**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT MALINDI**

**Civil Suit 87 of 2007**

**LORD M J B…….PLAINTIFF**

**VERSUS**

**LADY K B……..……..……DEFENDANT**

**J U D G M E N T**

Lord M B (plaintiff) has filed this matter under section 17 of the Married Women's Property Act (1882), section 3A Civil Procedure Rules, against Lady K B (the defendant) in which he claims half share of money invested in the joint names of the plaintiff and defendant in a life insurance policy held in policy numbers [information withheld] at the AXA Isle of Man Ltd in Britain, the plaintiff claims half the value of the house built on [information withheld] by virtue of its being the matrimonial home of the plaintiff and defendant, a property where the plaintiff and defendant are registered as joint proprietors. The plaintiff also claims an equal share of the proceeds and value of motor vehicles registration no. [information withheld] and [information withheld]- matatus which are registered in the joint names of the plaintiff and the defendant.

Plaintiff now prays for orders that:

1) The defendant signs the forms assigning the policies jointly owned by the plaintiff and defendant in the aforementioned policy numbers to individual ownership to enable the plaintiff acquire his lawful share as required in the letter dated 31st January 2006, sent to the plaintiff by AXA Isle of Man Ltd.

2) A declaratory order that the property built on [information withheld] Kilifi, is matrimonial property and by virtue of proprietary being in the joint names of the plaintiff and the defendant, the property be disposed off and the plaintiff be given half the value of the proceeds and/or in the alternative defendant be at liberty to pay the plaintiff half his share in the property if she wishes to retain the property.

3) An order for accounts to be taken and the defendant to pay the plaintiff his lawful share of the money made from the operation of the motor vehicle [information withheld] and the defendant do pay the plaintiff for half the value of the said motor vehicle.

4) The defendant to pay the costs of this suit. The application is premised on grounds that:

a) The insurance policy held at AxA of Man Ltd in Britain, is a joint investment from which both parties had in fact been given periodical payments of about one thousand sterling pounds (£1000) until the beginning of trouble in their marriage, when the said payment was discontinued.

b) By virtue of being registered as joint proprietors contributing to supervision of the matrimonial home, and the fact that the funds for building the house came from the plaintiff's and defendant's accounts, the plaintiff is entitled to his claim for half of the value of the matrimonial home.

The defendant has refused to recognize the plaintiff entitlement to the mentioned properties. Plaintiff also clarifies that there are no encumbrances registered on the property titles in Kilif-Bofa so no prejudice would be occasioned if the court ordered for a sale thereof.

In the supporting affidavit, the plaintiff deponed that he and the defendant were married in the United Kingdom (UK) as per the marriage certificate annexed and marked JMB(a). They cohabited at [information withheld] in Fulwood Park, Liverpool before finally taking permanent residence in Kilifi Bofa. When they met, defendant was running a nursing home called Rosebrook Residential Home.

At the time, the defendant was a widower, whilst the plaintiff was a divorcee – there are no issues to their present marriage.

Shortly after the marriage, defendant acquired another nursing home known as [information withheld], and plaintiff states that it was agreed that he should be in charge of management of the two businesses, - so they ran both homes for a while. Later on they decided to sell the properties to a developer because property value had risen handsomely so plaintiff negotiated for the sale of both homes and they managed to sell them off at a profit – a letter explaining details of how the sale was conducted is attached.

The profit made from [name withheld] was invested in the defendant's name, but the couple agreed to invest the profit made from the [information withheld], in their joint names, whereby £150,000 (one hundred and fifty thousand sterling pounds) was invested into a Barclays Unit Trust account and £200,000 (Two hundred thousand sterling pounds) was invested in a joint insurance policy with Axa Isle of Man in Britain, both of these accounts produce a monthly income and the balance of the money was held in a joint current account in Guernsey as per the policy schedule marked LMJB1.

Upon coming to Kenya, the pair identified land at Kilifi Farm being [information withheld] which they acquired jointly and later on built their matrimonial home thereon (copies of the certificates of title are annexed as LMJB 2(a) and (b) and a copy of the building contract between themselves and Mombasa Space Contractors (LMJB3).

