



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ORIGINATING SUMMONS NO. 81 OF 2003**

**IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN PROPERTY ACT – 1882**

**BETWEEN**

**JOYCE BOCHERE NYAKEYA NYAMWYA .....APPLICANT**

**AND**

**MATATA OYONDI NYAKEYA .....RESPONDENT**

**JUDGMENT**

The Originating Summons dated 18<sup>th</sup> December, 2003 was amended by filing an Amended Originating Summons dated 29<sup>th</sup> June, 2009 which seeks the following directions:-

- (a)LR No. 209/8358 House No. 58 Kyuna Crescent (Nairobi).
- (b)LR No. 209/359 House No. 7 Woodlands Avenue (Nairobi) and
- (c)LR No. 1870/V/228/75 Apartment Nos. 5 Waiyaki Way (Nairobi)

which are registered jointly in the parties names or in the name and possession of the Respondent be declared as jointly owned.

The Applicant also seeks further orders as under:-

2. ***That the said properties be shared on a ratio of one-third to two-thirds between the Respondent and the Applicant respectively or the said properties be distributed in such other manner as the court may deem fit to order.***
  
3. ***That the Respondent be ordered to render a precise account of the proceeds of rent collected from LR No. 209/8358 (Kyuna Crescent) with effect from 1<sup>st</sup> October, 1993 to date and LR 209/359 (Woodlands Avenue) with effect from 1<sup>st</sup> May, 1993 to date.***
  
4. ***That upon rendering the accounts set out at paragraph 3 hereinabove; that this Honourable court do order the Respondent to reimburse to the Applicant the equivalent or her two-thirds share thereof and/or such share as this Honourable court may deem fit.***
  
5. ***That this Honourable court do declare that all the furniture furnishings and household goods to be found in the matrimonial house at Kanyamera in Kisii and in LR 1870/V228/F5 Apartment No. 5 (Waiyaki Way) belong to the Applicant having been purchased by her through her sole efforts and funds.***
  
6. ***That this Honourable court be pleased to grant such further or other reliefs as may be just in the circumstances.***
  
7. ***That the Respondent do bear the costs of this Application.***

The parties were wife and husband as at the date of filing this application, which although not stated, is agreed to have been premised under Sec. 17 of the Married Women's Act, an Act which has been adopted as an applicable law as per the provisions of Sec. 3 (1) of the Judicature Act (Cap 8).

The Respondent in opposition to the said application has filed a replying affidavit sworn on 13<sup>th</sup> January, 2004.

Thereafter, as per the directions from the court, the parties filed further affidavits sworn on 4<sup>th</sup> June, 2009 and 1<sup>st</sup> October, 2009 respectively and accordingly it was directed that the O.S. shall be heard on the basis of the affidavits and on cross-examinations of the deponents.

At the hearing, the learned counsel for the Respondent did not cross-examine the Applicant but the Respondent was cross examined by the learned counsel for the Applicant.

By Chambers Summons dated 9<sup>th</sup> June, 2009, the Applicant averred the facts as regards the marriage and divorce and she was also allowed to amend her Originating Summons to list the properties in the Originating Summons which excluded the three properties.

Thus the Amended Originating Summons seeks the declaration for the properties, namely:-

(1) House No. 58 LR No. 209/8358 Kyuna Crescent (Nairobi)

(2)LR No. 209/319 House No. 7 Woodlands Avenue (Nairobi)

(3)LR No. 1870/V/228/F5 Apartment No. 5 Waiyaki Way (Nairobi)

The Applicant has, in her two affidavits specified hereinbefore, deponed to the following background of the acquisitions of the aforesaid three properties.

The couple started their married life in Mombasa when the Respondent was an officer with Eastern Africa National Shipping Line Ltd earning shs,6,000/= p.m. plus the overtime and the Applicant was earning shs.3,500/= as a temporary teacher. They did not own any property except the ancestral piece of land from the Respondent's father.

The first house purchased was at Port Reitz at an agreed price of shs.225,000/= in the year 1979. It was registered in their joint names.

It is averred that the Respondent in intermittent periods was without an employment namely from February, 1979 to mid 1980. He was further upgrading his education and qualification from June, 1981 to early 1985 and lost job again in October, 1987. The company incorporated by both of them also did not fare well and collapsed in the year 1998 as averred by the Respondent. However, the Applicant asserted that as against the above averments from him, he issued a cheque which was payable from the company's account in the year 2000 to one Rajdip Company (Annexure JBN 21 of her second Affidavit).

