REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 7 of 2004

IN THE MATTER OF SECTION 17 OF

THE MARRIED WOMEN PROPERTY ACT 1882

BETWEEN

J W N ……..PLAINTIFF/APPLICANT

-VERSUS –

C W N…….DEFENDANT/RESPONDENT

JUDGMENT

The parties got married on 6th October 1990 after meeting in the year 1980. The couple has no children. It may be opportune to note int he beginning that both the parties were gainfully employed during the relevant time.

The couple are separated since the year 2002 but the wife confirmed to have lived in the property in question from 1994 to 2007. She moved out in March, 2007 and since that time the husband is occupying the property solely. According to the wife, the husband came back in 2006 and thereafter she moved out in March, 2007 for her own security. The property in question is L.R. No.Nairobi/Block97/1575 (referred to as **"The Suit Property"**).

Most of the facts deponed by both parties are undisputed like:-

(1) The suit property was acquired during subsistence of cohabitation.

(2) The loan application and mortgage were applied for and are in the names of the husband. Though before the approval of the loan, a letter from the wife's employer was asked for and supplied.

(3) The suit property is registered in the name of the husband.

(4) The loan was repaid by the husband.

(5) The husband in his cross examination has agreed the veracity of the payment made by the wife, as claimed.

(6) In short it was agreed that wife was paying for household expenses, maid, security, utility and the gardener. She was buying vegetables and groceries. The calculations of all the payments are made and produced. Although she agreed that the husband sometimes paid for some household things through his credit card, but mostly through his credit cards (Senator & Co-operative Cards), he was paying for his entertainment and his mother's shopping.

(7) According to the wife, she contributed Shs.15,000/= to shs.22,000/= per month, out of her net income of shs.22,000/= allowances of US$ 300 and from business of selling clothes. She showed that her monthly salary was shs.27,000/= in 1994 and shs.60,000/= from 1994 to 1998 and thereafter from 1998 to 2000 it was shs.40,000/=.

(8) The deposit of the purchase of the property was made from sale proceeds of the vehicle [information withheld] which according to the wife was for her use she and maintained and fueled the same.

(9) The said vehicle was also registered in the name of the husband who purchased in 1992. Though no proof of such sale is before the court, it is not denied specifically that the same was used, maintained and fueled by her.

(10) The property was offered for sale to the couple as a result of intervention of the wife's father. They both went to see him when they were told by the Developer that there was no home available for sale.

(11) As per her payment schedule, produced by agreement, she has shown payments for utilities and household expenses.

(12) The respondent has paid initial 10 percent deposit of shs.150,000, shs.420,000/= from the sale proceeds of vehicle which was Kshs.750,000 and monthly installments of shs.21,000/= later, reduced to Shs.13,339/50 and the lase payment of Shs 21,814/05 on 31st December 1997.

With the above brief outline of the evidence as to contribution, which is largely admitted, I need not go into much details. In short, it is placed before the court that the monthly contribution of the wife was around Shs.20,000/= to Shs. 30,000/= and the husband paid mortgage by monthly payment from shs.13,339/50 to shs.23,000/-. It is also on record that he did also pay by credit card some payments on household goods which were not regular.

The property was acquired and mortgage was discharged during cohabitation of the parties. Thus they were living together as husband and wife when the property was acquired and fully paid for. It is also on record that both of them were earning comfortable income and were spending the same on the requirements of the family which consisted of only husband and wife.

It is also on record and not disputed that the wife made some renovation in the house to the tune of shs.79,105/= during the year 2005. I should note that at that time she was occupying the house and the repair was carried out on roof of the suit property, among other repairs.

From the documents before the court, I note that the mortgage was discharged around October 1998. With this evidence before the court, the submissions were made by both counsels. They were reduced to written submissions and the counsel expanded their contentious also by oral submissions.

Ms. Kamau, the learned counsel for the wife submitted that, it is proved by the wife that there was a common intention between the parties to acquire the suit property and that there was also an agreement/understanding that whereas one would pay the mortgage the other would meet the living expenses. Thus a trust arose from the said common intention of the parties.

She relied on the case of ***Peter Mburu Echaria –vs- Pricscilla Njeri Echaria (Civil Appeal No. 75 of 2001).***

As I understand from the close reading of the judgment in Echaria's case *(Supra)*, the court only ruled out that Kivuitu's case (1991) KAR 214, although decided correctly both on law and on facts, it did not lay down any general principles of equal division.

This principal is correctly propounded which is evolved after long line of precedents both English and local.

It is observed in Echaria's case: namely:-

"**where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective participation of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each party has made substantial but unascertainable contribution, it may be equitable to apply the maxim *"Equity is Equity"* while heeding the cautions by Lord Pearson in 'Gissing –vs- Gissing".**

In my opinion, 'Gissing –vs- Gissing (1970) 2 All ER 780 has crystallized the dictum of Trust between the married couple. At page 792 it is held:-

"***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 these contributions without which the house would not have been bought. I agree that this depends on law of trust rather than on the law of contract, so the question is under what circumstances does the husband become trustee to his wife in the absence of declaration of trust or agreement on his part. It is not disputed that a man can become a trustee without making 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 agreed to accept these contributions from his wife not impose such a trust on him)" (emphasis mine).***

It also cannot be disputed that the acceptance of indirect contribution is still alive in our jurisprudence as evidenced from the passage cited hereinbefore from the Echaria's case. Thus the court is entitled to evaluate those contributions as evidenced from each case.