The land and building were paid for from the money realized from profits made from the [information withheld] Nursing Home, which money, the couple had put in a joint bond.

Plaintiff maintains that he participated in the acquisition of the land on which their home is built and he single handedly bought building materials and supervised construction of the house to completion. As for the two motor vehicle [information withheld], he says they bought the motor vehicle jointly but now defendant is operating four matatus, is able to access funds from her accounts in Britain and lives lavishly without caring for his basic needs. Further that the defendant has given specific instruction for plaintiff not to be allowed into the matrimonial home, not to get a share from income realized out of the matatus, defendant has withdrawn all the money from their joint account in Kenya and she has instructed Axa Isle of Man Ltd to stop monthly remittances to the plaintiff (which he used to rely on to meet his expenses) and since he is unemployed and not pensionable – these moves have rendered him a pauper and he is currently surviving on handouts from friends and well-wishers. To confirm this, Axa Isle of Man Ltd sent plaintiff a letter (LMJB4) informing him that regular withdrawal payments had been stopped and that unless he obtains the defendant's original signature authorizing a split of the money, no funds would be availed to him and so from January 2006, no payments have been made to plaintiff.

Plaintiff further states that he was shot on his right leg by a gun man and now urgently needs funds to seek medical attention yet the funds are not available because defendant has refused to sign their joint bond to enable their bankers release his share of the money.

The prayers sought are opposed, and defendant in her replying affidavit states that upon marriage, the

plaintiff had no fixed abode and had to live in the plaintiff's private house known as The [information withheld] House, which she had acquired personally through a mortgage with her then bankers, HSBC in 1987. She then charged the [information withheld] House with Citibank in 1999 to finance the purchase of her sole business,

the [information withheld] Home long before her marriage to the plaintiff – the charge documents are annexed as Ex LKB.

She denies that the plaintiff ever had an input in either The [information withheld] or The [information withheld] Home and had no dealings with these until the defendant was subjected to a robbery in which she was severely beaten and stabbed in the head, and that is when she decided to sell the properties. She trans-shipped the household items into her house in Kilifi through Driver and Vehicle Licensing Agency as per copies of documents marked LKB2.

Defendant completely refused that the profits from her business (The [information withheld] Home) be invested in a joint account and she continued to invest the same, solely. Plaintiff begged her to include his name in the investments, since he was the husband and had nothing to fall back onto, and further to the fact that defendant was fully providing for his life and that of his younger children, (the result of his previous marriages) and that is why, on humanitarian grounds, the defendant included plaintiff's name in the investment. She demands that the plaintiff prove his contribution (monetary or otherwise) to any of her properties. As for the house in Kilifi, Defendant denies that it is their matrimonial home, saying it was her holiday home in Kenya as she is not a permanent resident of Kenya, and all the proceeds of her businesses in the UK were applied to the purchase of the plots and the construction of the house. She insists that the construction of the house was done by a fully paid contractor and neither she nor the plaintiff did any supervisory works since most of the time that construction was going on, they were both out of the country. She avers that, the purchase of the matatus was also out of the proceeds of her business and plaintiff has no claim of right whatsoever to them although in January 2006, the plaintiff drove off with one of the two matatus without her permission, and he has all along utilized it and ignored her calls for return being [information withheld] Nissan – he is drawing income from operations of that matatu. It is her contention that plaintiff had a dissipated lifestyle which led to stopping payment of the monthly interest of Kshs. 150,000/- from the bond as he used to secretly withdraw funds therefrom to support his lifestyle. She explains that the money which she withdrew from the joint account was from her personal savings in England and had been channeled through their joint account with Barclays Bank Mombasa since her bankers in situ i.e KCB Kilifi, had no computer system then. She points out that plaintiff has children who are in good employment and who will continue to ensure that he lives well and gets what he aims at. She denies operating four matatus or living lavishly saying she only depends on her small income from the matatu for her upkeep, paying staff, bills and general maintenance of the house. As for being indisposed, defendant states that plaintiff has fully recovered and is in a position to pay his medical bills in view of his daily drinking and partying habits, acts which cannot stand unless there are sufficient funds.

