



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CIVIL CASE NO. 350 OF 2008(OS)**

**A C I** .....**APPLICANT**

**versus**

**J A O** .....**RESPONDENT**

**RULING**

**A C I** ('the applicant') moved this court by way of an Originating Summon on 23/7/2008, against **J A O** and **[particulars withheld] LTD.**, who were then named as the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively, and in which he sought for inter alia, several declaratory orders pertaining to several immovable and movable properties, whose details appear hereunder and which I shall henceforth refer to as 'the subject properties', which are currently registered in the name of his wife **J A O** ('J').

He claims that he acquired the subject properties during his marriage to Joyce but that for reasons which I shall enumerate herein after, they agreed to have the properties registered in her name but on his behalf and also on behalf of their children, and it is for those reasons and the grounds that he relies upon that he now urges the court to declare that the properties are their joint properties and that Joyce holds the same in trust for both of them.

Their marriage is currently the subject of divorce proceedings.

He had also moved the court simultaneously for the following orders:

◆◆◆◆◆◆ *THAT pending the hearing and determination of this Application inter-partes, this suit or until further orders, an order be issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents whether by themselves, agents, servants or otherwise howsoever from interfering with the Applicant 's access to, quiet possession of, advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning and/or otherwise dealing with properties L.R. No.[particulars withheld]. I.R. [particulars withheld], L.R. No. [particulars withheld] I.R. [particulars withheld] and L.R. No. [particulars withheld] I.R. [particulars withheld] and the business run by the 2<sup>nd</sup> Respondent as [particulars withheld] on L.R. No[particulars withheld] to the exclusion of the Applicant .*

◆◆◆◆◆◆ *THAT pending the hearing and determination of this Application inter-partes, this suit or until further orders, an order be issued restraining the 1<sup>st</sup> Respondent whether by herself, agents, servants or otherwise howsoever from interfering with the Applicant 's access to, quiet possession of, advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning and/or otherwise dealing with Motor Vehicle BMW 3 Series, [particulars withheld], Mercedes Benz Convertible, E200 CLK, [particulars withheld], Toyota RAV4, [particulars withheld] Toyota Harrier, [particulars withheld]and unregistered Grey Hummer H3 to the exclusion of the Applicant .*

◆€€€€€€ THAT pending the hearing and determination of this suit, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be directed to render to the Applicant correct and proper accounts of the income and interest from properties L.R. No. [particulars withheld], L.R. No.[particulars withheld] I.R. [particulars withheld] and L.R. No. [particulars withheld] I.R. [particulars withheld] and the businesses run by the 1<sup>st</sup> Respondent as [particulars withheld] on L.R. No. [particulars withheld] .

◆€€€€€€ THAT Pending the hearing and determination of this suit, the income and interest from properties L.R. No. [particulars withheld] . I.R. [particulars withheld] , L.R. No. [particulars withheld] I.R. [particulars withheld] and L.R. No. [particulars withheld] I.R.[particulars withheld] and the businesses run by the 2<sup>nd</sup> Respondent as Deepwest Resort on L.R. No. [particulars withheld] be deposited in an interest earning account in the joint names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' and the Applicant 's Advocates and any such withdrawals from the account be made only with the consent of both the 1<sup>st</sup> Respondent and the Applicant .

He also prayed for costs, and relied on the grounds that:

◆€€€€€€ The 1<sup>st</sup> Respondent is his wife and that they acquired properties L.R. No. [particulars withheld]. I.R. [particulars withheld], L.R. No. [particulars withheld] I.R. [particulars withheld], L.R. No. [particulars withheld] I.R. [particulars withheld], and the business run by the 2<sup>nd</sup> Respondent as [particulars withheld] on L.R. No. [particulars withheld], households and motor vehicles in the course of cohabitation and marriage from funds solely contributed by the Applicant.

◆€€€€€€ Properties L.R. No. [particulars withheld]. I.R. [particulars withheld] , L.R. No. [particulars withheld] I.R. [particulars withheld], L.R. No. [particulars withheld] I.R.[particulars withheld] are all registered in the name of the 1<sup>st</sup> Respondent but are so held in trust for the Applicant .

◆€€€€€€ There is a pending divorce petition between the Applicant and the 1<sup>st</sup> respondent. The 1<sup>st</sup> Respondent has in breach of trust and the Applicant's beneficial rights in properties L.R. No. [particulars withheld]. I.R.[particulars withheld], L.R. No. [particulars withheld] I.R. [particulars withheld], L.R. No. [particulars withheld] I.R.[particulars withheld] , the business run by the 2<sup>nd</sup> Respondent as [particulars withheld] on L.R. NO. [particulars withheld], households and motor vehicles denied the Applicant access to the properties, income there from, has threatened and interfered with the Applicant 's quiet possession of the matrimonial home erected on L.R. No. [particulars withheld]. I.R. [particulars withheld] by changing the locks to the doors and ordered the security guards not to allow the Applicant into the properties.