While the Respondent was repaying mortgage by monthly installments of Kshs.1,806/65/=, the Applicant was repaying car loan on a family car purchased by both of them. The said repayment of mortgage was between September, 1980 and early 1984.

The Applicant then was sponsored for further studies in London in March, 1981 and she moved there with the child. The Respondent also joined them in a house prepared by her in June, 1981. In mid 1983 on her return to Port Reitz she found the house in bad repair which she organized so that they could sell the said property and buy a better oriented house, which they later did at Nyali at a price of Kshs.700,000/=. The first house was sold at Kshs.450,000/= out of which Kshs.171,956.80 was paid to complete the mortgage payment thereof.

Due to internal differences, she resigned from her job due to her inability to continue the same job with KCHS as it was to merge with KPA where the Respondent was working. Her pension due was used to construct the Kenyanware House at the ancestral land of the Respondent. The Applicant thereafter moved to Nairobi and Respondent also joined the family after he was 'sacked' by KPA by October, 1987. Then they agreed to buy a maisonette (Woodland Property) at an agreed price of Kshs.600,000/=. The part-payment thereof was made through the savings they made in UK during further studies. The cheque for the payment of ?6900/= was issued by the Respondent.

It is the case of the Applicant that all the payments made in 1991 and 1997 towards the purchase of the said property was from joint earnings of the couple and the rent proceeds from those properties.

The Applicant assisted the Respondent to set up a business (Incorporation of Jumla Trade Link Ltd.) in 1988. She obtained a loan from her employer, Alico (K) Ltd in the sum of Kshs.300,000/= which was to be injected in the said business.

She further applied for a loan for Kshs.1,000,000/= on 21<sup>st</sup> March, 1989 to pay off HFCK loan (Nyali House) renovation and completion of Woodland property and Kenyanware House etc. Then in early 1991 she requested for further loan from her employer in the sum of Kshs.326,000/=. The merged loans required the Applicant to pay shs.17,970/= p.m. out of her salary. The averments of the Applicant in respect of loans obtained are not disputed by the Respondent who only responded by saying that those loans were used by her for her own purposes without specifying.

With the Nyali House being unable to pay regular rent and the difficulty in Woodland properties being secured the Applicant thought of selling Nyali property so that Alico mortgage could be redeemed and a better House in Kyuna could be bought from the sale proceeds thereof. The sum of Kshs.1,222,866/= was paid and the balance of around Kshs.1,770,000/= was used to buy Kyuna properties.

The family moved to new house at Kyuna and Woodland was rented. They lived there for one year and when the Applicant was offered a job in USA by her employer CARE INTERNATIONAL, the whole family moved.

With this move, it was agreed that both aforesaid properties at Nairobi would be rented and proceeds received therefrom to be used for payment on rates and rents, mortgage repayments and the balance thereon was to be saved for educational purposes of the children.

From the benefits offered in her new job, she also bought a house in Atlanta, Georgia, USA in November, 1993.

She thereafter joined UN Secretariat – New York as a Performance Management Officer in April 1995. Her benefits included medical, house, leave travel benefits, 75% educational grant of US\$ 17,500/= per child per year.

While in USA, she single handedly looked after the whole family and all its living and educational needs.

The Respondent refused to assist the Applicant in any way to pay school fees, to render accounts for funds he received from rent in Nairobi. He used his resources in obtaining an MBA degree from London and ran campaign for Parliamentary seat which was very expensive.

The mortgage on Kyuna Property was discharged in September, 1997 and the Respondent informed the Applicant that he had earmarked a flat along Waiyaki Way for shs.4,500,000/= which is the flat No. F5 on LR No. 1870/V/228. The Respondent lives in that flat with his new family.

Though the Respondent maintains that he is not the owner of the flat, he has made payments in the sums of Kshs.450,000/= on 16<sup>th</sup> February, 2000, Kshs.3,061,698.95 on 21<sup>st</sup> February, 2002, Kshs.680,000/= from Jumla Trade Links dated 18<sup>th</sup> July, 2000 and Transfer fee of Kshs.58,300/= from Rajdip Holding to the Respondent of 6<sup>th</sup> August, 2003.