She maintains that since plaintiff made no contribution to her investments in England, and he kept insisting that their names appear jointly in the Kilifi property documents, she reluctantly agreed to that registration of joint proprietorship.

Every prayer in the application is therefore opposed.

The parties had sought and the court allowed for them to give viva voce evidence. The fact of marriage is not disputed. The plaintiff confirmed to this court – that currently he is in possession of motor vehicle registration [information withheld] while defendant retains motor vehicle registration [information withheld].

He stated that he is only claiming what bears his name, and that defendant is at liberty to keep everything else. What he stakes a claim on are properties which they acquired after marriage. Incidentally the defendant had initially given instructions for the joint insurance policy bond to be split into two and she also gave instructions cancelling payment of the £1000 per month. This is shown in the letter dated 21-6-

08 from Axa Isle of Man Ltd to the defendant which stated in part.

"***We received a letter dated 10th January 2006 from Lady B, instructing us to split the withdrawal payments for this policy and pay them into two separate bank accounts. We were unable to obtain the signature of Mr. B to confirm his agreement to this amendment and therefore the withdrawal payments have been cancelled until such time as both signatures are received"***

The defendant does not deny making such a request, but explains it was as a result of plaintiff's extravagant lifestyle. Incidentally, the couple had a joint insurance policy but which commenced on 17th March 2004 where the initial premium was £200,000 for a 99 year term and a sum of £1000 was being paid out annually. As a result of unresolved issues between the couple the regular withdrawals were suspended.

It would seem that when defendant wanted the payments split, because of what she perceived to be a raw deal on her part, the plaintiff refused to append his signature to documents that would have facilitated that. Now it seems the shoe is on the other foot, plaintiff is the one who now needs defendant to sign certain documents so as to enable him get the regular withdrawals – defendant has refused to budge. When the bond was set up (albeit in both names), the payee was then indicated as the plaintiff M B. Plaintiff now wants the bond split into two and the interest accruing be paid, which can only happen by the court ordering defendant to sign the consent to the split bond.

The defendant's refusal to budge to any of the plaintiff's prayers is that he has not contributed any money or resources in any of these assets – as he had spent his time drinking away, never working and she is earned it all. The plaintiff confirmed that when he met the defendant, she was working as an Administrator of an international medical company on a salary of £18,000 per month. She then stopped working and used the [information withheld] House as security for a loan from Citibank to purchase a small health care facility (which was really a home for the elderly known as [information withheld] Residential Home. He further confirmed in his evidence, that initially for six months the defendant was running the business by herself as they were not yet married. The plaintiff came into the business after a while, his role was to pay creditors, pay salaries, do the accounts, book keeping, interacting with the Care Standing Commission which was carrying out inspections in homes and he describes himself as having been the General Manager of the business. It was his testimony that, Lady K would deal with the Human Resources i.e get client, recruit workers, and liaise with the health department.

The loan was eventually paid off when the property was sold off to a developer in the year 2004 and the money put in an investment Insurance company in Lady K's sole name, as an independent income. Plaintiff says he does not claim any of that money. While he worked at [information withheld], plaintiff told this court that neither of them was on a salary, and they just drew out money whenever they needed.

Then they bought [information withheld] Residential and Nursing Home at £1 (i.e Kshs. 120/-) which due to logistics was registered in the defendant's name (this was a result of an arrangement with the local authority that so long as the [information withheld] home in the name of the defendant had been registered they would allow Cedars to be registered in defendant's name to avoid delaying registration. He then did the maintenance, salaries and purchases, whilst the defendant dealt with the human resource matters - again they were not drawing a salary as both had gold credit cards, in the name of [information withheld] and they would draw money from the two accounts.