◆€€€€€€ The 1<sup>st</sup> Respondent has refused and/or failed to account to the Applicant on the income due from the properties, the whereabouts of the titles to the same, is misappropriating the income there from and the Applicant is apprehensive that unless restrained, 1<sup>st</sup> Respondent may continue misappropriating and part with title to the properties, households and motor vehicles and defeat the Applicant 's right therein whereby the Applicant will suffer irreparable loss and damage.

◆€€€€€€ The Applicant is ready, able and willing to furnish a suitable undertaking as to damages, if

any, may be suffered by the Respondents as a condition for the grant of the orders sought herein.

As stated earlier, this suit was originally filed against both the respondents but on 2/10/2008, I upheld a preliminary objection by the 2<sup>nd</sup> respondent, and ruled that the suit could not be sustained against it for stated reasons, I then proceeded to strike it out accordingly, which then means that the matter before me now pertains to the application against Joyce whom I shall now refer to as 'the respondent'.

Mr. Havi who appeared for the applicant stated that the parties are husband and wife, having cohabited since 2001 and during which year they got married under Luo customary law. He therefore urged the court to find that it was the applicant who had solely acquired the subject properties during his marriage to J, and that in the circumstances a trust could be implied notwithstanding that the properties are registered in the respondent's sole name, for which reasons, he has set out a prima facie case of trust.

Mr. Mutuli, who appeared for the respondent, was however of a different view for he urged the court, to be guided by the principles which were set out in the case of **Geilla vs Cassman Brown**, and to find that it is for the applicant to establish that he has a prima facie case with a probability of success, that he stands to suffer irreparable damage if orders which the applicant seeks are not granted, but that if the court is in doubt it should decide the case on a balance of convenience, otherwise J raises eleven grounds of opposition to this application and states:

1. *THAT the said application and the Originating Summons have not invoked the provisions of section 17 of the Married Women Properties Act 1882 or at all. Accordingly, the Applicant 's suit is fatally defective and this honourable court lacks the jurisdiction to grant the reliefs sought in the application.*
2. *THAT the reliefs sought cannot be granted on the basis of Order XXXVI of the Civil Procedure Rules as purported or at all.*
3. *THAT by the Applicant 's own admission all the properties namely; LR No. [particulars withheld] LR. No. [particulars withheld] and LR No. [particulars withheld] are registered in the name of the 1<sup>st</sup> Respondent. The prayers sought cannot be granted unless the Applicant produces a Trust deed signed in his favour as proof that the Applicant holds the said properties in trust as alleged or at all.*
4. *THAT the Applicant did not contribute to the acquirement of the suit properties in any manner whatsoever and has not produced any evidence of his alleged contribution.*
5. *THAT the Applicant has not produced any evidence to proof how he allegedly paid the purchase of the suit properties on behalf of the 1<sup>st</sup> Respondent and has further failed to demonstrate how and to whom the money was paid, the source of funds and/or an acknowledgement of the alleged payment either by way of a receipt, bank deposit, bank statements or other mode of payment of any manner whatsoever.*
6. *THAT the Applicant has miserably failed on a prima facie basis to discharge the burden of proving his contribution to the Respondent's lawfully acquired properties and the prayers sought are not merited and cannot be granted.*
7. *THAT by virtue of section 23 (1) of the Registration of Titles Act chapter 281 of the Laws of Kenya the 1<sup>st</sup> Respondent is legally deemed to be the lawful and absolute proprietor of the suit properties and her title is not subject to challenge except on the grounds of fraud or misrepresentation. The 1<sup>st</sup> Respondent is therefore not under any legal obligation at this stage to demonstrate how she acquired the suit properties and/or the source of funds used to acquire the properties.*

8. *THAT the mere fact that the Applicant and the 1<sup>st</sup> Respondent are husband and wife respectively does not imply that the existing property rights of each spouse have been altered. The Applicant must discharge the burden of proving that he has a legal title and/or beneficial interest in the 1<sup>st</sup> Respondent's properties.*
9. *THAT the Applicant 's claim is weak and fanciful and he has not established a prima facie case with a probability of success at the trial.*
10. *THAT the balance of convenience is in favour of refusing to grant the prayers sought.*
11. *THAT the application lacks merit and is otherwise an abuse of the process of the court.*

It was therefore Mr. Mutuli's submission that apart from it being a suit for declaration of trust, the suit is otherwise one under section 17 of Married Women's Properties Act 1882 because parties are man and wife, and therefore it is for the applicant to prove that their existed a marriage between him and the respondent at the time when he filed his suit and that the properties were acquired during the said marriage and furthermore that he contributed towards their purchase; that in the absence of such proof, a trust cannot be implied and her title to the subject property would be impeachable.

