REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 958 of 2004

IN THE MATTER OF AN APPLICATION UNDER THE MARRIED WOMEN'S PROPERTY ACT 1982

BETWEEN

MATILDA CHEMELI BACHIA ….………………………..… APPLICANT

VERSUS

ANTHONY IRUNGU BACHIA ………………...……… RESPONDENT

JUDGMENT

The Applicant herein moved the court by way of an originating summons dated 31st August 2004. The Originating Summons was premised under section 17 of the Married Women's Property Act, 1982, and is supported by two affidavits sworn by the Applicant on 31st August 2004 and 18th August 2008.

The Respondent in opposition to the Originating summons filed and a replying affidavit on 18th August 2004 but sworn on 18th October 2004.

The Originating Summons was filed when the parties were still married though a divorce cause was filed and pending. The Divorce cause is now determined.

Thus the issues of the marriage of the parties and that of acquisition of the property namely L.R. NO. Nairobi/Block 90/61 (hereinafter referred to as the suit property) during cohabitation are not in dispute. So is the fact that the property was registered in joint names of the parties vide Certificate of Lease given on 16th November 1995.

The marriage started facing trouble thereafter and hence the originating summons.

The applicant seeks orders to the effect that she be given the whole of the suit property and half of the household goods and the motor vehicles KYW 040, KAB 948, KUM 654 and KAJ 071B.

The Respondent has not sought for any cross-declarations to those claims by the Applicant, but has proposed the equal distributions in his replying affidavit.

As per the evidence of the Applicant, she sourced/looked for the suit property and got the purchase price reduced to Kshs.5,600, 000/= from offered price of Kshs.7,000,000/=. The couple had two businesses; a gift shop at Unga House Westlands called Touch Wood, run by the Applicant and car sale business run by Respondent. The initial deposit of Shs.1,100,000/= was paid from the Joint income from the said two businesses deposited in a Joint Account. Thereafter the Respondent paid Kshs. 500,000/= and Kshs. 250,365/= and thereafter he has not paid anything towards the re-payment of mortgage amount. She moved her Provident Fund Scheme to Housing Finance Corporation

of Kenya to get the benefit of reduced rate of interest. She was employed by Kenya Airways throughout the relevant period and still is so employed. She had to forgo the interest given on the Provident fund by moving it to HFCK. She showed that she earned Kshs. 33,980/25 in the year 2007 – 2008 when she moved back the Provident fund to Kenya Airways. The Mortgage installment was Kshs. 93,000/= per month. From February 1998, the Applicant started paying mortgage installments. She could raise the sum for instalments from savings of allowances from her foreign trips. Thereafter, she took loan from Wana Ndege Co-operative for Kshs. 950,000/= when she was placed on local duties and started paying Kshs. 35,000/= since June, 2003. According to her she has paid Kshs. 10,908,866/35 upto October 2005, towards repayment which excludes payment of Kshs. 500,000/= and Kshs.250,368/= paid by the Respondent. She also shopped for children, contributed towards food when needed, fueled her motor vehicle, obtained medical insurance, free travel ticket for the family including two sons of the Respondent from the previous marriage. She also paid for two house maids, helped to maintain Respondent's parents as well as contributed to repay his debts. The Respondent has not paid for land rates and there was a balance of Kshs. 478,000/= to be payable. Moreover, there is mortgage due in the sum of Kshs. 2,700,000/= and security and service due in the sum of Kshs. 66,000/=.

She also testified on the purchase of a farm in her names in the sum of Kshs. 750,000/= out of which Kshs. 300,000/= was paid by her father. The Respondent also bought a farm in his own name at Naivasha. Although the Respondent has testified about his contribution towards the purchase of the said farm, no proof of such contribution was given except to show that the Applicant was able to buy the said farm despite the fact that there is mortgage due and payable.

It is not in dispute that the Respondent paid for education, and all utilities like water, electricity and telephone. She also agreed that the Respondent paid legal fees and stamp duty for the suit property in the sum of Kshs. 60,000/= and Kshs. 250,000/=.

She also agreed that there were two renovations made on the suit property and she paid Shs. 60,000/= to pay for labour. She was shown receipt for Kshs. 117,234/= and Kshs. 250,000/= for first renovation and Kshs. 100,000/= for second renovation paid by the Respondent but commented that she was against such renovations because of the fact that the mortgage was still due and payable.