In the year 2004, they sold the [information withheld] property and plaintiff states that he wrote a letter (ex9) confirming that he had completed the accounts. The sale of Cedars fetched £750,000 and its from that sale that they invested £200,000 in the joint bond in Axa Isle of Man account. £150,000 was invested in a joint bond with Barclays and Sterling Unit Trust but they eventually closed it and the money was transferred to their joint account. The letter (Ex 10) undated but signed by both plaintiff and defendant as addressed to Barclays Sterling and reads as follows:

"***We shall be grateful if you will arrange, with immediate effect, the redemption of the above investment, currently valued at £146,999.00 and pay to the Ra…Redemption facility account"***

Another letter dated 2-7-05 signed by both plaintiff and defendant, addressed to the Manager of HSBC reads as follows:

**RE: Account No. 10813494 M.J. & K Blackburn**

"***On Tuesday 5 July 2005, an amount of approximately £150,000 should arrive for credit to the above account from an investment. We shall be most grateful if you will transfer £100,000/ immediately and by the safest method possible to the following account***

***BARCLAYS BANK***

***NKRUMAH ROAD BRANCH***

***MOMBASA, KENYA.***"

Plaintiff explains that this was the money that they used, to purchase the plot in Kilifi and construct a home i.e 75% by transfer of the [information withheld] proceeds and the balance from their joint account in Jersey Island i.e £23,000. They both negotiated for the purchase of the property, chose the design, architect and plaintiff signed the contract on 29-5-03 as per Ex 12.

The architect supervised the construction but the couple frequented the place to see the progress and make changes. They then brought all the furniture in the house from the UK.

He challenges the defendant's claim that she had all along had the Kilifi house as a holiday home, saying that in 2001, plaintiff had never been in Kilifi and did not even know that such a place existed. Plaintiff seeks to make a distinction between the defendant's property known as Cedars which is still in the UK and owned by her, and the [information withheld] Residential Home which was a home for the aged.

He also denied claims by defendant that she maintained him and his young children, saying he does not have young children pointing out that his two older children are married and working, his daughter was at the University and his youngest son lived with his mother and step-father. When he came to Kenya as a retiree on Class A permit, the defendant was his dependant and its in 2005 that they changed their status to investor permit.

It is his testimony that they both spent lavishly in the UK, both had dinner in hotels, drunk a lot and defendant smoked a lot. He denied that his use of crutches is stage-managed and produced a medical report by Dr. Njiru dated 8-9-08 (ex.14) which indicated that the plaintiff complained of pain in the leg which was as an injury to the sciatic nerve, following a bullet injury and that there was slight improvement – he was shot in October 2006 and on the basis of that, he needs to go for further treatment in South Africa.

Defendant gave the history of her employment and how she came to make her money and acquire the different properties which she had in England. She worked as a manager of a Nursing Home, which cared for the elderly at a salary of about £2000. It was her testimony that she had owned the Rosebrook facility even before she got married to the plaintiff and she had acquired it using her personal home as security to get a mortgage. She purchased the house alone and to confirm this she produced the mortgage documents as D.Ex2. In the course of her dealing with the bank, she had correspondences with the bank (produced as D.Ex 3A-D) she bought the [information withheld] property at £395,000 and by the time of marriage the property was still on mortgage with Citibank. She then acquired a second nursing home known as the [information withheld] Nursing Home, by mortgage. She used her personal house, [information withheld] Residential Home and [information withheld] Nursing Home as security for the mortgage. And contrary to claims by the plaintiff that Cedars was purchased for £1, she says it cost her £338,000 – the correspondences with the bank shows the various stages of negotiations that defendant had with the bank regarding the mortgage – all these correspondences were addressed to the defendant.

Defendant explained that initially she was the sole manager of [information withhled] Residential Home then when she bought [information withheld] Nursing Home, she appointed her daughter as the manager of [information withheld] and the (defendant) managed the second home. She explained that under English Law, one has to be fairly qualified and have official documentation to prove that they can run a nursing home – she was qualified for that and had a certificate and she stated that she would never have allowed plaintiff to manage the homes as he was not qualified.