According to her, the Respondent had collected following rents from both properties namely;-

**A. Woodlands Property**

**i) 2 year Tenancy Agreement dated 1.2.93 – shs.18,000 per month**

**ii) 1 year Tenancy Agreement dated 1.11.95 – shs.35,000 per month**

**iii) 2 year Tenancy Agreement dated 30.5.97 – shs.40,000 per month**

**B. Kyuna Property**

**i) 2 year Tenancy Agreement dated 4.10.93 – US\$ 1000 per month**

**ii) 2 year Tenancy Agreement dated 1.10.95 – US\$ 2000 per month**

**iii) 3 year Lease Agreement dated 5.11.2003 – shs.120,000 per month**

It is to be noted that the Respondent has accepted that he does receive the rents upto the date of his testimony before the court which was 11<sup>th</sup> November, 2010.

When the Applicant was offered a job as Permanent Secretary in the Office of President of Kenya between November, 2004 and April 2008, she was refused access to any of the joint houses. She had to rent a house for herself and children while in Nairobi.

She also averred that she had to sell Atlanta property at a loss due to financial commitments. I have endeavoured to give the details of the averments made by the Applicant simply because she had not been cross-examined and her testimony remained unchallenged.

The Respondent's response to the averments through his affidavits and cross examinations is in brief as under.

As regards Woodland Property according to him he paid ?6,900/= from his personal account in UK and the other payments as stated therein.

Similarly, he asserts that Kyuna Properties also is paid by him without any contribution whatsoever from the Applicant.

Waiyaki Way Apartment as per him, is not owned by him and that he is merely a tenant therein.

He reiterated the same averments in his affidavit sworn on 1<sup>st</sup> October, 2009. Specifically he stated that he was earning shs.18,000/= at the marriage and not shs.6,000/= as averred by the Applicant, that there was no agreement to buy a house from the savings from London educational scholarship, that Kenyanware House having been completed in 1985 and the Applicant having retired in 1987 there was no need to use her pension sum on the said house, that he paid shs.300,000/= to one Mr. Mburu being the balance of purchase price of Woodland House in 1987 and that there was no repair or construction on the said property, that he paid shs.1,230,000/= being the balance of Kyuna Property which was purchased for Kshs.4,500,000/= though the sale agreement mentions the sale price as shs.3,100,000/=, that the Applicant never disclosed rental income from Atlanta House and the sale price of US\$193,000/= was used towards purchase of her farm with a house in Nakuru District, that he paid US\$24,000/= towards the purchase of Atlanta House being proceeds of Kyuna Properties rent for two years, that the rent accounts is not a joint account. The claim of the Applicant in respect of rent according to him is time barred as per Sec. 4 (2) of the Limitation of Actions Act.

In cross examinations, he did concede that he was away from house mostly during the period of 1981 – 1985 and also testified that the Rural House was completed in 1985 but he added that he started collecting materials since 1979. He also agreed that the value of the house erected thereof is about shs.2,000,000/- and that he lives in the house.

He further conceded that the Applicant started working since May, 1979 and that first property was acquired in 1981 at Nyali. The repayment of mortgage with HFCK was made from the joint account of the parties and Woodlands and Kyuna properties are also registered in their joint names.

He agreed that the Applicant went to USA with the children in September, 1993 and he joined them in October, 1993. Both the Nairobi properties in question were given on rent. Kyuna, according to him, fetched US\$1,000/= and Woodland shs.5,000 per month. Those rents were what was received in the year 1993 and over the time they varied and that he has not and does not share rent proceeds with her. He also stated that he paid shs.5,000,000/= towards university education for their child Tonya and that the

Applicant's employer paid the education fees for the children and she did not have to pay any additional amount.

He failed to produce any documents in support, even the banking documents by alleging that the Applicant took away all from his apartment.

Be that as it may, the Applicant has produced all the relevant documents in respect of process of purchase of the properties starting from the first one up to the payments to one Rajdip Housing Development Ltd., namely two Banker cheques for Kshs.450,000/= (Barclays Bank) and for Kshs.3,061,698.95 (Kenya Commercial Bank Ltd.) as well as a cheque of Kshs.680,000 dated 18<sup>th</sup> July, 2000 drawn by Jumla Trade Links Ltd. despite the fact that according to the Respondent the said company had closed doors since 1998. The receipt for the last payment dated 18<sup>th</sup> July, 2000 is acknowledged to be in respect of part payment for Flat No. 5 1870/5/828. The Bankers cheques are dated 16<sup>th</sup> February, 2000 and 21<sup>st</sup> February, 2000 respectively. These evidence has not been explained or refuted by the Respondent.

