



IN THE MATTER OF: THE MARRIED WOMEN'S PROPERTY ACT, 1882

-BETWEEN-

H.Z.P.....PLAINTIFF

-AND-

S.S.K.....DEFENDANT

JUDGMENT

The plaintiff came before the Court by Originating Summons dated **22nd May, 2009**, brought under s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya), s.17 of the Married Women's Property Act, 1882 of England (which is a "*statute of general application*" and is applicable in Kenya), and Order XXXVI, Rule 5 of the earlier edition of the Civil Procedure Rules.

The plaintiff seeks several decisions as follows:

- (i) *a declaration that the suit property, being a six-bedroom house built on plot No. [PARTICULARS WITHHELD], Chembani area and measuring 150 by 80 feet, is a matrimonial property and the plaintiff is entitled to one-half share thereof;*
- (ii) *the plaintiff be allowed to purchase the defendant's half-share in the said property and/or, in the alternative, the defendant be at liberty to pay the plaintiff for the value of her share thereof;*
- (iii) *the Court do make any and all directions, further orders or reliefs, as it may deem necessary;*
- (iv) *the defendant do pay the costs of this suit.*

The suit rests on the following grounds:

- (a) *the suit property was acquired by the joint efforts and contributions of the parties herein;*
- (b) *at the time of acquisition of the property, the parties were legally married under Chonyi customary law, but they have since divorced; the plaintiff and the four issue of the marriage reside on the suit property, while the defendant relocated elsewhere following the dissolution of the marriage;*
- (c) *the defendant has "constantly threatened the plaintiff and the children with illegal eviction from the premises, and has [on several occasions] physically assaulted the plaintiff, claiming...she has no interest*

or right therein”;

(d)it is “in the interest of justice and fair play that the parties’ shares and interests are determined herein and appropriately secured.”

The plaintiff swore a supporting affidavit on 22nd May, 2009 providing evidence in support of her case. She avers that she and her husband, before the divorce between them, had jointly conducted a business which, previously, had belonged to her exclusively; and out of the proceeds thereof, the two purchased and developed the suit property, which became the matrimonial home. The plaintiff deponed – and annexed validating record – that the defendant had attempted to evict her from the matrimonial home, and had physically assaulted her. Of her interest in the suit property, the deponent avers:

“THAT I am genuinely entitled to one-half share of the matrimonial property in view of the fact that it was acquired from the proceeds of the shop-business which I began....”

The plaintiff was represented in this matter by learned counsel, **Mr. Mrima**, while the defendant was represented by learned counsel, **Mr. Mushelle**.

Mr. Mrima submitted that the inevitable question in this suit is: What was the plaintiff’s input in the acquisition and development of the matrimonial property herein?

Counsel urged that the answer was in the family history, which is recorded in the evidence. When the plaintiff married the defendant, she was already running a small business, selling foodstuff and charcoal; and the defendant at the time was employed in town as a shopkeeper. The plaintiff’s business prospered, enabling her to rent premises where she established a shop. The fact that the plaintiff’s business was booming, was the main factor in the defendant leaving his employment, and joining her at her business premises. It was from the profits of the plaintiff’s business that the money was raised for acquiring and developing the suit property as the matrimonial home; and this was so even though the contractual documents in the said acquisition bore the defendant’s name.

Counsel urged that the plaintiff’s evidence regarding the acquisition of the suit property, is not matched by any testimony from the defendant giving a differing account; and so, “it goes without saying that the property herein was acquired through the joint efforts of the parties”; and it “goes without saying that the property herein is jointly owned, and the plaintiff is entitled to one-half share of the same.”

Counsel relied on principles of law laid out in case law. In **Njuguna v. Njuguna** [1982] LLR 823 (HCK), the parties were man and wife; during the course of their marriage, the husband acquired a rural property – the suit premises; there was evidence that the husband had been unemployed for over one year, and that the wife made financial contributions towards the acquisition of the property. On an application for the determination of the wife’s share in the property, the High Court (**Sachdeva, J**) held:

“Upon the evidence on record, I entertain no doubt that the applicant contributed very substantially towards the purchase of [the Murang’a property], and I assess her share in it at 50%....”