She agreed that the Respondent was a good father and looked after the children's welfare when she was out of country on her duties. She agreed that Respondent has employed a driver to look after the children. But she stressed that those payments made by the Respondent was his duty towards the family and children, and cannot be considered as contribution towards the purchase of the suit property. She thus asked for the prayers she has asked form this court.

The Respondent in his evidence stated that he has paid Kshs. 3,236,515/65 towards the purchase of the suit property. He denied that the initial deposit was paid through a Joint account and stated that the same was paid from his Account of Balcom Co. Ltd. He denied that the Applicant is either a share-holder or a signatory in the said company. He however showed that one Victor Gatanya Kariuki resigned as a director and share-holder thereof since 1994. It is trite law that a company cannot have a sole shareholder. But he did not show who was the shareholder apart from himself and went on to testify that he paid the said sum not as a company but for himself.

I may state here, that no resolution of such payment or the leaf of the cheque is before the Court to support his contention. As against that the Applicant has testified that she was a co-signatory of the Account. He also testified that there was no contribution from the business of the gift shop – Touch wood.

He then gave evidence on payments made towards household expenses, education fees, petrol and maintenance. He also showed expense on medical for dental problems, (which was not covered under medical insurance provided by Kenya Airways). He categorized the said expenses which according to him totalled to Kshs. 8,829,837/= though according to him the said sum could be more as he did not have all the receipts.

He conceded that the receipts produced by him in the evidence had not been produced in his replying affidavit filed on 18th August, 2004 (sworn on 18th October 2004 (sic)), though he was aware of the Originating Summons filed. He explained the non-disclosure of those

documents on the ground that they were consistently trying to settle the case.

He also agreed that receipts shown by him (D EX3) were mainly from the year 2004 but not after the suit was filed. He also agreed that the documents produced by the Applicant are more or less fair but not 100 per cent correct. He agreed that she has paid Kshs. 10,908,866,130/= towards mortgage and that he is not paying any sum towards the mortgage and that she has been paying the same since filing of the Originating Summons.

He was examined on the evidence of his contribution of Kshs. 3,236,515/= but when shown pages 2, 3 & 9 of his DEX3 – he had to concede that the documents do not show that he paid the same. He also had to agree that there was a statutory notice issued by the mortgagor but still insisted that even in absence of her intervention, the suit property would not have been sold!!!

He also agreed that there was no written agreement as to splitting the duties of household expense to be paid by him and mortgage repayment by the Applicant. He also had to concede anomaly on many receipts produced by him.

He also agreed that the motor vehicle KUM 654, which was registered in the name of the Applicant was given by him to his parents, and that the Applicant did not use the same.

With the above, it is proposed by the Respondent that the suit property be shared equally by the parties.

With the above pleadings and evidence, the issues to be determined are:-

1) What is the scope and purview of section 17 of the Married Women's Properties Act 1882 (hereinafter referred to as "MWPA").
2) What share each Party is entitled to vis a vis Joint Registration of the suit property.
3) Whether the prayers sought for by the Applicant be granted.
4) Who pays the costs of the originating summons.

Issue No. 1

Since Pettitt V. Pettitt ((1969) 2 WLR 966), it is an established principle of law that:

> **"Disputes between husband and wife as to title or possession of property brought under section 17 of 1982 Act must be decided by applying settled law to the facts as may be established just as courts do in ordinary suits between other parties who are not so married."**

I shall refer to a passage from Lord Upjohn at page 989 in Pettit's Case (Supra).

> **"In my view, section 17 is a purely procedural section which confers upon the judge in relation to questions of title no greater discretion than he would have in the proceedings began in any Division of the High Court or in County court in relation to the property in dispute, for it must be remembered that apart altogether form section17, husband and wife could sue one another even before the 1882 Act over questions of property, so that, in my opinion, section 17 now disappears from the scene and the rights of the parties must be judged on the general principle applicable in any court of law when considering questions of title to property, and though the parties are husband and wife, questions must be decided by principles of law applicable to the settlement of claims between those not so related while making full allowances in view of that relationship.**

In the first place, the beneficial ownership of property in question must depend upon the agreement of parties determined at the time of acquisition. If the property in question is land there must be some lease or conveyance which shows how it was acquired. If that document declares not merely in whom the beneficial title is to rest that necessarily concludes the question of title as between the spouses for all time and in the absence of fraud or mistake at the time of transaction, the parties cannot go behind it at any time thereafter even on death or the break-up of the marriage."

Yet after the above observations it was observed on page 991 of Lord Upjohn's judgment namely:-

"But where both spouses contributed to the acquisition of property, then my own view (of course in the absence of evidence) is that they intended to be joint beneficial owners, that is so whether the purchase be in the joint names or in the name of one. This is a result of an application of resulting trust."

