



L.K.K.....APPLICANT
VERSUS
J.K.....RESPONDENT

J U D G M E N T

The plaintiff through originating summons dated 4th March, 2008 sued the respondent one Julius Kiambi seeking a declaration that:-

- 1. That the property registered as land parcel No.[...] and [...] Ha together with buildings and improvements thereon, acquired by joint funds and efforts of the applicant's and respondent during their marriage and registered in the name of the respondent be declared joint properties and that the same be shared equally and/or as this Honourable court may deem just to order.***
- 2. That it be declared that the motor-vehicle registration number [...] Land Rover and all assorted domestic goods and appliances currently on land parcel No.[...] and the matrimonial house therein be declared joint properties and be shared equally and/or as the court may deem just to order.***
- 3. That orders of inhibition be issued against the land parcel Nos. [...] and [...] restraining the respondent from disposing the same and the orders be served upon the land Registrar Meru Central for compliance.***
- 4. That further and other relief as may be just in the circumstances.***

The summons is supported by affidavit of Lucy Kaari Kiambi and the pertinent grounds set out as follows:-

- a. That there exists a valid marriage between the applicant and the respondent under Customary law since August, 1974, with 4 issues arising thereof.***
- b. That the applicant and the respondent have been separated since 1988.***
- c. That it is in the interest of justice to grant orders prayed.***

The respondent filed a Replying Affidavit denying that he is married to the applicant but admitted he had cohabited with her between 1974 to 1978 when she left. The respondent further averred that no property was acquired jointly with the applicant.

On counsel application on 6th October, 2009 court directed that this matter be heard by way of viva voce evidence.

The applicant in this case gave evidence and called one witness whereas the respondent on his part he gave evidence and called one witness.

The applicant on her part testified that she comes from Imenti South District. The applicant testified that she knows the respondent one Julius Kiambi who she described as her husband. She averred that she got married to the respondent in 1974 and have four children of the marriage, who she names as 1. F.W, 2. I.K (3) L.G and 4. L.N. The applicant testified that she stays away from the respondent and that she stays at Kiangwa town since they parted their ways in 1988.

The applicant stated that during their stay together with the respondent they jointly acquired the following properties:

1. Planted coffee plants

2.Planted tea bushes which were registered under applicant's number as [...]

3.Semi-permanent timber house

4.3 dairy cows

5.50 chicken

6.Motor vehicle [...] Land Rover.

The applicant testified that they both contributed to acquire the above-mentioned properties. The applicant averred that she was married under customary law when she was young and worked in contribution of the properties. The applicant stated that whenever she talks to the respondent he does not talk to her and she has no ill-motive against the respondent.

The applicant testified that she summoned the respondent before the elders and chief. That the elders and chief ordered the respondent to give applicant one (1) acre as a wife so that she can return home but the respondent declined to give her one(1) acre.

The applicant prayed that the court do order the respondent and herself to share (*particulars withheld*) and (*particulars withheld*) (1.21) hectares, and M/V Reg. No.[...] Land Rover or court do grant her any other relief that it may consider just. The applicant prayed also for costs of the suit. During cross-examination the applicant testified that she started cohabiting with the respondent in 1974 and had no association with the respondent before 1974. That F.W is a biological daughter of the respondent. That the birth certificates of the children are all with the respondent. That at the time of their marriage they lived in a mud grass thatched house but later put up a timber house in 1978. The applicant testified that she left the matrimonial home in 1988 and not in 1978. That she moved from the matrimonial home after the last child was born through an operation as she could not bear any more children. She stated that she knows one K.N, who is father to the respondent and also H.M.K, elder brother to the respondent.

Applicant admitted that J.K, the respondent received (*particulars withheld*) from K.N, respondent's father as his share of inheritance. That J.K also received (*particulars withheld*) as his share of inheritance through H.M.K through exchange. That H.M.K's parcel of land through exchange is [...] being part of J.K's extended family ancestral land. The applicant further testified that they bought coffee seedlings jointly and that the respondent had previously not planted coffee seedlings before applicant had joined him. The applicant averred that she is the one who bought tea seedlings from Nyayo Tea Zone in 1978. Applicant testified that she does not know whether the respondent bought any tea seedlings in 1990 and 1991 from Nyayo Tea Zone. She also averred that she is not aware of Tea seedlings that were bought and planted in 2005 as by then she had left the matrimonial home. The applicant also confirmed that she is aware of AFC loan obtained by the respondent in 1993 but she is aware of an earlier loan. She testified that the vehicle [...] was purchased either in 1988 or 1989 but she was not sure. On being asked whether she would be surprised to find out the vehicle was purchased in 1983 she said she won't be surprised because they had many vehicles. She claimed they had M/V registration No.[...] Peugeot which was sold at Nkubu.

