



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 31 of 2005 (OS)

CECILIA WACHUKA NG'ANG'A PLAINTIFF

versus

**BERNADUS NG'ANG'A
DEFENDANT**

JUDGMENT

CECILIA WACHUKA NG'ANG'A and BERNADUS NG'ANG'A were married on 2/1/1988. Their union was blessed with four children who are currently aged between the ages 8 and 20 years.

Their marriage was legally dissolved 14/9/2007, and Cecilia who I shall now refer to as 'the plaintiff' has now moved this court by way of an Originating Summons in which she seeks the following orders against BERNADUS NG'ANG'A ('the defendant'):

'1. That it be declared that the properties listed herein with all buildings and developments thereon acquired and developed by the joint funds and efforts of the Plaintiff and Defendant during their marriage and all registered in the name of the Plaintiff and/or the defendant, are owned jointly by the Plaintiff and the defendant: -

- a. Eldoret Municipality/Block 11/601*
- b. Eldoret Municipality/Block 11/608*
- c. Eldoret LR No. 7821 Plot No. 2*
- d. Mombasa Plot No. MN/11/3666 Section II Mainland North*
- e. Nairobi/Block 97/1719*
- f. Nairobi/Block 82/86*
- g. Motor Vehicle Registration Number KAE 960M*
- h. Motor Vehicle Registration Number KAL 419T*
- i. Motor Vehicle Registration Number KAK 449H*
- j. Motor Vehicle Registration Number KAP 098Z*
- k. Motor Vehicle Registration Number KAT 088F*

l. *Motor Vehicle Registration Number KAS 423W*

m. *Household goods and items*

2. *That an Order do issue declaring that 50% or such other or higher proportion of the properties aforesaid, is held by the Defendant in trust and for the Applicant.*

3. *That this Honourable court be pleased to order that the properties aforesaid be settled in proportions aforesaid or as the court may order’.*

She also prays for costs.

This suit is brought under section 17 of Married Women’s Properties Act 1882 (‘The Act’), which “*is purely procedural, which does not entitle the Court to vary the existing proprietary rights of the parties*”, and which section recognizes the fact that the “*the status of marriage does not result in any common ownership or co-ownership of the property, and the term “family assets” is devoid of any legal meaning when it refers to assets separately owned by one spouse – disputes over properties between husband and wife must be decided in accordance with settled law as in ordinary suits between parties who are not married*”.

It is for the plaintiff to establish that the defendant properties against which she lays a claim, though registered in the latter’s name are so registered in trust for her because she contributed towards their acquisition and or development, after which it will be upon the court, based on the evidence on record to declare what proportion, if any, would be allocated to her.

The plaintiff thus relies on several the grounds but mainly that the said properties were acquired and/or developed during the subsistence of their marriage, with their joint efforts and/or contribution.

At the time when the two initially met in Eldoret, the plaintiff was a final year student at Kenyatta University while the defendant who had just completed his studies had managed to secure employment with the Customs Office that January, and was posted as a Customs Trainee to Mombasa, while the plaintiff lived within the campus. The two started off by operating a joint account where they deposited the cash that they had received as wedding gifts, from which account they drew their finances. As a trainee the defendant was earning a monthly allowance.

The plaintiff who testified that she used her university allowances for her sustenance, completed her studies in June of the same year was posted to Star of the Sea School in Mombasa where she joined her husband, after which they started to acquire the said assets, which she now claims a 50% stake.

The plaintiff claims to have supported the defendant morally, and that when he was transferred to Eldoret in 1998, she took over the construction of the house and was involved in purchasing the construction materials, and that she used her savings from a matured insurance policy and proceeds of a loan to pay half of the purchase price for LR 7821, which fact is acknowledged by the defendant who states that the said property will be registered in her sole name. It was also her evidence that she took two loans, whose proceeds she used to acquire a computer and its accessories as well as household furniture, fittings, and curtains which evidence does not appear to be seriously contested. She conceded that the household goods, a portion of which she lays a claim on are currently in her possession.

She however concedes that she did not make any financial contribution towards the purchase of the other properties, whose acquisition she learnt of after they were purchased, but she claims that they managed their home jointly, and she was responsible for the food, household items, clothing and her own needs, and that in the circumstances, the moral support which she gave the defendant was her contribution, which in her view was quite substantial.

Though she claimed to have contributed towards the renovation of Nairobi/Block 97/1719, which they acquired in 1996, she did not support her claim by documentary evidence.

She however conceded that motor vehicle registration number KAE 960M is registered in her name, and urged the court to disregard it as it should not form part of her claim in this suit. She also abandoned her claim to a share of the value of Motor Vehicles Registration Numbers KAP 098Z, KAT 088F and KAS 423W, which are registered in the names of registered companies.

She also conceded that until the year 2000, the defendant provided for the family adequately, that he shopped for the household goods and items, paid school fees for the children, paid for their utilities, the insurance premiums for her car which he also fueled car and had serviced. He also paid the watchman’s salary. She continues to withdraw money from their joint account into which the defendant ‘*made regular handsome deposits*’ and which had credit balances of Shs

Shs.900,000/= as at August 2005.