In spite of the indisputable fact that the two properties, (Woodland and Kyuna) are evidently jointly owned, are rented and the proceeds thereof are received by him, the Respondent has failed to render accounts thereof. His averments contrary to what is stated by the Applicant, are as stated hereinbefore, unsubstantiated. Moreover, I have the evidence that the Applicant, since the marriage, has been in gainful employment apart from her study scholarships in UK during which time she has averred that she was capable of having an accommodation for herself, the Respondent and their child and also capable to look after their needs. She has stated that they also saved from the said scholarship and used the same to purchase House at Woodland. I also have the evidence that on her joining UN in USA, the Respondent also went there and there is no proof otherwise that he was earning in the USA. Whilst back in Kenya, the rent proceeds were being deposited for his use. The Applicant has on January, 1984 requested his employer to deposit her salary in the account of the Respondent (Annexure JBN 3 – letter dated 17<sup>th</sup> January, 1984).

It is also clear that since 1993 the Applicant had been looking after the children of marriage in respect of their needs of education and upkeep.

The couple started having marital problems and a divorce cause No. [.....]was filed which was withdrawn on 6<sup>th</sup> September, 1999. In any event, the marriage was eventually dissolved in May, 2005 during the pendency of this Originating Summons.

Coming back to the issues which this court is required to determine I shall start with citing relevant part of Sec.17 of the Married Women's Property Act.

The relevant part of the said Section 17 stipulates:-

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

The said section has been widely interpreted in chain of precedents both from British Courts and our local courts.

The Applicant's case is that despite the registration in their joint names, due to higher contribution by her, the presumption of acquisition of properties through equal contribution should be rebutted.

Mrs. Kiarie relied on the passage from the case of ***Peter Mburu Echaria –vs- Priscilla Njery Echaria (2007) eKLR*** namely:-

***“It is clear that in Kivuitu's case, the court was dealing with a narrow dispute involving the beneficial interest of spouses who are already registered as owners of a property as joint tenants without the registration declaring the beneficial interest of each spouse. There are well-defined equitable rights which accrue to each joint tenant from such a registration. Equal contribution results in a joint***

**tenancy unless there is contrary evidence to show that irrespective of registration there was no equal contribution.**

***In Kivuitu’s case, parole evidence was received which justified the finding that the contributions were equal. That case did not lay any general principle of equality applicable to all property disputes between husband and wife as later confirmed in *Essa vs. Essa (supra)*” (emphasis mine)***

Moreover, under Section 102 (3) of the Registered Land Act (Cap 300), the joint proprietors can agree or apply for severance of the joint proprietorship. The Applicant claims that due to her higher contribution towards the family needs as well as during acquisition of property the severance of the interest in the property must be higher in her favour.

As against that, the Respondent contends that, Sec. 17 of the Matrimonial Causes Act, it being purely procedural, does not entitle the court to vary the existing property rights of the parties.

Reliance was placed on the case of ***Pettitt –vs- Pettitt (1969) 2 ALL ER 385*** at page 388.

***“The meaning of the section cannot have altered since it was passed in 1882. At that time the certainty and security of rights of property were still generally regarded as a paramount importance and I find it incredible that any Parliament of that era could have intended to put the husband’s property at the hazard of the unfettered discretion of a judge (including a country court judge) if the wife raised a dispute about it. Moreover if this discretion, if it exists, can only be exercised in proceedings under s. 17: the same dispute can arise in other forms of action; and I find it even more incredible that it could have been intended that such discretion should be given to a judge in summary proceedings but denied to the judge if the proceedings were of the ordinary character. So are the words unequivocal that we are forced to give them a meaning which cannot have been intended? I do not think so. It is perfectly possible to construe the words as having a much more restricted meaning and in my judgment they should be so construed. I do not think that a judge has any more right to disregard property rights in s. 17 proceedings than he has in any other form of proceedings.”***

In the same case, however, the observation in the case of ***Goodman –vs- Gallant (1986) 2 WLR 236***, is cited, which is a later case, namely:-

***“We respectively agree with Lord Denning M.R.’s observation that a conveyance into joint names does not necessarily mean equal share, for it does not necessarily have this meaning when the conveyance contains no declaration of the beneficial interests.”***

In the case of ***Virginia Wanjiku Njoroge –vs- Francis Njoroge (2008) e KLR***, this court also considered Sec. 102 (3) of the Registered Land Act (Cap 300), which provides for severance of the joint proprietorship as well as Sec. 107 of the Evidence Act which places burden of proof to the party who asserts a fact.

It is also well established principle of law that while considering the settlement of claims between married couple, the principles of law applicable has to be looked into ***“while making full allowance in view of that relationship”***. This principles also include gifts by the parties as well as the resulting trust.