She testified that she cannot recall the other vehicle numbers. The applicant testified that F.W and I.K are married but L.N is not married and is at (*particulars withheld*) University as a student. She also stated that L.N is also a Teacher at (*particulars withheld*). Applicant averred that the respondent and herself have jointly educated I.K and L.G but not F and L.N. Applicant stated that she is the one who Pays College fees for L.N at (*particulars withheld*) University College though she could not recall the last time she paid the college fees.

The applicant testified that she was married under customary law in August, 1974. Applicant averred she knows one John G. Rachi alias John Gikunda Rachi but she does not know whether he was a teacher. That applicant came to know him in 2007 when she took the respondent before elders. Applicant stated that John G. Rachi is her area chief but she does not know when he became a Chief. She averred that he is her neighbor and he lives about 15 kilometres away. She testified that she had not known Chief John Gikunda Rachi in 1974 and that she did not meet him between 1974 and 1988. In being re-examined the applicant testified that she left the respondent in 1988 after the respondent chased her away. She averred that [...] was bought when they were living together. On being re-examined by court the applicant testified that she is still wife of the respondent and that there is no pending divorce proceedings. She averred dowry was paid in respect of her marriage. The applicant averred that her husband followed her at the town and she has not gone to her parent's home and that the respondent has not sent his parents to the applicant's home.

Besides the above, the applicant, called PW2 who introduced himself as John Gikunda Rachi. He stated that he is the locational Chief of Karia Location, Igoji Division, and that he has been area chief since 1st January, 1990. He testified that he had known the applicant before he became a Chief. He averred that he came to know the applicant in 1980 as she comes from his location. He testified that he knows Julius Kiambi also comes from his location. He testified that he knows the applicant and the respondent as a married couple since 1980. He knew they had four children between themselves. He averred that he can only remember two of their children who he taught when he was a Teacher. He averred that he remembers K and L.K who he taught in Primary School. He testified all the four children of the applicant and the respondents are girls. That in the school they were referred to by their father's name. He testified the applicant and the respondent are now not living together.

PW2 recalled that in 2007 the applicant came to his office complaining that she had lived in rented house for a long time and she requested PW2 to request the respondent to allow her to go back to her matrimonial home as he had sent her away from her matrimonial home in 1988. PW2 testified that the applicant complained she was sent away because she was no longer giving birth.

PW2 testified that he consequently summoned the applicant and respondent with their elders. They all came with their elders who upon hearing them concluded that the applicant had been married under customary law and that the applicant should get an acre of land from the ancestral land. PW2 testified further that he did not know what followed but the applicant came for a letter from PW2 to enable her file a suit at court of law. PW2 consequently wrote a letter dated 23/10/2007, which he produced as plaintiff exhibit P1.

That the applicant returned to PW2's office on 13th June, 2008 seeking PW2's confirmation that she was married to one J.K, the respondent herein.

PW2 wrote a letter confirming the applicant's marriage to the respondent. PW2 produced the letter as plaintiff's exhibits P2. PW2 confirmed the applicant lives at Kiangua market in a rented house. He confirmed the applicant and the respondent are separated.

During cross-examination PW2 testified that he does not keep register of marriages in his location nor does he officiate marriages. PW2 testified that the basis of saying the applicant and the respondents were married was as established by the elders. PW2 testified that the elders included Mr. Magambo, Mr. Henry Meeme, a witness in this case, Murithi Mutungiri and Muriithi Kiambati. PW2 testified he cannot remember the exact number of elders who set over the parties case but he was one of the elders and he was the chairman. PW2 stated that he did not keep any minutes but he wrote what was decided in the two

letters. PW2 testified that he could not establish the type of marriage between the applicant and the respondent. PW2 testified he was not in the meeting throughout the deliberations but his two Assistant Chief's were present. PW2 later admitted the applicant and the respondent were married under customary law. PW2 averred that he could not confirm that dowry was paid. PW2 confirmed that there cannot be customary marriage unless dowry is paid. PW2 testified that when he became chief in 1990 the applicant and the respondent were not living together as man and wife. PW2 confirmed that he does not have evidence that respondent is father to two children and that when people have children together that is not evidence of a marriage. PW2 testified that he is not aware of any single property the two bought together. He confirmed the respondent lives on ancestral land.

On the other hand, the respondent gave evidence as DW1. DW1 introduced himself as a farmer from Karia Location, West Igoji Division, Meru South District. DW1 testified he knows the applicant, L.K.K as his friend long time ago. He testified that they were friends between 1974-1978. That they were not married but had three (3) children together namely E.K, L.G and L.N. That during their period of friendship they were staying separately. DW1 testified he was staying in his parent's home whereas the applicant was staying at Kiangua market doing tailoring business. That the two had children as they used to visit one another. DW1 denied that the applicant was his wife. DW1 testified that he never paid anydowry nor did he ever visit the applicant's parents nor did they ever visit the respondent's parents.

