17 of the Married Women's Property Act.

Order 37 of the Civil Procedure Rules provides for the procedure to be followed in matters required to be filed by Originating Summons. One of such matters under Order 37 Rule 1 is a claim by any person interested in the relief sought as a *c'estui que trust* as is claimed by the Plaintiff. The equitable principles relating to trusts will therefore apply to the Plaintiff's claim in this respect, to the extent that they also bind the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as will be determined after examination of the issues before the court.

The Plaintiff also relied on sections 28 and 93(2) and (3) of the Land Registration Act of 2012. Section 28(3) provides that spousal rights over matrimonial property shall be an overriding interest over all registered land, while section 93(2) and (3) provide as follows:

**“(2) If land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common of that land with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered .**

**(3) Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house—**

**(a) the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that charge; or**

**(b) the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.”**

The commencement date of the Land Registration Act of 2012 is 2<sup>nd</sup> May 2012. The sale and lease agreement entered into between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant produced in evidence is dated 24<sup>th</sup> October 2008 and the Plaintiff’s Originating Summons was filed on 19th August 2011. The Land Registration Act of 2012 was therefore not applicable at the time of the alleged sale and lease of the suit property to the 2<sup>nd</sup> Defendant, nor at the time did the Plaintiff’s cause of action arise. In addition section 107(1) of the said Act states any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of the Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

Lastly, the 2<sup>nd</sup> Defendant argues that the law that applied in this regard is the Registration of Title Act (since repealed). The conveyance produce by the Plaintiff as evidence of title of the suit property however shows that the land is registered under the Government Lands Act (since repealed) and the indenture conveying the said land to the 1<sup>st</sup> Defendant was registered in the Government Lands Registry on 17th September 1975. It is thus my finding that the substantive law that applies to the transaction between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant is the Indian Transfer of Property Act(since repealed), which is the Act that regulated the rights and liabilities arising from deeds registered under the repealed Government Lands Act.

**(b) Is the suit property held in trust for the Plaintiff?**

Equity recognizes various trusts that can be created in relation to the matrimonial home particularly the resulting trust and the constructive trust. It is not disputed by the 1<sup>st</sup> Respondent and he admits that the suit property herein is the matrimonial home, where the Plaintiff resides with the children of the marriage. The principles that apply where the family home is registered in the name of one spouse only are captured in **Halsbury’s Laws of England, Fifth Edition , Volume 72** at paragraph 280 as follows:

**“Subject to any express declaration of trust, where property is purchased in one party’s name but both parties contribute to the purchase price, the other party acquires an interest under a resulting trust proportionate to his or her contribution to the purchase price, or alternatively may make a claim under a constructive trust. On such a claim the first and fundamental question which must always be resolved in whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement or understanding reached between them that the property is to be shared beneficially. This common intention, which has been said to mean a shared intention communicated between them and which must relate to the beneficial ownership of the property can only be based on evidence of express discussion between the parties, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made, it will only be necessary for the party asserting a claim to a beneficial interest against the party entitled to the legal estate to show that he or she had acted to his or her detriment or significantly altered or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppels.”**

There are two key differences between a resulting trust and constructive trust as shown in this passage. The first is that for a resulting trust, there must be proof shown of a financial contribution to the purchase

of the matrimonial property, which is not necessary in a constructive trust. Secondly, a resulting trust can only arise at the time of acquisition of the property, and the financial contribution must be made to the purchase price that is paid to the vendor.

The Plaintiff in the present case alleges she did make loan repayments and arrears to offset the mortgage taken up by the 1<sup>st</sup> Respondent to purchase the suit property. She did not bring any evidence of this financial contribution, nor of any financial contribution she made to at the time of the acquisition of the suit property. It is therefore not possible for the court to find a resulting trust in her favour, which trust requires evidence of financial contribution.

