



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MILIMANI LAW COURTS

CIVIL CASE NO. 550 OF 1999

PATRICK GITHERU GATONYE.....PLAINTIFF

VERSUS

MARY WANJIRU GITHEHU.....DEFENDANT

JUDGMENT

The parties herein were married and lived as husband and wife since 1979 but at the time of filing this suit they were divorced.

The Plaintiff claims that he solely acquired the following properties during the subsistence of the marriage, namely:

- a) ***Motor Vehicle Registration Number KYN 886 Toyota Corolla.***
- b) ***Land Parcel No. Kajiado/Kaputei North/1269***
- c) ***Land Parcel No. Dagoretti/Kinoo/1143***
- d) ***Land Parcel No. Dagoretti/Kinoo/1144***
- e) ***Assorted Household Properties.***

He has averred further that despite the fact that he bought the above mentioned properties, he caused all the properties to be registered in the name of his wife, the Defendant herein. Consequently, he claims that the Defendant is holding all the aforesaid properties in trust for him and seeks declaration accordingly in

prayer no. a) of the Plaintiff. He also prays for the costs of the suit.

The Defendant by an Amended Defence and Counter Claim dated 25th July, 2005 has denied the claims of the Plaintiff and has averred that she purchased and acquired solely all the properties and that the Plaintiff was jobless. She has claimed that she sold land parcel no. KAJIADO/KAPUTE NORTH 1269 which was her property and denied holding the same in trust for the Plaintiff.

In her Counter Claim she has alleged that the Plaintiff has wrongfully lodged a caveat on the property DAGORETTI/KINOO 1143 AND 1144 and is trespassing on those properties. She thus claims that the suit be dismissed with costs, the caveat be removed and the Plaintiff be directed to vacate the above properties.

The evidence of the Plaintiff was partly heard by Hon. Ojwang J. (as then he was). He has testified that their marriage was not fully accepted by his parents and thus in 1980 they asked the Defendant to leave. Afterwards they both worked hard, but he fell seriously sick in 1983 but continued working hard after recovery. According to him he started running matatu business. As regards his medical condition what is produced is a letter dated 26th January, 1984 from a doctor from Kenyatta National Hospital stating that the Plaintiff be given light indoor duties as he is undergoing treatment at the hospital and felt dizzy in the sun. He further testified that though he had paid for the properties he, considering his physical health, had registered the same in the name of the Defendant to protect his family in the event of his demise.

Apart from the sale agreement dated 20th July, 1989 all the documents produced such as the receipts from the vendors and green card for the parcels nos. 1143 and 1144 are in the names of the Defendant. The receipts for some building materials of August to October 1991, apart from one, are shown as “cash” receipts. The total amount for these receipts, as rightly commented by the previous court, was a very minute fraction of the contribution.

In cross-examination, he agreed that the first property, parcel no. Kajiado North/1269 was sold in 1993-94, while they were living together. He agreed also that all the receipts which are on record from Rhoda the vendor for Kinoo/1143 and 1144 are in the name of the Defendant and he has signed as witness and that there is nothing to show that he has paid any money for these two properties. He has also conceded that he is living on these properties.

His first witness(PW.2) testified that as the properties had loan thereon the Plaintiff and one Charles Ng’anga went to the bank and paid each shs.102,028/= in the bank. But in cross-examination he changed his version and stated that it was his mother Rhoda who went to the bank and the documents before the court do show that his mother received money from the Defendant. The second witness (PW.3) just stated without mentioning any date, that he was present in the house of the Plaintiff when Rhoda came to get money. The Plaintiff went in and came with shs.17,000/= and gave the money to Rhoda. I may note that there is no receipt or record of payment of such sum before the court. In cross-examination he stated that he was working as a matatu driver with the plaintiff. He also agreed that he did not witness the payment on any document. He also said that PW.2 was not present at that time. The Plaintiff’s last witness was James Kairu Kanyora who stated that once he saw that the Plaintiff gave some money which was in the house and he witnessed the same.

The Defendant testified that the motor vehicle in question was purchased by her from a German client when she was working as a massage therapist and beautician on a freelance basis. She has also worked as such in Viena, Austria. The motor vehicle was transferred to her name on 30th May, 1994 after the full payment.