DW1 testified that he knows land parcel [...] and that the land is his own. That DW1 got it from his parents as a share of his inheritance; from his father the late K.N. DW1 produced Green Card over [...] which shows he was registered as proprietor on 6/7/1989. That by then DW1 testified he was not in friendship with the applicant as the friendship ceased in 1978. DW1 testified the land was transferred to him from his brother one H.M.M. DW1 explained that his late father shared his land amongst his children and his share of land fell on the portion where his brother had developments whereas his brother's share fell on his land. Consequently the two decided to exchange their respective portions to save on one's development. DW1 produced Green card over [...] as defence exhibit NO.1.

DW1 testified on the said land there are coffee plants and tea bushes and that he is the owner of the crops thereon. He testified that he planted coffee plants first in 1972 and he was issued with share certificate in 1973 showing that he was a member of Chogoria Coffee Owners Co-operative Society Ltd. The certificate is dated 12/11/1973. DW1 produced the original share certificate as defence exhibit No.2.

DW1 testified that he planted tea bushes between 1990-2005. That the respondent had a purchase receipt of the seedlings dated 2nd October, 1990 in his name. DW1 testified that he purchased tea seedlings from Nyayo Tea Zone Development Co-operation. DW1 further averred that he had another purchase receipt dated 23rd October, 1991 for purchase of tea seedlings and also another issued on 17/11/2005 for purchase of tea seedlings from KTDA. DW1 produced the three purchase receipts as defence exhibit No.3(a) b) and(c).

DW1 testified that he charged the land to secure a loan from AFC on 29/6/1993. The loan was of Kshs.50,000/- for the purposes of improving the farm. DW1 produced the instrument signed between the respondent and AFC as defence exhibit No.4.

On [...], DW1 testified that the land is his own as a share of inheritance given to him by his late father. DW1 testified that he was given the land in 1992 but title was not issued to him till on 4/6/2004. DW1 produced Green Card as defence exhibit No.5. The Green card under entry No.1. DW1 testified that it shows that the land was in the name of the late DW1's father Kiambati Ndamba. DW1 testified that he has tea bushes which he personally planted between 1990-2005. DW1 testified that there is no parcel of land which he jointly acquired with the applicant nor jointly bought with the applicant.

DW1 testified that M/V registration NO.[...] Land Rover is unknown to him but he has had M/V NO. [...]. DW1 averred the vehicle is his own and he acquired it in 1983. DW1 testified he purchased the vehicle from M/S Mutindwa Enterprises Ltd. DW1 testified he had a receipt dated 31/12/1983. That the purchase price was Kshs.30,000/-. DW1 produced statement as defence exhibit No.6(a) and receipt of purchase defence Exhibit 6(b). DW1 testified that when he purchased the Motor vehicle in 1983 he was

not friendly to the appellant and he did not receive any part of the purchase price from the applicant. DW1 denied that any of the property were jointly acquired by the applicant and the respondent.

DW1 testified that the applicant has no right over the properties the respondent got from his own father and that the applicant did not make any contribution towards acquisition of the mentioned properties. DW1 testified that the applicant is not entitled to any share.

During cross-examination DW1 testified that he knows L.K but testified that he does not know her names as per her National Identity Card. DW1 testified he could see that the applicant as per her National Identity Card is referred to as L.J.K which was issued in 1996. DW1 testified the last time he saw the applicant was in 1978. That the children were brought to him by the applicant's father. DW1 stated that he did not go to see the last child who was born in 1979. DW1 admitted three children were between him and the applicant. That applicant used to visit him at parcel No. [...] and that applicant would not do any duties at the respondent's home, but she used only to sleep and go. DW1 testified that both parcels of land have tea bushes and his membership number for tea is No.[...]. DW1 testified that he did not know the owner of receipt advice No. [...] and grower's members No.[...] and that he did not know whether they belonged to the applicant. DW1 testified that he had been educating his children. DW1 admitted that the applicant had taken a claim against him before chief claiming that she was respondent's wife.

That the parties had a discussion before the area chief. DW1 stated that Chief resolved that the applicant was to be given 1 acre because of the children. DW1 denied that Chief found that the parties were married under Kimeru Customary Law. DW1 denied that he received any money from the applicant to purchase motor vehicle [...] or any money for any development of the land nor did she make any contribution to the respondent. DW1 insisted that they separated in 1978 but they were not married under Kimeru custom. In re-examination DW1 testified that the applicant's ID card was issued in 1996 by which time his friendship to the applicant had long ceased, since it had ceased in 1978. DW1 testified that he does not know from which shamba the tea delivered under NO.[...] comes from and that he sells his tea using his own number. DW1 testified that he did agree with Chief's decision.