When she met plaintiff, before she married him, he was unemployed and had no house, no money and was driving a very old jaguar car. Upon marriage, they lived in the defendant's [information withheld] House because plaintiff had no place to live.

She described the plaintiff as a very heavy drinker who would be out until late at night, going form bar to bar, drinking and because he had access to defendant's money, he got to drink even more, after they got married.

The plaintiff was given visa cards to assist him in his daily upkeep and defendant authorized her banks to allow him to draw money from her bank account until such a time that he would get employment. The plaintiff used the money on drinks, and buying everyone a round of drinks.

Defendant insists that plaintiff was always in the bar drinking until morning and there is no way that he could have been available to run the business. He would start drinking at 7.30am/ 8.00am and carry on the whole day. After a terrible raid in her UK house during which she was stabbed, the defendant decided to sell her business and acquire property in Kenya. So she bought two pieces of land in Kilifi along Bofa Road and a house was built on the land – she paid for both the house construction and plot. By December 2003, the house in Kilifi was complete. She explained that the only role plaintiff played was to introduce someone who was interested in buying the UK properties but its her lawyer who negotiated for the sale and plaintiff told her the sale package for both properties was £770,000.

It was the defendant's further explanation that the only reason why the money she had made was placed in a joint investment account was because four years after marriage, plaintiff still had no job and was still using her money. She also realized that when they had come to Kenya for holiday, then in case of travel and they were at different or separate places and plaintiff needed to access money, then he would need to have a means of earning a living because after all, he was her husband and she could not just abandon him. So she provided for him by the bonds. She insists that the house in Kilifi was not purchased using proceeds from sale of [information withheld] and 25% offshore Jersey account because the house in Kilifi house was already built and paid for by the business which were in her names. The Supervision of Construction was done by a Mr. Nixon, an architect based in Kilifi. The Title documents for that house are in the joint names of plaintiff and defendant. Defendant however insists that plaintiff made no financial contribution to acquiring the plot or constructing the house – so how did plaintiff's name end up as a registered co proprietor of the property? Defendant explains that, the house was a holiday home and if she didn't come to Kenya on holiday, the plaintiff would need to access the Kilifi home as her husband and that's why she placed his name in the title document. And why did she stop the bond payments? She stated she had to do that because the plaintiff was withdrawing £120,000 per day for 20 months and if she had not stopped him, there would be no more money in the account by now.

How then does she explain the two letters (Ex 10 and 11) which transferred some funds from an account in the UK, to Kenya, defendant told this court that she transferred Ksh 600,000/- from her account in the UK, to their joint account in Mombasa because her KCB account in Kilifi did not have a computer account to receive the money. But wasn't this then joint money from the UK? – defendant says no, those were proceeds from the Barclays Bond which were sold then transferred to Kenya and funds were loaned to Kibiru Emporium Ltd, a company where she was supposedly given 25% shares but she was thrown out of the business and the Board of Directors as soon as her money arrived in Kenya. She confirms that she owns two matatus, one is in her sole name and the other is in joint names of herself and the plaintiff.

She pointed out that the company's business accounts (whenthey were still operating) were always done by herself, her daughter and the company's accountant and points out that the letter purportedly written

by plaintiff about doing some accounting work for the company was not in her official business correspondence papers and she does not recognize it. As far as she is concerned, the plaintiff would occasionally poke his nose into the business.

On cross-examination the plaintiff explained that with regard to the joint bond held in Axa, they had agreed to share the same at 50:50 basis although there was nothing in writing to that effect. As it is the same has not been split because defendant refused to sign to such an arrangement. Naturally the question is why? More to the point, what formed the source of these funds, did the parties contribute equally to the bonds or is one party riding on the shoulder of another? Plaintiff on cross-examination says he is not aware that the reason why the bond was not split was because defendant objected to his getting 50%.