She further testified that Kajiado property was bought in the year 1988 and after the Plaintiff introduced her to a lady the same was sold in the year 1991 and the sale amount was used to renovate the premises on the parcel 1143. She gave a detailed version of the purchase of two parcels at Kinoo, i.e. 1143 and 1144. She reiterated with the support of documents on record that it was she who paid the purchase price and that the Plaintiff had not paid any sum towards the acquisition of those properties. She mentioned a

parcel no. Kajiado North/1272 acquired on 20th June, 1989 registered in Plaintiff's name which was later sold. She denied that the Plaintiff had taken care of the family and stated that it was she who worked hard and made money.

In cross-examination she stated that she was earning shs.3000/= per day. The Plaintiff lost a job at U.N. within three months after she got it for him. She denied she was not accepted by his family and stated that he had issues with his parents and thus he was thrown out by his parents. She also denied that because of his ill health in 1982 the properties were transferred in her names. She also denied that she carried all household goods (though has admitted in her pleading) and claimed that the Plaintiff was a violent man and used to beat her and hence the divorce. She has also looked after the children and continues to work hard for them with her job with U.N.

One thing is quite clear that the properties were acquired during the subsistence of the marriage. It is also apparent that the Defendant has been working and that she has been registered as the proprietor of all the properties. She is still working and looking after the children. She has also given very detailed version of the purchase of two Kinoo properties. As against that the Plaintiff's version was wanting in details and his witnesses cut very sorry pictures, which no court could accept as credible.

I have also carefully considered the written submissions from both counsel. The learned counsel of the Plaintiff curiously submitted that his claim is under provisions of Sec.17 of the Married Women's Property Act of 1882, an applied law as per Sec. 3 of the Judicature Act. (Cap 8 of Laws of Kenya) The said provision stipulates, and I quote the relevant part thereof.

17. "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 of the High Court of Justicemay take such order with respect to the property in dispute and as to the costs of and consequent on the application as he thinks fit."

I shall have difficulty to accept that after the divorce of the marriage a divorced party can be described or accepted as a "spouse" i.e. husband and wife. As per the jurisprudence developed by our courts the claim under the said Act can be made during the subsistence of the marriage. The Act has also prescribed the procedure of bringing the claim before the court which is by Originating Summons, which, as per our process, is a summary process. This claim before the court is by way of a Plaint, and even as per the averment it can be considered as a claim of trust by a person contributing to the acquisition of a landed property. It is trite law that any person who claims the trust has to prove the claim by adequate proof of contribution. The Plaintiff herein, in my considered view has fallen short of such obligation and thus cannot take support of proviso of sec.28 of the Registered Land Act (Cap. 300 of Laws of Kenya). The Defendant having been shown as the proprietor of the two parcels of land be deemed as the absolute and indefeasible owner thereof. (see Sec. 28 of the Registered Land Act,Cap.300).

I may reiterate that as I have rejected the Plaintiff's claim under the Married Women's Property Act, 1882, I have considered the Plaint as a civil suit and have come to the conclusions as aforesaid. As regards the claim of household goods, the Plaintiff has, in my considered view, failed to prove that he had purchased the goods which were specified only in his testimony. The Defendant has stated that she took household goods for the interest of the children. But in absence of the proof from the Plaintiff, it shall be impossible for the court to make an order on this claim which can be enforced or enforceable. The Plaintiff thus also fails to get this claim.

In view of the aforesaid findings I shall have to allow the Counter Claim of the Defendant.

In view of the premises aforesaid, I make the following order:

a) That the Plaintiff's suit be dismissed with costs to the Defendant.

b) That the caveat placed on the property known as DAGORETTI/KINOO 1143 AND 1144 be lifted.

c) That the Plaintiff to vacate the Defendant's property DAGORETTI/KINOO 1143 AND 1144 and that he be permanently restrained from entering or in any way dealing with the said property.

I shall not make any order on costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 13th day of **October, 2011**

K. H. RAWAL

JUDGE

13.10.2011