On the other hand, DW2 Salacious Kaburu Kirigia, introduced himself as a farmer from Karia sub-location and as a member of family of the respondent and that he is the Chairman of Mbaa clan. DW2 testified that he had known the respondent since his childhood and that he has a wife known as Eunice Mukonyaga. He testified that he also knows L.K, the applicant. DW2 testified he knows the applicant as she had three children with the respondent; though he had never seen her at the respondent's home. That the two used to visit each other and had three children. DW2 testified that he knew respondent's parents and that his father was called S.K and that they used to call respondent's mother Mama K. DW2 testified that he very well knew J.K's home and had visited him severally. He testified that the respondent lives on the parcel of land that he had been given by his father being his share of inheritance. DW2 averred that L.K was not wife of the respondent as there was no valid marriage between the two. DW2 testified as Chairman of respondent's family he is not aware of any marriage between the two. DW2 testified that on 23rd October, 2007 he attended a meeting called by Chief of Karia location in which meeting the applicant was demanding 1 acre from the respondent. DW2 testified that the elders rejected her request because she was not married to the respondent. DW2 testified that they did not resolve that the applicant be given 1 acre. DW2 testified that the letter, that is plaintiff's exhibit No.1, was written by Chief(PW2) alone in spite of the elders having rejected the applicant's request.

DW2 averred that the elders advised the applicant to seek remedy elsewhere. DW2 concluded by stating that he does not recognize L.K as a wife of J.K.

During cross-examination, DW2 testified that he came to know J.K since 1957. That DW2's home is about 1 ½ KM from that of the respondent and he knows who lives at the respondent's home. DW2 testified that the respondent never told him he had a wife by the name L. DW2 testified further the respondent was a farmer and was living alone. That his farm has coffee plants and that the witness did not know where the respondent got money from to buy coffee and tea seedlings. DW2 added that from 1978 to 1988, the respondent lived on his land alone. DW2 stated that he came to know that the applicant and

the respondents were friends when the applicant brought the children to the respondent. That the respondent was educating the children. That the claim before chief was for applicant to be awarded a piece of land. DW2 averred that the issue of the parties marriage was not raised before the area chief. DW2 testified that according to Kimeru custom one can marry more than one wife.

That after close of the respondent's case the parties Counsel put in written submissions. The applicant's counsel filed his submissions on 25th May, 2012 whereas the counsel for the respondent filed his written submissions on 24th May, 2012.

I have considered the pleadings, the evidence of both parties as well as written submissions by both Counsels. The main issues raised in this case are as follows:-

1. Whether there exists a valid marriage between the applicant and the respondent under customary law since 4th August, 1974 with 4 issues arising thereof, and whether the applicant and the respondent had been cohabiting together as man and wife and if so upto when and whether any marriage can be imputed from their association?

2. Whether properties listed in the originating summons being parcel No.[...] and [...] together with the building and improvements thereon were acquired by joint funds and efforts of the applicant and the respondent during their marriage and registered in the name of the respondent can be declared joint properties and whether the same can be shared equally and/or as the Honourable court may deem just to order?

3. Whether motor vehicle Reg. No.[...] Land Rover and all assorted domestic goods and appliances currently on land parcel No.[...] and house therein can be declared joint properties and whether they can be shared equally and/or as the court may deem fit to order?

4. Whether orders of inhibition can be issued against the land parcel No.[...] and [...] restraining the respondent from disposing the same for compliance?

On the first issue for consideration whether there exists a valid marriage between the applicant and the respondent under the customary law, I have carefully considered the evidence that was tendered in this case, the pleadings and submissions by both counsel as well as the authorities referred thereto. Firstly, I have to consider what constitutes a Meru and Tharaka customary marriage.

Restatement of African Law of Marriage and Divorce Volume 1 by Eugene Contron there are 4 standard procedures regarding the Meru Customary Law of Marriage as follows:-

i. The boy selects his bride and proposes to her.

ii. If the proposal is favourable the boy's parents invite the girl's parents to their home to have the beer known as NcobiyaKuruaUthoni, i.e.the beer of asking the girl's hand.

iii. Payment of dowry(ruracio)

iv. Marriage ceremonies – taking and formalities the girls to the boy's home.

The respondent's counsel in his written submissions, submitted that there was never a marriage between the parties as per evidence tendered. The parties only cohabited together between 1974 and 1978 after which the applicant left. That the applicant also failed to prove existence of a customary marriage.