The Respondent also relied on the principle of Gift/Advance, in the event the court is inclined to accept and find that the Applicant made larger contribution.

This case thus poses an intricate issue of declaration of the proprietary rights of a couple on the properties

which are registered in joint names and in view of the fact that both parties were educated and working.

The Applicant's averments, as I have observed earlier, are not challenged by the Respondent. She has averred that the properties were acquired for the security of the children and their education. Although, with the Applicant obtaining an employment outside Kenya, which gave some benefit in respect of educational fees, there is no evidence that the said initial intention of the couple had changed. The Applicant has averred that she had to pay the balance of the fees and other requirements of the children and has been consistently demanding her share of the rent proceeds of the two properties. The Respondent has denied her share, use and occupation of those properties. It cannot be disputed that the Applicant has been deprived of her beneficial rights over the properties by the Respondent. Not only that she has been looking after herself, the Respondent also while in USA and the children while the Respondent is solely receiving and keeping the rent proceeds from the properties for his sole purpose.

I shall like to quote the cited paragraphs from the book entitled "**Trust and Equity**" (4<sup>th</sup> Edition at page 155).

***"Where a voluntary conveyance is made by a man in favour of his wife or fiancée or to his child or any person to whom he stands in loco parentis (and, to a lesser extent, if a conveyance is made by a mother in favour of her child), there is a presumption that the transferor intended to make a gift for the advancement of the transferee. This so-called "presumption of advancement" rebuts the presumption that the transferor intended to recover the benefit of the transferred property under a resulting trust. However, the presumption of advancement can itself be rebutted if there is evidence that the transferor did not intend to make a gift."***

Further down the author goes on to add;

***"The presumption of advancement, which is based on the assumed financial dependence of wives and children upon the husband and father of the family, is now less appropriate than it used to be to disposition within families and is relatively easily rebutted by evidence that the transferor did not, in fact, intend to make a gift to the wife or child. In Pettit v. Pettit, the House of Lords expressed some doubt that the "presumption of advancement" as between husband and wife still survives and observed that, even if it does survive, it will seldom play a decisive part in disputes between living spouses".***

This observation thus defeats the submissions of the Respondent who, in any event as per his own averments was not dependant on the

Applicant. Even in the case of *Echaria* (supra) as observed earlier and I reiterate, namely:-

***"..... Equal contribution results in joint tenancy unless there is contrary evidence to show that irrespective of the Registration, there was no equal contribution....."***

With the above observations, I am of a considered view, that the court has discretion to determine the shares of beneficial interest held by joint proprietors. I also note that the registration of the property is joint tenancy and not the tenancy in common where the shares are presumed to be determined. Thus the court is entitled to determine the shares in a joint tenancy during the lives of the joint tenants, and I shall now proceed to do so.

When the marriage was without problems, this couple started to secure the future of the family and their children by acquiring properties out of which initially one was rented and thereafter the second one when the Applicant moved out of the country and the Respondent followed. It is amply shown that the Applicant has been consistently in gainful employment and was always capable to contribute to the welfare and need of the family. The Respondent was also helped by her in settlement of his business

which according to him failed since 1997. However, I have evidence that he paid handsome sum out of the account of the said company even in the year 2000 to a developer company in respect of Apartment 5, Waiyaki Way. There is no evidence how even the other two large payments from two other banks were made to the same developer company in respect of the same property, if the Apartment was occupied as a tenant.

I may pause here, and state that the Respondent has not explained those payments which considering the dates of those three payments cannot be accepted, even by a child, to be the payments for rents. The Respondent's averments that he is occupying the said Apartment as a tenant is untenable and can be termed as a feeble attempt to throw wool in the eyes of the Applicant and also of this Court.

From the evidence before this Court, an inevitable conclusion has to be drawn that the said payments were made to acquire the said Apartment through purchase thereof and that the Respondent has used the proceeds of the rents from two properties to acquire the same. I shall thus refuse to accept the averments by the Respondent that he is occupying the Apartment 5 along Waiyaki Way as a tenant.

In the face of the undisputed averments from the Applicant, the Respondent has failed to substantiate that he has paid the sum of Kshs.5,000,000/= towards the educational needs of the children. Moreover, the same contradicts his own averments that the employer of the Applicant had been paying the fees and thus the Applicant did not need to pay the same!!

That leave me to determine what shall be the shares of the parties in respect of Kyuna Crescent and Woodland properties.

I have considered the facts as related to the acquisitions, financing and discharge of loans of the two properties.