Lord Upjohn also observed:

"The matrimonial property in issue was clearly purchased as such and on the evidence, both parties contributed towards its purchase and my analysis and evaluation of the evidence at the trial does not lead me to any reason to find that the wife contributed any less to the acquisition of property than the husband."

The beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim "Equality is equity" Lord Pearson in Gissing vs. Gissing (supra) at page 788 paragraph stated that**:**

"No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one-quarter, I do not think it is helpful or right for the court to feel obliged to award either one-half or nothing."

Lastly it was urged by the Learned Counsel for the Applicant that the principles enunciated in the case of ***Echaria V. Echarial*** be followed by dint, of '***Stare decisis***'

I have considered the comments made by Applicant's Counsel on two High Court decisions namely:-

1) Charles Phillip Mason versus Vennessa Kahala Mason (H.C.C.S NO. 11 of 2006 (O.S) Mombasa. 2008 eKLR.

2) Virgina Wanjiku Njoroge Versus Francis Njoroge H.C.C.S No. 2125/2000 (O.S) Nairobi (unreported)

I have also considered the authorities cited in support of the comments against these two cases.

As regards the ***Mason's*** case (Supra) I may state that in a recent case H.C.C..S No. 18 of 2003 (Dorcas Wangari Versus KCB and 3 others unreported). I have found that the evidence to be led by parties to prove the beneficial interest derived from **Resulting trust** is similar both in the cases under sec. 17 of MWPA and those filed under Order 36 Rule 1 of Civil Procedure Rules.

As regards ***Wanjiku's*** case (supra), I did decide the matter form the facts of the case and distinguished **Echaria's case** (Supra) which any court is entitled to even under the principle of stare decisis.

I shall have or should have no quarrel on the principles of ***stare decisis*** and shall definitely quote following passage from **Halsbury's Laws of England, 4th Edition Vol. 26, Paragraph 573**.

> **"…the enunciation of the reason of principle upon which a question before a court has been decided is alone binding as precedent. This underlying principle is called the ratio decidendi, namely the general reasons given for the decision or the general grounds upon which it is based, detached or abstracted from the specific peculiarities of the particular case which give rise to the decision. What constitutes the binding precedent is the ratio decidendi, and this is almost always to be ascertained by analysis of the material facts of the case, for judicial decision is often reached by a process of reasoning involving a major premise consisting of a pre-existing rule of law, either statutory or Judge-made, and a minor premise consisting of the material facts of the case under immediate consideration." (Emphasis added).**

The aforesaid passage does accept the fact that ratio decidendi of the case is mainly reached after considering the material facts and pre-existing rule of law.

Even in the case of Kibaki V. Moi (2008) 2 KLR (EP) 351, the Court of Appeal has accepted that the superior and subordinate Courts must follow their decisions unless they can be distinguishable from case under review or on some principle such as obiter dictum.

In ***Echaria's Case,*** the property in question was registered in the name of the husband while in ***Kivuitu's case*** the property was jointly owned and after considering the facts of ***Kivuitu's case,*** the court in ***Echaria's case*** accepted that the decision in the said case, was properly arrived at..

The court in ***Echaria's case*** further held that while considering the contribution the party has to show the same in financial terms.

In short, considering all the aforesaid, section 17 of MWPA enjoins the court to decide as per evidence the contributions made by a spouse in acquisition of the property during coverture and to determine the beneficial interest of that spouse as a result of an application of resulting trust.

Thus the courts shall have to consider peculiar circumstances of each case and to independently assess the contribution of a spouse.

Issue No. 2

In response to the evidence of the Respondent's contribution towards maintenance, education and welfare of the family it was urged that by so doing the Respondent was merely fulfilling his duty as a husband and a father.

The case of **R v. Flinton (1824 – 1834) All. E. R. 685** was relied upon to show that at common law it was the duty of a husband to maintain his wife and if he fails to do so a wife has an implied authority to pledge his credit for necessaries suitable to his station in life.

Similarly section 23(1) of the Children Act (Act No. 8 of 2001) was cited to show that a parent has a responsibility for a child. Section 24(1) of the said Act provides interalia that neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.