The funds were part of proceeds of sale of [information withheld] Nursing home and [information withheld] Residential Home. The plaintiff on cross-examination admits that plaintiff acquired [information withheld] before their marriage and that [information withheld] Nursing Home was acquired using Plaintiff's own Residential [information withheld] House as security and the security of [information withheld], to secure a loan for the purchase. So the purchasing was actually made using the defendant's funds. Yet plaintiff on cross-examination says:-

"***we bought Cedars Residential Home at £1 but the advocate charged a fee of £5 – that is because the business was facing bankruptcy …when we bought the business, we acquired some small liabilities…"***

Plaintiff also explained his role at [information withheld] saying:

"***When K acquired [particulars withheld], the business had already been operational for years. I did bookkeeping, preparing accounts, paid staff, creditors and general maintenance and shopping when necessary"***

It was plaintiff's evidence that for the time that he worked at [information withheld], for 3 years, he did not receive a salary nor does he claim anything.

As for [information withheld], he says he was involved in negotiating for the loans although he has no documents to support his involvement in its running. What about the two matatus? Plaintiff on cross-examination stated:

"***There are two motor vehicles (matatus) which were bought from proceeds of some bonds that we sold"***

And how did the plaintiff contribute towards the purchase of the Kilifi House? He stated that the money for the Kilifi House came 75% from operating profits of the [information withheld] Residential Home (which had begun as [information withheld] Nursing Home) which takes us back to the question, where did the funds for purchase of [information withheld] Residential Home come from? Would the fact that plaintiff worked at [information withheld] doing general maintenance paying staff salary and doing the accounts translate into financial contribution to be taken into account when the property was finally sold? Plaintiff claims to have been building a large yatch for a company in Liverpool, then he worked as operations director for company in Yorkshire (UK) – however there are no documents to support this, nor any evidence of how much he earned, or how much of his money he put into the [information withheld] Nursing Home business and in his own words

"***We lived on drawings from the business."***

Is the plaintiff entitled to the prayers he has made? Does he automatically became entitled to the Kilifi House, ½ shares of the bonds (by compelling defendant to sign the consent) and one of the matatus by virtue of having had his name entered as a joint owner, or should he demonstrate that he made actual contribution towards acquisition of these assets?

Defendant on cross-examination states that the six years that she lived with the plaintiff he did nothing except spend his hours in bars – which habit he begun almost immediately they married. Defendant stated that she entered into a mortgage agreement in the year 2001 when she was buying the [information withheld] Nursing Home – if the Home was bought at £1, then what would the defendant be requiring a mortgage for and why would she have to use her own residence and [information withhheld] as securities? (which is also confirmed by the plaintiff)

As far as she is concerned her daughter did the management of her business and not plaintiff and she also did the business accounts together with a professional accountant by the name Clive Nagus Bakerman who did the accounts annually. She explained that for the day to day accounts, it was mostly her daughter and herself doing them. However she concedes that plaintiff did introduce the QuickBooks System of Accounting but defendant says this was because plaintiff wanted to disguise her accounts and cheat. She basis this on the fact that no one else could get into the QuickBooks System (i.e neither defendant nor her daughter), so they did not use that system.

She insists that it was her daughter who paid the staff salaries.

She also states that shopping for supplies was mostly done by her daughter and herself and has rejected most of the receipts from suppliers which were shown to her by plaintiff's counsel saying she does not recognize them.

As for statements of accounts purportedly prepared by plaintiff for the business, she explained that she had shipped all her documents relating to the business from the UK to Kenya and kept them in the garage. Lately she realized they were missing and so her response to the statements of account by plaintiff is-

"***He could have taken all the invoices from my garage in Kilifi, then made up those accounts – that is something anyone can make. Either he made it up or someone did it for him."***

She admits on cross-examination that plaintiff was involved a little bit in the negotiation of the sale of the two nursing homes and he also ran errands for the two businesses and to that extent the plaintiff had credit cards for the two businesses. However according to defendant, plaintiff misused the cards for private purposes mostly to buy alcohol and the cards became overdrawn and the bank refused to pay. Occasionally plaintiff would come into the business, but he refused to be employed even when defendant offered him a position. The defendant had been married twice before marrying the plaintiff – and according to her, she had a lot of money in her account but she did not even know the exact figure and all she knew was that plaintiff had no money and no bank account.