This suit, which was initially filed in the Land and Environmental Law Division of this Court but which was transferred by the Presiding Judge of that division Osiemo, J. to the Family Division, was brought under the provisions inter alia Order XXXVI rule 1 of the Civil Procedure Rules, and section 17 of the Married Women's Properties Act 1882 of England. It is clear that a party who wishes to have the court resolve issues pertaining to cestui que trusts may move the court to determine issues pertaining inter alia to payment of any money in the hands of amongst others trustees, restraining the trustee from performing specified acts. Furthermore the pleadings and the submissions of both counsel reveal that there existed a relationship between the two as far back as the year 2001. The fact that the applicant deposes that they had before their civil marriage of 13/7/2004 initially contracted a customary marriage in the year 2001, which is the same year when their first child was born, is not seriously controverted. At prima facie level, the subject properties which were acquired after the year 2001 would thus appear to have been acquired during the marriage and they would thus be clearly categorised as matrimonial properties, and that being the case then, issues pertaining thereto would be the subject of this litigation under the provisions which the applicant relies on, and it is my humble opinion that this suit which seeks determination of issues as mentioned hereinabove, is therefore properly before this court and in the circumstances, grounds 1 and 2 of the objection cannot in the circumstances be sustained.

Be that as it may, it is important that I point out at this stage that section 17 of the Married Women's Properties Act 1882 of England – is purely a procedural provision which does not entitle the court to vary the existing proprietary rights of the parties, indeed *"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 the transaction the parties cannot go behind it at any time thereafter even on death or the break-up of the marriage ----- but where both parties contributed to the acquisition of property, then .....(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"* (as per Lord Upjohn in **Pettitt v Pettitt [1969] 2 WLR 966**)

It is trite therefore that the contribution of each spouse will depend on the circumstances of each case and needless to state each party is expected to prove his contribution which shall be done when the Originating Summons is set down for hearing. I shall not therefore delve into it now as this is an interlocutory application.

The applicant deposes that he is a businessman dealing with importation of electronics and building materials with a base in Nigeria; that he acquired the subject assets with his wife of eight years, with which he has 2 children aged 8 and 6 years old, and that having contributed towards their purchase, the respondents holds them in trust for him; that the respondent was not gainfully employed when he first met her; that save for having managed a beauty shop in Nairobi, which was closed down towards the end of the year 2007, the respondent has not had any independent source of income; and that he was the one who

solely contributed fully towards the acquisition and development of the immovable properties which form part of the subject properties, and that they had agreed to have them registered in her name because he was not a Kenyan national, and that he would therefore be entitled to their ownership; that despite the said agreement, the respondent has taken exclusive control of the said properties including one which is their matrimonial home and denied him access or rental proceeds from the others as well as sale proceeds from others which she is disposing of. He also deposes that though they also acquired the aforementioned motor vehicles, under similar terms of ownership, she has also denied him access to them.

Based on the above disclosures and also on the fact that all the facts which he raises in his affidavit have not been controverted, I do find that the applicant has established that he has a prima facie case with a probability of success and that unless the respondent is restrained, he stands to suffer irreparable loss which can not be compensated by damages, especially in view of the fact, which again has not been controverted, that the subject properties which form the basis of this application are the only assets which they own.

But even if I was wrong in the above finding I would nevertheless find that the balance of convenience tilts in the applicant's favour for he has demonstrated that he was the only one of the two who had the means to acquire and or develop the properties, one of which is their matrimonial home; that the other immovable properties may be disposed of or alienated, which if allowed would render the suit nugatory.

I will in the circumstances allow his application against the respondent, and also order that whatever proceeds have accrued from the sale of the specified properties be deposited with immediate effect in an interest earning account to be held in the joint names of both counsel.

I do note that he is willing to give an undertaking as to any damage which the respondent may suffer, and I therefore order that he deposits the sum of Shs.1,000,000.00 in court within the next 21 days as security for damages.

Costs of this application shall however be in the cause.

Dated and delivered at Nairobi this 11<sup>th</sup> day of February 2009.

**JEANNE GACHECHE**

**Judge**

Delivered in the presence of:

For the applicant - Mr. Anzala holding brief for Mr.Havi.

For the respondent - Mr. Mutuli.