This finding notwithstanding, it is however possible that a constructive trust may arise in the Plaintiff's favour in the circumstances of the case. The requirements for a constructive trust to arise are explained in more detail in **Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 48** at paragraph 690 that I shall quote *in extenso*:

**“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.**

**The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive.**

**Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage instalment, will readily justify the inference necessary to the creation of a constructive trust.**

**Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement.**

**The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive. Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property.”**

It is therefore the case that a constructive trust can arise from the conduct of a party, and the court may infer a common intention therefrom that the property was to be shared beneficially. The Plaintiff avers that she had resigned from her teaching job after the acquisition of the suit property by the 1<sup>st</sup> Defendant, and that she engaged in horticulture, general farming and cow-rearing, activities which enabled them completely pay off the loan used to purchase the property in addition to being a supplemental source of income. These allegations were not disputed by the 1<sup>st</sup> Defendant. It can therefore be inferred that there was a common intention by the Plaintiff and 1<sup>st</sup> Defendant that both of them had a beneficial interest in the suit property, and the Plaintiff did act to her detriment in this belief by leaving her teaching job to

engage in activities that added value to the suit property.

It is therefore the finding of this court that the 1<sup>st</sup> Defendant was a constructive trustee to this extent, and held the suit property in trust for the Plaintiff.

### **(c) The Plaintiff's share of the suit property**

The Plaintiff has asked this Court to assess her share of the suit property, and specifically to find that she is entitled to a 50% share of the suit property. A spouse's share of matrimonial property can be determined both under trust principles and under the provisions of section 17 of the Married Women's Property Act. This determination can be made whether or not there are matrimonial proceedings pending between the parties, and indeed even during the subsistence of a marriage. There are practical difficulties that however arise in making this determination while a marriage is still subsisting, which shall be discussed hereinbelow.

In reaching this determination, the law of trusts requires a specific quantification of a spouse's contribution and his or her share of the matrimonial property is pro-rated according to their share of contribution. As seen earlier in resulting trusts this contribution can only be in financial terms, but in constructive trusts both financial and non-financial contributions are taken into account.

The Court of Appeal in **Echaria vs Echaria (2007) eKLR** gave a detailed account and history of the application of section 17 of the Married Women's Property Act 1882 in Kenya, and noted that the said section gives the courts discretion to grant appropriate remedies upon ascertainment of the respective beneficial interest in a disputed property. The Court of Appeal also noted the unsatisfactory status of our laws with regard to the issue of financial and non-financial contribution in determination of parties' beneficial interests in matrimonial property, and called for reform in this regard. The Constitution of 2010 has since been enacted which now provides for a constitutional standard of equality of rights within and after marriage under Article 45(3), and which in my opinion raises a presumption of equality with regard to financial and non-financial contributions to acquisition of matrimonial property as the starting point in determining spouses' respective shares to matrimonial property.

In the present case, the court is faced with certain difficulties in applying the above principles of the law to assess the Plaintiff's share of the suit property. In the first instance the Plaintiff did not provide any evidence of the value of the suit property, and of the valuation of her contribution both financial and non-financial, to enable the court make this assessment. No valuation was also provided of the 1<sup>st</sup> Respondent's contribution. On the contrary, it was the 1<sup>st</sup> Respondent's argument in this respect that the Plaintiff's claim has been overtaken by events as the sale of the suit property to the 2<sup>nd</sup> Defendant was rescinded.

The second more practical difficulty faced by the court in determining the Plaintiff's share is that her contribution to the suit property must be evaluated and assessed in the context of the total contributions by the respective spouses to all matrimonial properties held by the parties, and not in isolation. These particulars were not provided to the court. Finally, as the marriage is still subsisting, a determination of the Plaintiff's share should also take into account any future contributions that may be made by the parties that will add value to the suit property. This court cannot enter into that arena as its assessment will be based on speculation and not on established facts.

It is therefore the finding of the court that it cannot at this stage make an assessment or determination of the Plaintiff's share in the suit property for the reasons given in the foregoing.

### **d. Whether the Plaintiff is entitled to the Injunctions sought.**

The principles that apply to the grant of a permanent injunction are well known. Once the Plaintiff has established a right, infringement of that right will be restrained unless an award of damages would be sufficient or adequate remedy. The Plaintiff has established her rights as a *c'estui que trust* as against the

1<sup>st</sup> Defendant, and damages will not be an adequate or appropriate remedy in light of the court's inability to determine her share of the suit property as found in the foregoing. In the circumstance it is the finding of this court that she is entitled to an injunction as against the 1<sup>st</sup> Defendant restraining him from selling or transferring the suit property.