I shall have difficulty in accepting the aforesaid contention presented by the Applicant. The case of **Flinton** (Supra) is an old case, and from an era when the wife was not expected to work to earn living and thus a husband was obligated to provide for her necessities. It has no bearing on the issues before this court. In the case before me, the applicant is a working Lady and apart from occasional buying of food has not paid anything towards the household expense. Moreover, the Children Act imposes equal responsibility towards a child on mother

also. In my considered view, it shall be sufficient to state that the contribution by husband towards the household expense should be considered in assessing the contributions in acquisition of the property by a married couple. Granting that privilege only to a wife shall be an obvious discrimination and against the principles of settled law and justice.

I shall like to cite, at this stage, a passage from **Falconer v. Falconer (1970) 3 All E.R. 449 at 452** (which followed Gissing v. Gissing (1970) 2 All. E.R. 780).

> **"The law imputes to the husband and wife an intention to create a trust, the one for the other. It does so by way of inference from their conduct and surrounding circumstances, even though the parties themselves made no agreement on it. This inference of trust the one for the other, is readily drawn when each has made a financial contribution to the purchase price or to the mortgage instalments. The financial contributions may be direct, as where it is actually stated to be a contribution towards the price of instalments. It may be indirect, as where both go out to work , and one pays the house-keeping and the other the mortgage instalment. It does not matter which way round it is. It does not matter who pays what. So long as there is a substantial financial contribution to the family expenses, it raises the inference of trust. But where it is insubstantial no such inference can be drawn."(emphasis mine)**

I shall also cite following passage at page 792 from Gissing's Case.

> **"If there has been no discussion and agreement or understanding as to sharing in the ownership of the house and the husband has never evinced an intention that his wife should have a share, then the crucial question is whether the law will give a share to the wife who has made those contributions without which the house would not have been bought. I agree that this depends on the law of trust rather than on the law of contract, so the question is under what circumstances does the husband become a trustee for his wife in the absence of any declaration of trust or agreement on his part. It is not disputed that a man can become a trustee without making a declaration of trust or evincing any intention to become a trustee. The facts may impose on him an implied, constructive or resulting trust. Why does the fact that he has agreed to accept these contributions from his wife not impose such a trust on him?"**

I do not see why such trust cannot be imposed on a wife in favour of a husband!!! All these cases are cited with approval by Court of Appeal in the case between **David M. Mereka versus Margaret Njeri Mereka** CCA No. 236 of 2001 at Nairobi (2004) eKLR.

The question then will arise as to whether the Joint Registration of the suit property under Registered Land Act (Cap 300) bars the application of section 17 of the MWPA?

The learned Counsel for the Respondent contended that section 27 of the Registered Lands Act (Cap 300) (hereinafter refer to as 'RLA') sets out the right of a proprietor as absolute subject to provisions of section 28 and 30 of the RLA.

It was further submitted that as the Applicant has not contended that there was any fraud in the Joint Registration of the suit property, only way an indefeasible title could be challenged is through the imputation of trust which issue in any event is not pleaded.

The only way a joint proprietorship be severed during life time is by seeking to severe the same and to register the parties as tenants in common.

In **James Kamole Njomo v. Phoebe Wangui Kamau and another (C.A No. 63 of 1998) – (unreported).** at page 7 thereof the Court of Appeal observed:-

> **"When a property is acquired during the course of a cohabitation and is registered in the Joint names of both the spouses, the court <u>in normal circumstances</u> must take it that such property being a family asset, is acquired in equal shares"** (emphasis mine)

Similar observations were made in the case of **Gathiya Essa v. Mohamed Alibhai Essa** (CA No 141 of 1998), on page 185, it was observed that **"where the property is acquired during the subsistence of a marriage is registered in the joint names of the spouses, the law <u>assumes</u> that such property is held by the parties in equal shares"** (emphasis mine).

The reliance was placed on two cases of **Wanjiku Njoroge** (supra) **and Mason** (supra).

A passage quoted from principles of family law by S. . Cretenry 4th Edition (1984) at 655 and 654, was also relied upon namely:-

> **"If the conveyance contains an express declaration of beneficial interests that is conclusive or (at least) required high degree of fraud or mistake if it is to be rebutted. If for example the conveyance states that the parties hold the property upon trust for themselves as joint tenants beneficiary (which presupposes equality) it will be difficult for one of them subsequently to assault that he is entitled to more than 50 per cent of the sale proceeds."**

From the above passages, it was contended by the Respondent's counsel that the Joint proprietorship be severed and converted into Tenancy in common in equal shares as per section 102(3) of RLA.

It was in short contended that a joint owner cannot be equated to non-owner who could be recognized as holding a beneficial interest in the matrimonial property.