On the other hand, it was submitted on behalf of the applicant that there existed a marriage between the applicant and the respondent since 4th August, 1974 and then as a result of the said marriage the parties

had 4 issues, until he respondent purportedly terminate the union on 5th February, 1988 by chasing the applicant and their children out of the matrimonial home. The respondent denied there being any union and stated no dowry was paid to the applicant's parents and for that reason their union cannot be construed to be a marriage. The applicant's counsel submitted that the parties had cohabited together for a period of 14 years and the respondent sired 4 children. That PW2 the Area Chief confirmed the parties were cohabiting together. That he came to know the applicant in 1989 and had also known the respondent for the last 30 years. That he knew the parties as married couple since 1980. That he knew they had children between themselves numbering 4 children and which children he had taught when he was a teacher before becoming a Chief. He even gave names of the two children he could remember. He also confirmed all the 4 children of the parties to be girls. PW2 even gave evidence how they dealt with applicant's claim against the respondent and in which the elders who include DW2 resolved that the respondent should give the applicant one(1) acre of land from the ancestral land. PW2 produced letters as exhibit to confirm the elders resolution.

The applicant's counsel further submitted that the respondent in his Replying Affidavit under paragraph 3 admitted that he had cohabited with the applicant from 1974 upto 1978 when she left. Under Paragraph 4 of the respondent deposed that the applicant deserted and left behind the children of their cohabitation and he has all along taken care of them. He denied having expelled the applicant with the children.

The respondent on being cross-examined he averred that the applicant was issued with ID Card in 1996 as L.J.K. He further contrary to the contents of his Replying Affidavit testified that the children were brought to him by the father of the applicant and that the last child was born in 1979 and that the applicant used to visit her at Plot 830 which is contradictory –to paragraph 3 of his Replying Affidavit in which he stated clearly they cohabited together between the year 1974 and the year 1978. DW2 in his evidence was not a truthful witness as he knew the applicant had three children with DW1 and yet he said he had never seen her at the respondent's home yet he said they used to visit one another. He averred the applicant was not wife of the respondent because there was no valid marriage between the two. He also stated that in the arbitration which he attended the elders rejected the applicant's request because she was not married to the respondent. He averred that they did not resolve the applicant be given 1 acre whereas DW1 in cross-examination admitted the applicant used to sleep at the respondent's home. He also admitted he has been educating the children between himself and the applicant. DW1 admitted that the issues of their marriage and applicant's claim over properties was discussed and it was decided the applicant be given one acre. DW2 testified that his home is 1 ½ kilometres from that of the respondent yet he admitted that he is not aware as to who comes and goes in and out of the respondent's home.

The applicant's counsel submitted that the evidence tendered by the respondent was not cogent enough to rebut the presumption of marriage between the applicant and the respondent and urged the court to find there was marriage between the applicant and the respondent. This court was referred to a number of authorities in support of applicant's Counsel proposition and in opposition of the presumption of marriage between the applicant and the respondent.

In the case of **Florence Wairimu Kanyua – VS- Njoroge Kinyanjui(2005)** eKLR Hon. Lady Justice Koome stated:-

“customary law is not static, it is dynamic and the exigencies of modern living should also be taken into account, especially where parties have taken certain steps to formalize the marriage and continued to cohabit as man and wife and disputes have occurred before all the steps have been completed.”

Besides the above, in the case of **Lillian Mweru Thuita – V- Samwel Thuita Wanjama(2006)** eKLR **Hon. L. K. Kimaru**, J stated in a matter similar to that which was before of Hon. M. Koome J as she then was, in his judgment he stated as follows:-

“ The fact thatCustomary Law Marriage ceremonies were not concluded does not preclude this court from finding from the evidence presented before it that there existed a common law marriage between the applicant and the respondent by virtue of the fact that they lived together as a

husband and wife for a long period of time,

In addition to the above, in **Mbogo – Vs – Muthoni & Another Civil Appeal No.311 of 2002** the Court of Appeal held:-

“.....such a long cohabitation and general repute must surely in our view form a strong basis for presumption of marriage. As stated in the Yawe case, the onus is on the person alleging that there was no such marriage to prove otherwise.”

In the instant case there is no evidence that customary law rites or steps had been taken to formalize the marriage between the applicant and the respondent at the time when the union broke down, however in my view that does not mean there was no marriage between the two parties. There is admission that the parties had started cohabiting together from 1974 upto 1988 according to the applicant and upto 1978 according to the respondent. To find there existed such cohabitation whether one takes it to have existed upto 1978 or up to 1988, to be such a long cohabitation coupled with the fact that the respondent sired 4 children who he acknowledges as his and had been in custody of them and one can only presume existence of a marriage between the two. The applicant was chased from the matrimonial home because she could not bear further children following an operation, if there was no operation on the applicant, perhaps the parties would have continued to stay together and the unformed ceremonies to formalize the marriage would have taken place. The parties during their stay from 1974 upto the time the union was terminated had no problem. There was no evidence adduced to show that they were not a happy couple and that they did not enjoy the cohabitation with each other. DW2 and the surrounding community including the applicant's father who had to return the children to respondent knew them as husband and wife. I therefore find that the fact Customary Law Marriages ceremonies were not carried out or concluded do not preclude this court from finding from the evidence tendered before it that there existed a common law marriage between the applicant and the respondent by the virtue of the fact that the two parties lived together for a reasonable period being between 4 and 14 years as per the evidence as man and wife and out of their cohabitation were richly blessed with 4 children who are now adults and three of whom are married and the youngest one is at University College.