The respondent/husband on the other hand, contends that the suit property was intended to be solely his property. There was never an agreement or understanding that the applicant would acquire any share. He considered the contributions made by the applicant were minimal as the family consisted of himself and his wife. It was also contended she had "**an opportunity of having her name incorporated in the transfer and mortgage when the East African Building Society requested for her payslip**".

I would definitely frown upon such submissions when the husband, instead of accepting her gesture in appreciation, takes it against her. That is also the attitude shown when he testified that he was never in the matrimonial house most of the time and thus "***it is usual for the mother of the house to meet such expenses!!!"***

He has, while stating that he was the main cardholder and was paying also for supplementary cards, agreed that it was his responsibility to fend for "his family and mother". Similarly, he took very lightly the assistance from his father-in-law in acquiring the suit property.

On the other hand, the husband urges the court to hold that the motor vehicle which was initially purchased by him but which was shown to be used, maintained and fueled most of the time by the wife, was absolutely his and the sale proceeds thereof was used to acquire the suit property. In any event, it is largely admitted by the wife that the husband paid for the purchase of the suit property but, **without her indirect contribution**, would not have been able to purchase the suit property.

In the case of **Karanja –vs- Karanja (1976 – 80) 1 KLR 3rd Ed. Simpson J.** as he then was, at page 393 relied on observations made by Lord Reid Gissing in Case (namely:

"***He could see no reason of any distinction between direct payments and indirect payments "by way of paying sums which the husband would otherwise had to pay". A rough-and-ready evaluation, he thought, was required and did not mean that the wife as a rule got a half-share with regard to the intention of the parties.*** He further said, at page 783:

"***If the evidence shows that there was no agreement in fact then that excludes an inference that there was an agreement. But it does not exclude an imputation of a deemed intention if the law permits such imputation".***

In the case of **Falconer –vs- Falconer (1970) 3 All E.R 449 at 452 Lord Denning** also found:-

"***it may be indirect, as when both go out to work and one pays the house keeping and the other the mortgage installments. 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 a trust." (****emphasis mine****).***

Even in the famed Echaria's case (**Supra)**, the court of Appeal has not disputed the above holdings, as I have observed earlier on. The Court of Appeal also cited with approval the exposition the matrimonial Property Law in English case of **Burns –vs- Burns (1989) 1 All E.R. 244 at 252.**

"***If there is a substantial contribution by the woman to the family expenses, and the house was purchased on a mortgage, her contribution is indirectly referable to the acquisition of the house since in one way or another it enables the family to pay the mortgage installments."***

Should I say anything more, when I do find that the wife has shown substantial contribution towards household expenses during the time the repayments of the installments were made by the husband? These payments are not disputed. I may agree that these contributions made upto the year 1998, are more relevant to the issues before the court. She has undoubtedly proved that she contributed during those years and also continued to do so upto 2002 when the husband left the house and came back in 2006. The payment of the water bill was towards arrears from the year 1992 and similarly the rates were also paid which was supposed to have been paid by the owner so as to preserve the suit property.

The facts of these case undoubtedly point out to the inference of trust. This inference is cemented when the husband moved out from the house in 2002 leaving the house with the wife. Once again, when he came back in 2006, they stayed together till March, 2007, when the wife left the house to protect her security.

I do not need any further support when I say that the parties did by implication agree to acquire the suit property jointly and by implication, trust is raised obligating the husband to hold the same in trust for the wife. I thus do hold and declare so.

Mr. Mutuli, the learned counsel for the husband, raised the issue that from the jurisprudence developed so far, it emerges clearly that the contributions made by a spouse should be only referable to the acquisition,

which means the 'purchase' of the house. Any other contribution made after such purchase cannot be considered. He may be right to a certain extent but, if a property at the time of purchase is either vacant or some substantive development was made jointly, either from direct or indirect contributions, the same has to be considered as the contribution giving beneficial interest in favour of the spouse so contributing.

In the present case repair expenses paid by the wife when she was solely occupying the suit property, in my humble opinion, may not be a contribution towards acquisition of the suit property and I will consider the said expenses accordingly.

After what is observed hereinbefore, the only question remains to be considered is the ratio of contribution of the wife/applicant.

I shall not rehash the facts of this cause which are adequately put forth hereinbefore.

Suffice it shall be to state that, both parties during the period of acquisition of the suit property have contributed almost on equal footing. This court or any other court, shall not expect any spouse to give the exact account of the financial contributions. None of the parties before me has claimed that he/she has not spent more money than what is shown before the court. It is so because when they were purchasing or spending for the repayment of mortgage sum or for household expenses, none of them foresaw that they would have to appear before the court. They just did so as spouses living together.

After the acquisition of the property while, the wife was in possession, she paid for all dues as well as for necessary repairs. In short, she preserved the property.

But those factors, I shall not be considering while arriving at the ratio of her contributions.

The upshot of all the aforesaid is that I direct that:

1. **The suit property was held in trust for the applicant by the respondent, and**

2. **The applicant holds 50% share in the suit property i.e. Nairobi/Block/97/1575.**

3. **Each party to bear its costs.**

Dated, signed and **delivered** in Nairobi this **28th** day of **October, 2009**.

K. H. RAWAL

JUDGE