With the foregoing authority in reference, counsel asked for application of the same principles: “Now, what of this case where the wife had started her business which was successful, [occasioning] the husband [leaving] his employ....” He urged that it was “only fair that the matrimonial property herein should thus be declared as jointly owned, and assessed in equal shares.”

Counsel also relied on the earlier High Court (**Simpson, J**) case, **Karanja v. Karanja** [1976] KLR 308. In that case the parties, during their marriage, had acquired several properties which were all registered in the name of the *husband*. One of those properties was acquired from money supplied by the wife, while the others were acquired with her direct or indirect contribution. The Court, after considering whether customary law would operate to preclude any imputation of trust in favour of a married woman, especially a woman in salaried employment, ruled that the husband held the immovable properties in dispute *in trust* for himself and his wife in proportions of two-to-one, respectively.

Counsel submitted that though it emerged from the facts of the instant case that the defendant was shown in the legal documents as owner of the land on which the matrimonial home was built, with the plaintiff shown only as witness, an inference should be drawn that the husband held the property in trust. Counsel urged that, not only did the plaintiff make direct contributions towards the development of the matrimonial property, she also contributed indirectly through performing household chores.

Learned counsel, **Mr. Mushelle** for the defendant, submitted that “*the plaintiff did not contribute in any way either by way of purchase of the plot in question or [of] construction of the ...house.*” Counsel submitted “*it was the defendant’s own effort that led to the purchase of the plot...and subsequent construction of the house.*”

The outcome of this case must flow from the *evidence*. The plaintiff has given detailed evidence showing the evolution of family finances, from the time of marriage to-date: she says she was the one generating most of the family finances at the beginning, and the husband only held the humble position of an employed shopkeeper; and that it became expedient for the husband to improve his position by joining her in her business; and it is *thereafter* that sufficient finances were raised for acquiring the suit property, and then constructing a house thereon. This evidence is uncontroverted; and the defendant has not shown any separate source from which he could, at the time, have drawn the funds for the purchase and development of the suit property. On the evidence, therefore, an inference is to be drawn that the funds used in acquiring the land, and in developing the matrimonial home, were sourced from the common family business wherein the plaintiff was a crucial partner.

Furthermore, the plaintiff’s case that the suit property was the *matrimonial home* is not controverted by any evidence at all. While the plaintiff deposes that she and all the four children of the family **are** the occupants of the suit property, the defendant only claims through counsel that he is the one who “*has been educating and taking care of the children to-date*”. This claim, apart from being no more than “evidence” from the Bar, fails to address the questions: who would be the legitimate occupants of a matrimonial home? is it truly **the** matrimonial home? are the *plaintiff and her children* legitimate occupants of *the* matrimonial home? ought the plaintiff and her children to be protected as occupants of the matrimonial home? does the defendant (with his *new family*) deserve to be put into the matrimonial home, in place of the plaintiff and her children?

On the evidence, and taking into account the submissions of both learned counsel, this Court cannot but answer each of the foregoing questions in favour of the *plaintiff* and against the defendant.

Consequently, I hereby hold, and make a decree in the following terms:

(1) I declare that the suit property, namely L.R. No. [.....] Bamburi, and the six-bedroom house constructed thereon, is the matrimonial home established by the parties herein.

(2) I declare that the plaintiff and the defendant are each entitled to half-share of the said suit property.

(3) The plaintiff is entitled to retain the possession and use of the said matrimonial property, to the exclusion of the defendant, failing a different consent-arrangement which complies with the terms of these Orders and of this Judgment.

(4) In the event the suit property is sold, the plaintiff and the defendant shall each be entitled to 50 per cent of the proceeds of sale.

(5) The defendant shall bear the costs of this suit.

SIGNED at NAIROBI

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 7th day of February, 2012.

MAUREEN ODERO
JUDGE