The defendant, who concedes that the assets were acquired during the subsistence of their marriage however denies her claim and states that save for L.R. No. 7821 Eldoret which they jointly acquired in the year 1991, and whose title will be issued in her name, the plaintiff who is a teacher never utilized her income to cater for the family needs, or even to contribute towards the acquisition of all the other assets or their development, and that he had on several occasions sought financial assistance from his father and his siblings for the acquisition and development of the said properties. He also maintains that the various receipts of payment which she produced to support her claim were issued for money received from him or withdrawn from their joint account but not from her earnings. It was his evidence that she started off as a trainee on an allowance of Shs. 3,000/-; that he used his allowances and the cash gifts which they had received on the wedding day, to maintain his family and that the plaintiff had no income with which to support the family during that time; that she earned her first salary in November/December 1988, which is when she took over the role of buying vegetables for the family, while he catered for everything else.

It was also his evidence that apart from the fact that she contributed Shs.40,000/= for the acquisition of aforementioned property in Eldoret, while he contributed Shs.80,000/=, she did not contribute towards the acquisition or development of all the other assets. He gave the plaintiff several vehicles, and the parcel of land known as Mombasa Plot No. MN/11/3666 Section II Mainland North, and has offered her LR 7821 absolutely.

He denied that she contributed towards the acquisition of the other properties or to their development, and it was his evidence that they never discussed the acquisitions or development of the properties at all; that she offered him no moral support; that each played his role as a parent and he played no lesser role; that the two properties in Nairobi were fully developed at the time of acquisition and he had appointed a manager for them; that she did not participate in their development, but that he gave her all the money which she used to renovate the house on Nairobi Block 82/86, which she currently occupies and which she can remain in occupation for as long as the children will continue living with her there.

Miss Kiptoo who appeared for the plaintiff urged the court to find that her client had established a case to warrant granting her the orders which she seeks. It was her submission that not only were the listed properties acquired during the subsistence of the marriage, but that though except for LR 7821 in Eldoret, the plaintiff may not have made direct cash contributions for the acquisitions of all the other assets, she had nevertheless contributed indirectly by taking care of the children of the marriage; by managing the subject properties on the defendant's behalf while he was away from home and also by undertaking renovations, and that she acquired loans from her employers with which proceeds she refurbished the houses. She relied on the cases of **Nderitu v Nderitu [1997] E.L.R. 606 (CAK)**, and **Kivuitu v Kivuitu [1985] LRR 411 p43**.

She also urged the court to find that the vehicles which were acquired by defendant but registered in plaintiff's name should be declared properties jointly owned and should be shared equally between them, which line of submission cannot lie as the plaintiff who is the registered owner of motor vehicle registration number KAE 960M, abandoned her prayers for a share of the value of all the listed vehicles.

Miss Wambui who appeared for the defendant however urged the court to distinguish the authorities which Miss Kiptoo cited, for in her view, the most recent decision on division of matrimonial properties is well laid down in the case of **Echaria v Echaria CA 75/2001**. It was her submission that he who claims a share of property which is registered in the other spouse's name must prove their claim to it, and that he must prove fraud or mistake at time of its registration/transaction following its acquisition. It was also her submission that the fact that the two were married does not prove joint ownerships or that a trust was ever created in a plaintiff's favour, but that it was upon the plaintiff to call evidence of contribution, whether direct or indirect, and that such contribution must be financial; that though the court had found evidence of financial contribution in cases of Muthembwa and Kivuitu, the Court of Appeal restated the law in Echaria's case. She urged the court to find that save for LR 7821, where the plaintiff contributed cash amounting to a third of the purchase price, she did not make any recognisable contribution towards the purchase of all the other assets.

Indeed I stand guided by the latest decision by a five Judge Bench of the Court of Appeal in **Echaria v Echaria** (supra), where the court held that "*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 performance of domestic duties.*"

It is clear that although the plaintiff claims to have made both direct and indirect contributions towards the acquisition of the properties, save for LR 7821, which as stated earlier has been offered to here by the defendant, the evidence on record does not support that she made any other financial contribution. The contention that the plaintiff's non-monetary contribution to the acquisition of matrimonial property should be taken into account and a value put on it in support of her claim to a share of the other assets cannot therefore hold any water.

I am therefore of the view that save for her contribution towards the acquisition of LR 7821, the computer and its accessories, and the items of furniture and fittings, she has failed to prove her case on a balance of probability and her cause fails. I however do take note of the fact that Mombasa Plot No. MN/11/3666 Section II Mainland North is registered in her name, and in the circumstances it should not have formed part of the properties in question. It remains her property. I do also note the fact that the defendant has stated that LR 7821 will be registered in her name. It should be so registered. She will also retain the computer, its accessories, and the items of household furniture and fittings which she acquired during the subsistence of their marriage.

Each party shall bear its own costs.

Dated and delivered at Nairobi this 14th day of May 2009.

JEANNE GACHECHE

Judge

Delivered in the presence of:

For the plaintiff - Miss Kiptoo.

For the defendant – Miss Wambui.