As against the aforesaid submission from the Respondent, the Applicant's Counsel submitted that the parties are holding the suit premises as tenants in common. With due respect, the aforesaid contention is contrary to the Title document (Certificate of Lease) produced by the Applicant. In the proprietorship section of the Title it is specifically stated that the two are joint proprietors.

I shall quote the following passage from **Echaria v.s Echaria** (2007) 2 EA 139 at 145.

> **"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 the 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 v Essa.**
>
> **The first statement of the law by Gachuhi JA, that in a joint tenancy each party owns an undivided equal share therein is not, with respect, entirely correct. It is in a tenancy in common in equal shares where each tenant owns an undivided equal share in the property. On the contrary, one characteristic of a joint tenancy is that the joint tenants have a unity of interest, that is to say, that, although they have separate rights, the interest of each joint tenant is the same in extent and duration and in reality they are in the position of a single owner….. <u>However, the joint tenants have a right to sever the joint tenancy in their lifetime in which case the joint tenancy is converted into a beneficial interest in common equal shares</u>. It is however correct to say, that a joint tenancy connotes equality for there is a rebuttable presumption that where two or more people contribute the purchase price of property in equal shares, they are in equity joint tenants.**

With the above observations and the evidence of contribution by payment of greater part of purchase price of the property, it is reiterated that the Applicant be given wholly the suit property and half of the household goods and motor vehicles. The Respondent seeks equal shares.

I shall now make my observation on the shares to be held by parties.

I would observe here that as regards the household goods, during cross examination, the Applicant did state that the Respondent could keep the household goods if he wanted them. As regards the motor vehicles, the Applicant did not render sufficient evidence of her contributions except to show that her motor vehicle was sold to buy another motor vehicle which she did not use and was given to the

Respondent's parents. All other vehicles are registered in the name of the Respondent and Finance Companies. One vehicle is used for the needs of the children.

It is also not in dispute that the Applicant is paying the mortgage amount which stands in arrears in the sum of around Kshs. 3,500,000/=. I have enumerated the payments made by both the parties hereinbefore.

The facts of this case is very much peculiar. Both parties commenced the process of acquisition of the suit property. The Respondent started the payment of monthly instalment and paid around Kshs. 754,000/=. The evidence as regards the initial deposit of Shs. 1,100,000/= is not very conclusive. But it is not denied that the couple were running two businesses and payment was made through a Bankers Cheque without showing the details of the maker. Moreover, the title was registered in Joint names of the parties.

Thereafter the mortgage instalments have been paid by the Applicant to the exclusion of the Respondent which are detailed hereinbefore and, in any event accepted by the Respondent. She also paid for land rates when the statutory notice was issued. As against that the Respondent has been paying household expense, education, payment for watchman/gardener and utilities. He mainly paid for two house renovations. These payments by the Respondent cannot be shrugged off as father's duty so as not to be accountable as contribution under MWPA.

The holding of **Burns V. Burns (Laser) 1 All E.R. 244** was adopted in Echaria's case – namely:-

"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 purchase price or;

b) Contributes regularly to the mortgage instalments or

c) Pays off part of the mortgage, or

d) Makes substantial financial contributions to the family expenses so as to enable the mortgage instalments to be paid.

With these facts and principles of laws, I shall, without hesitation, hold that the Applicant could not have paid the mortgage instalments without contributions received from the Respondent which were not insubstantial at any standard. Thus her claim of absolute ownership must fail, and further she also could not satisfy the court that she was able to acquire the suit property without any contributions from the Respondent.

In the case of **Lord Melvin John Balckburn v. Lady Kathleen Backburn (H.C.C.S No. 87 of 20007) eKLR** despite the fact that no financial contribution from the husband was received, he was given 20 percent of share in the property registered jointly in the names of both spouses.

I do not have this kind of scenario. With acceptance by both parties, there is evidence of a kind of shared responsibilities between the spouses, despite the problems in marriage. Both parties have so far stayed under one roof with the consistent arrangements.

Considering all the facts and circumstances of this case, I do severe the Joint proprietorship into tenancy in common and direct that

1) The Applicant holds 60 per cent of the suit property and the respondent holds 40 per cent thereof on condition that she undertakes to pay the mortgage dues.
2) The Respondent shall pay 80 per cent of the purchase price of Motor vehicle KUM 654 to the Applicant.
3) The Respondent to pay ½ of the costs to the Applicant.

Orders accordingly.

Dated, Signed and Delivered at Nairobi this 26th day of January, 2010.

K.H. RAWAL

JUDGE

26.1.2010