The respondent did not rebut the presumption of marriage hence I find there was marriage between the applicant and the respondent.

According to the applicant the cohabitation of the two was between 1974 and 1988; whereas according to the respondent the parties cohabited between 1974 and 1978. The applicant in her evidence during cross-examination testified that she moved out of the matrimonial home after the last child was born through an operation as she could not bear any more children. According to DW1 the last child was born in 1979 which has not been challenged by the applicant. DW2 testified that he came to know the parties in 1980. Further the applicant on being cross-examined on when M/V [...] was purchased she said it was either 1988 or 1989 but being told vehicle [...] was purchased in 1983 as per the exhibits shown to her and being asked whether she would be surprised to find out it was purchased in 1983 she said she won't be surprised. The applicant was I believe by 1983 not in cohabitation with respondent. I believe Cohabitation between the two was terminated between 1979 to early 1980 and before 1983.

The second issue for determination is whether the properties listed in the Originating summons being (*particulars withheld*) and (*particulars withheld*) together with the buildings and improvements therein were acquired by joint funds and efforts of the applicant and the respondent during their marriage and registered in the name of the respondent can be declared joint properties and whether the same can be shared equally and/or as the Honourable Court may deem fit to order?

The evidence from the parties and their witnesses is clear that (*particulars withheld*) and (*particulars withheld*) are lands which the respondent got from his father as his share of inheritance. The applicant confirmed the said parcels were ancestral land. PW2 during cross-examination admitted that he was not aware of any single property the applicant and the respondent jointly bought together. The respondent produced exhibit D.I in respect of (*particulars withheld*) which clearly shows that the land was initially registered in his father's name on 23/5/1974 then in 1976 in the name of H.M.K, DW1's brother and was

exchanged with (*particulars withheld*) in favour of the respondent on 15/6/1989 when the same was registered in the name of the respondent.

On the other hand, exhibit D5 in respect of (*particulars withheld*) was registered in the name of K.N father to the respondent and same transferred to the respondent on 3rd March, 1992.

The applicant did not adduce any evidence to show or support her contention that the above-mentioned lands were acquired by joint funds or efforts of the applicant and the respondent during their marriage.

In her evidence in chief she did not contrary to contents of her affidavit dated 4th March, 2008 mention any of the land as jointly acquired. The land (*particulars withheld*) mentioned in applicant's affidavit vide paragraph 3 could not have been acquired jointly by the applicant and respondent as the same was between 1974 and 1988 in the name of third parties. Indeed the property was inherited by the respondent from his father and registered in his name in 1989. The applicant in her affidavit dated 4th March, 2008 never mentioned parcel of land (*particulars withheld*) nor was it mentioned in her evidence in Chief as one of the properties jointly acquired by her and the respondent but she claimed in her affidavit it was purchased using proceeds from (*particulars withheld*).

The applicant in her evidence in chief stated that they acquired the following properties:-

- (a) ***Planted 4000 coffee bushes***
- (b) ***A semi-permanent timber house***
- (c) ***3 dairy cows***
- (d) ***50 chicken***
- (e) ***M/V [...] Land Rover***

The applicant averred that they both contributed to acquire the properties. She averred she was married when young and contributed through doing other works at home. The respondent denied that the applicant made any contribution.

The counsel referred me to a number of authorities in support and against the applicant's claim that the listed properties were jointly acquired.

The respondent's counsel referred me to the case of **PETER MBURU ECHARIA – VS – PRISCILLA NJERU ECHARIA** Civil Appeal No.75 of 2001 in which Court of Appeal stated:-

As the case law currently shows, the status of the marriage does not solely entitle a spouse to a beneficial interest in the property registered in the name of the other, nor is the performance of domestic duties. Even the fact that the wife was economical in spending on housekeeping will not do (see e.g. **Pettitt vs. Pettitt, Burns vs. Burns** (supra) **Button vs. Button** [1968] 1 WLR 457).

“If there is a substantial contribution by the woman to the family expenses, and the house was purchased on a mortgage, her contribution is, indirectly referable to the acquisition of the house since in one way or another, it enables the family to pay the mortgage installments.