It is in this regard admitted by both the 1<sup>st</sup> and 2<sup>nd</sup> Respondent that the sale of the suit property has not been completed, and the court will therefore not be acting in vain. The issues raised by the 2<sup>nd</sup> Defendant with regard to the said sale agreement and any remedies he seeks in this regard will have to be specifically prayed for and litigated in another fora.

The only question remaining to be decided by this court is whether the Plaintiff has established any rights as against the 2<sup>nd</sup> Defendant to entitle her to the injunction sought against him. It is not disputed that there is a subsisting tenancy agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent over a portion of the suit property which is to expire in 2017, and evidence was brought by the 1<sup>st</sup> Defendant of the lease agreement and rent payments made by the 2<sup>nd</sup> Respondent in this regard. The said lease agreement was entered into at the time of as the sale agreement and is not disputed by the 1<sup>st</sup> Defendant, nor were any allegations made or evidence brought to show that it has been terminated in the manner provided by the repealed Indian Transfer of Property Act or under common law.

In the circumstances, for the Plaintiff to establish a right as beneficiary against the 2<sup>nd</sup> Defendant, she must prove a breach of the trust by the 2<sup>nd</sup> Defendant and loss occasioned by that breach. The liability of strangers to a trust for breach of trust is determined by two principles, known as the "dishonest assistance" and "knowing receipt" principles. These principles are explained in the text by Alistair Hudson on Equity and Trusts, 4<sup>th</sup> Edition, at page 732 as follows:

**"First, a person who is neither a trustee nor a beneficiary will be personally liable to account to the trust for any loss suffered in a situation in which she dishonestly assists the commission of a breach of trust, without receiving any proprietary right in that trust property herself. This liability is referred to as 'dishonest assistance'. The test for 'dishonesty' in this context is a test which asks whether or not the defendant acted as an honest person would have acted. This notion of dishonesty extends beyond straightforward deceit and fraud potentially into reckless risk-taking with trust property.**

**Secondly, a person who is neither a trustee nor a beneficiary will be personally liable to account to the trust for any loss suffered in a situation in which she receives trust property with knowledge that the property has been passed to her in breach of trust. This form of liability is referred to as 'knowing receipt'. 'knowledge' in this context includes actual knowledge, wilfully closing one's eyes to the breach of trust, or failing to make the inquiries which a reasonable person would have made in these circumstances.**

**In either case, there must have been loss suffered by the beneficiaries as a result of some breach of trust: the liability of the strangers is then to account to the beneficiaries for that loss, providing that the knowing receipt or dishonest assistance has been demonstrated. Therefore, there must have been a breach of trust of trust before either of these claims could arise."**

It has not been shown by the Plaintiff that the 2<sup>nd</sup> Respondent was aware of the Plaintiff's beneficiary status at the time of entering the lease agreement. The 2<sup>nd</sup> Respondent on the other hand claims he entered into the said agreement with the 1<sup>st</sup> Respondent as absolute proprietor. In any event the proper remedy for the Plaintiff in the circumstances would be for the 2<sup>nd</sup> Defendant to account for any loss the Plaintiff has incurred as a result of the said lease agreement, which loss has also not been shown or proved. It is therefore the finding of this court that the Plaintiff has not established a right against the 2<sup>nd</sup> Defendant to entitle her to the injunction she seeks against the said Defendant.

The upshot of the foregoing is that the Plaintiff's suit only partly succeeds to the extent of the following orders:

4. The Plaintiff is granted a declaration that L.R. No. 5900/1 situate South East of Limuru Town in Kiambu District registered in the name of the 1<sup>st</sup> Defendant is held in trust for the Plaintiff.
5. The 1<sup>st</sup> Defendant be and is hereby restrained from selling, transferring or otherwise disposing of the whole or any part of L.R. No. 5900/1 without the Plaintiff's consent.
6. The 1<sup>st</sup> Defendant shall meet the Plaintiff's costs of the suit, while the Plaintiff shall meet the 2<sup>nd</sup> Defendant's costs.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_25<sup>th</sup>\_\_\_\_ day of \_\_\_\_June\_\_\_\_, 2013

**P. NYAMWEYA**

**JUDGE**