When the house in Woodland was purchased with the initial payment from the savings at UK while undertaking studies, thereafter in 1988, after the Respondent stopped working with KPA, a company – Jumla Trade Links Ltd, was set up in December, 1988. As per paragraphs 34, 35 and 36 of the second affidavit, the Applicant took major shares towards the repayment of the mortgage and renovation of Woodland property. This house was also used as family residence upto 1992 when the family moved to stay at Kyuna property.

Considering the facts as aforesaid, I shall find that the share of the parties in respect of Woodland Property shall be in ratio of 55% to 45% in favour of the Applicant and the Respondent respectively.

Coming to the Kyuna property i.e. LR No. 209/8358 House No. 58, Kyuna Crescent Nairobi, the family lived in this house for about one year when the Applicant was offered a job in USA by Care International.

As stated in paragraph 43 of her affidavit, and not disputed by the Respondent, it was agreed that both properties be let and proceeds thereof be used to pay the land rent and rates, mortgage repayments and balance to be saved for children's education.

Since then, the problem started and the Respondent refused to contribute anything to the family and the couple started falling apart.

The mortgage was repaid in the year 1997. It is on record that the rents from both these houses are collected and kept by the Respondent and the Applicant has not been given either any account or any share from those proceeds and that she was also looking after herself and the children.

After acquisition of Kyuna property, as per the Applicant, it fell on her solely to look after the entire family including the Respondent who enjoyed the benefit of rent proceeds solely. The Applicant's acquisition of USA property has been appropriately explained and the Respondent has once again failed to show his contribution. These properties are not in any way claimed by the Respondent and in any event given back to her by a legal process.

At this juncture, I would reiterate that determining the exact contribution in respect of matrimonial properties is an arduous and complex exercise. The parties do not keep the records of the payments made

for the household upkeep. But while making payments for an immovable property, one does expect to have some documents. I would also observe that the transactions to acquire an immovable property, by law, entails written process. I have already made my observations on the Respondent's failure to produce even the banking documents which could be requested at any time from those institutions. The Applicant has, on the other hand produced the relevant ones. Moreover, his silence on the three payments made in respect of Waiyaki Way Flat speaks volume and which silence does not elicit any sympathy from the court.

Be that as it may, I shall thus proceed to declare that the Apartment No. 5 also is a property acquired by the joint contribution of the parties and the Applicant shall be deemed to have share therein and I determine that share as 50 percent.

The above now takes me to determine the ratio of shares held by both the parties in Kyuna property.

Considering that it is difficult to ascertain the exact ratio of contributions made by each party, from the circumstances of this case, I find that the ratio of shares shall be 60% : 40% in favour of Applicant and Respondent respectively in respect of Kyuna Property.

Finally, I shall deal with the issue of limitation raised by the Respondent against the claim of rent proceeds. As per the Applicant, she has been deprived of her right to have the accounts and refund of her share at least from 18<sup>th</sup> December, 1996 in view of the fact that the Originating Summons was filed by her on 18<sup>th</sup> December, 2003. Moreover, it is also on record that the mortgage was repaid in the year 1997. With this concession, I shall refrain from making any finding on the issue of limitation, although the continuous default by the Respondent from accounting and paying share of the Applicant as well as the acknowledgment that the property is jointly owned and the rents were received solely by him would have removed the block of limitation.

The upshot of all the above is that I allow the Originating Summons with following orders/declarations:-

- (1) LR No. 209/8358 House No. 58 Kyuna Crescent (Nairobi) is declared to be held in ratio of 60% : 40% in favour of the Applicant and Respondent respectively.**
- (2) LR No. 209/359 House No. 7 Woodlands Avenue (Nairobi) is declared to be held in the ratio of 55%:45% in favour of the Applicant and Respondent respectively.**
- (3) The Applicant is holding 50% share in LR No. 1870/V/228/F5 Apartment 5 Waiyaki Way Nairobi.**
- (4) The Respondent is ordered to disclose forthwith the proprietorship of the above property being Apartment No. 5 along Waiyaki Way.**
- (5) The Respondent is further ordered to render accounts of the Woodlands and Kyuna properties above specified as from December, 1996 to upto date and pay the Applicant her shares thereof as declared hereinbefore.**
- (6) The Respondent to pay the costs hereof.**

I do not make any order in respect of prayer No. 5 as I do not have sufficient evidence and details thereon.

Orders accordingly.

**Dated, signed and delivered at Nairobi this 11<sup>th</sup> day of March, 2011**

**K. H. RAWAL**

**JUDGE**

**11.03.2011**