Thus a payment could be said to be referable to the acquisition of the house if, for example, the payer either:

- (a) ***Pays part of the purchase price, or***
- (b) ***contributes regularly to the mortgage instalments, or***

(c) *pays off part of the mortgage, or*

(d) *makes a substantial financial contributions to the family expenses so as to enable the mortgage instalments to be paid”.*

That list is not of course exhaustive.

Thirdly, the learned Judge misapprehended the decision of Kivuitu vs. Kivuitu and erroneously applied it, as the property in dispute was not registered in the joint names of the appellant and the respondent.”

The applicant in this case did demonstrate how she contributed both financially to the acquisition and development of the properties in question. The lands as pointed out were not acquired during the time of cohabitation of the applicant with the respondent.

The lands were respondent’s share of inheritance which parcels of land though the respondent was in occupation at the time of cohabitation with applicant were transferred to the respondent much later after termination of the parties union. On the other hand the applicant did demonstrate that in actual fact that the coffee plants and tea bushes she referred to were bought and planted during the time of the cohabitation with the respondent; though the applicant did not produce any document to support her claim or call any material witness to support her assertion that some developments were carried out during their cohabitation. This court believes that she directly or indirectly made contribution.

DW1 testified that he planted coffee plants in 1972 and was given share certificate in 1973 as a member of Chogoria Coffee Growers Cooperative Society Ltd before he had started cohabiting with the applicant. He produced certificates as exhibits D2.

This was not controverted by the applicant, but the respondent did not either deny that during his cohabitation with the applicant they did not plant more coffee with the plaintiff.

The respondent further testified that he planted tea bushes between 1990 and 2005 and produced purchase receipts of the seedlings dated 2/10/1990 in his name and also produced another purchase receipt dated 23/10/1991 for purchase of tea seedlings. He further produced a receipt issued on 17/11/2005. The three receipts were produced as defence exhibit No.D3 (a) (b) and (c). The respondent testified he had charged the land to obtain the loan from AFC on 29/6/1993 for Kshs.5000/- for improving of the farm. He produced the agreement as D.4. DW1 testified the tea on the land was personally planted by him between 1990-2005 and that there was no property that he jointly purchased with the applicant. The respondent’s witness DW2 did not corroborate the respondent’s evidence on planting of coffee and tea. He did not mention when was planted on the land and by who. He stated that he did not know where respondent got money to buy coffee seedlings.

I have considered the authorities referred to me by the applicant’s Counsel and the facts of this case.

In the case of **Tabitha Wangechi Nderitu & Samson Nderitu Kariuki Civil Appeal No.203 of 197** it was held:-

“.....A wife’s contribution to the acquisition of family property need not to be financial-indirect contribution by the wife to the family income by looking at the welfare of the family must form a basis just like the financial contribution”

Besides the above, I was referred to the case of **KARANJA – V- KARANJA(1976) KLR 307** in which Hon. Simpson J, as he then was held:-

“.....payments by the wife need not to be direct payment towards the purchase of the property, but may be indirect such as meeting household and other expenses including expenditure on clothing for the wife and children and the education of the children which the husband would otherwise have had to pay.....”

In addition to the above, in the case of **Muthembwa – vs – Muthembwa (2002) 1 KLR 91** Court of Appeal while adopting the holding in case of **White – V- White(2001) 1 ALL ER 1**, held:-

“.....in certain instances as in present case, such property is pooled with other property the couple may have and is developed by joint effort. The property then ceases to be in its original form and increases in value.....however,whereas here improvements have been made to the property using matrimonial resources, which increases the value thereof. If it is land property may be a house has been built on it, trees have been planted thereof and possibly perennial cash crops have been planted and they yield a regular income, English Courts consider such property as a contribution.....”

I have considered the instant case and the reasoning in the above-mentioned case, which binds this court. The respondent as in the above-mentioned case inherited the property being (*particulars withheld*) in the instant case from his father. The respondent stated that he planted coffee plants in 1972 and that both parties started cohabiting together in 1974. The applicant stated that she moved to stay with the respondent on (*particulars withheld*) and they developed the land before transfer of the land to the respondent. That they lived in a mud house and later put up a timber house in 1978. That they planted 4000 coffee plants, 4000 tea bushes which were registered under applicant's name and she was allocated growers and/or farmer No.[...] by Kinoro Tea Factory while the parties were cohabiting together. The applicant further stated they purchased 3 dairy cows and 50 chicken. The semi-timber house was constructed for occupation by both applicant and respondent at their matrimonial home.

It is not clear what kind of other works both parties were engaged on but it is clear that both of them were engaged in farming from which they were earning their living. The applicant must therefore have been helping the respondent in their farming, by cultivating, picking coffee, plucking tea and looking after their livestock. The applicant must have been assisting in various domestic chores and working to make the land more productive and more valuable. She swore that she contributed towards the purchase of tea and coffee seedlings.

In determining wife's contribution court has to bear in mind that marriage institutions is usually built on mutual trust and it is rare for the parties to have agreements regarding the acquisition of properties or have receipts or ledge books showing their respective contributions and that is why Court of Appeal in the much celebrated case of **KIVUITU – VS – KIVUIT(1991) 2 KAR 241** expanded the principles in determining the wife's contribution to include indirect contribution by the wife who is possibly a housewife and who devotes all her time in keeping the home going on while the husband is busy pursuing a career of paid employment or self-employment.

In the instant case and from the evidence tendered before me I am satisfied the applicant made indirect and direct contribution in purchasing 4000 coffee seedlings and 4000 tea seedlings, in putting up of semi-permanent timber house, purchasing 3 dairy cows and 50 chickens and in cultivating, picking coffee, and plucking tea. She assisted in making the land more productive and more valuable. The coffee and tea produced from (*particulars withheld*) was delivered into respondent's account at Chogoria Coffee Growers Co-operative Society Ltd from which the respondent was paid and the proceeds used to construct the semi-permanent timber house for the parties use. I am further satisfied the applicant made direct or indirect contribution and it is therefore fair and just her share be determined.

In this case there is evidence from DW2 that the respondent has another wife one Eunice Mukonyaga. We were not told the number of her children. The applicant has four daughters, three of whom are married and the remaining one is working and is independent. Assuming that the respondent's other wife has 4 children if the property was to be shared under the provisions of the Law of Succession Act under intestacy the applicant would get 1/11 of the land so that the other family is not rendered destitute. This court would not allow the applicant to reap from whatever she had not planted. I believe this is the reason behind the elders and Chief's decision, who first arbitrated between the parties. In their decision they awarded the applicant one(1) acre to settle and move out of the town.

The third issue for consideration is whether motor vehicle Reg. NO.KUW 945, Land Rover, and all

assorted domestic goods and appliances currently on land parcel No. (*particulars withheld*) can be declared joint properties and whether they can be shared equally.

The applicant testified M/V [...] was one of the jointly acquired properties between her and the respondent. During cross-examination the applicant stated that M/V [...] was purchased either in 1988 or 1989. She further stated that she won't be surprised if the vehicle was purchased in 1983 because they had many vehicles. DW1 testified that M/V [...] is unknown to him, but he had bought M/V [...] in 1983 from Mutindwa Enterprises Ltd as per receipt dated 31/12/1983 at a purchase price of Kshs.30,000/- long after his friendship with the applicant had ceased. The applicant in her evidence in chief did not mention M/V [...] nor does she know when it had been acquired and from where. The applicant has failed to demonstrate that M/V [...] was jointly acquired by herself and the respondent. She has failed to show that she contributed either directly or indirectly into its acquisition. The applicant did not at least in her evidencemention the alleged domestic goods and appliances currently on the parcel (*particulars withheld*) nor did she attempt to show whether there are any domestic goods and appliances to which she directly or indirectly contributed towards their acquisition and whether any of the alleged goods or appliances were indeed acquired at the time of her cohabitation with the respondent. I therefore find that M/V [...] was acquired solely by the respondent after the parties ceased to be cohabiting together and the same is not a jointly acquired property by the applicant and the respondent.

Taking all the circumstances of this case into consideration, I would declare in view of the contribution either directly or indirectly by the applicant in the development of a portion of (*particulars withheld*), she is beneficiary of one(1) acre thereof where there is tea and coffee. This portion is about 1/10 of the respondent's land.

This action is brought under Section 17 of the Married Women's Property Act of England of 1882 which is deemed as a statute of general application vide the provisions of the Judicature Act. Section 17 of Married Women and Property Act of 1882 is clear that a court has jurisdiction to deal with a question arising between a husband and wife regarding title to properties and share acquired during the time of marriage. The jurisdiction of this court under Section 17 of the Married Women's Property Act is limited to making a declaration. The issue of valuation, partitions and transfer are subject of separate execution proceedings pending partition.

The respondent is hereby restrained by an order of inhibition against land parcel (*particulars withheld*) from disposing or dealing with the portion of one (1) acre in a manner that is detrimental to the applicant and the said orders hereby issued to be served upon the land Registrar Meru Central for compliance.

This being a family matter involving a husband and wife, I order that each party bears its own costs.

It is so ordered.

DATED, DELIVERED AND SIGNED AT MERU THIS 21ST DAY OF JUNE, 2012.

J. A. MAKAU
JUDGE

Delivered in open court in presence of:

1. Miss Kiome h/b for Mrs. F. K. Gitonga for applicant
2. Mr. M. Kariuki for the respondent(absent)

J. A. MAKAU
JUDGE