So now that the monies the couple had, really seems to have come from proceeds of the defendant's property, why did she not just put them in a bond in her sole name or an account in her sole name – she says the plaintiff persuaded her to put his name in the joint account and she did so on humanitarian grounds. She also had the same consideration when she registered the Kilifi property in their joint names, wondering how else the plaintiff could have lived and saying that if she had not done that, then plaintiff would have had to live on the streets of Kilifi with nothing to eat. As for the Kilifi House, defendant's evidence is that the vendor of the land, one Mr. Tony Stones got the contractor, and the plaintiff signed the construction contract because defendant was busy. She admits that plaintiff signed seven transfers to pay for the property in Kilifi but quickly adds that it was of no consequence because the payments came from one account.

As regards the two matatus, defendant says:

"***The two matatus are in joint names. I was not forced to put them in joint names. We both went to buy the matatus."***

As far as she is concerned the two matatus are unserviceable, though she owns another matatu [particulars withheld] which is her sole name.

The defendant's daughter L H (DW2) told this court she worked at [information withheld] Residential Home and also at [information withheld] Residential Home – she would do the shopping, wages, general day to day duties, food, take accounts and general assistance at [particulars withheld]. She worked from December 2000 to the day the home closed. It was her testimony that during her stay, the plaintiff did not work there and that she did the accounts daily with her mother.

She told this court that plaintiff did not do any accounts, maintenance or assist in running the business yet he lived off the profits of the business and spent most of his times in pubs as he used to drink a lot.

On cross-examination she said of plaintiff and the business

"***may be once in a while he would drop something there"***

And that it was her mother who did the correspondence. She is not aware that plaintiff signed cheques or paid creditors as that would be done by her mother and she heard her mother complain that plaintiff contributed nothing and only went home drunk.

Both counsel had undertaken to file written submissions, but I only received written submission from the defence counsel.

The defence counsel submitted that The Married Women's Property Act 1882 is an English Statute whose application into the Kenyan legal system is by virtue of being a statute of General application in England on the 12th August 1897 and in respect of section 3 of the Judicature Act (cap 8) it commenced operations of 1st January 1883. This he submits extends the jurisdiction of this court to deal with property in the UK.

Mr. Mrima submitted on behalf of the defendant that she had demonstrated how she sustained her businesses until the time she made a decision to sell them and make an investment from the proceeds. So from the [information withheld] sale defendant made an investment in the form of an insurance bond in her sole name, to the tune of £150,000 and the plaintiff does not claim anything on this. Mr. Mrima then poses the question as to why plaintiff is not staking any claim on this investment if it is true that he managed the business as alleged. From the [information withheld] proceeds defendant invested £200,000, but she included the plaintiff's name – that is the investment with AXA.

He argues that there isn't a dot of evidence that plaintiff contributed towards the acquisition of the businesses nor did he have anything to do with them. As regards management of the two businesses, Mr. Mrima argues that plaintiff is not being truthful – which is why in his affidavit he claims to have been managing the entire business, yet in his viva voce evidence he said he was managing the accounts of the business.

He dismisses the plaintiff's assertion that he was managing the business saying plaintiff didn't have the qualification and has not denied that one would have to be licensed by the Care Standards Commission so as to take over management of such businesses as that of Nursing Homes for the elderly. Mr. Mrima also pointed out that despite plaintiff insisting that he was in charge of accounts, and that he had prepared his own set of statements of accounts, he did not produce a single accounting document to support his position nor did he deny that upon leaving the Kilifi home, he carried away documents belonging to defendant relating to invoicing and accounts. It is argued that the only reason why plaintiff could not produce any document of accounts, including what he had carried away is due to the fear that such evidence would in fact be prejudicial to his case.

Defence counsel's submission regarding the role plaintiff played in the defendant's business is that his

short stint in the business was merely attempts to introduce other systems of accounting, so as to defraud the business but these systems were rejected by the defendant's bankers and further, he failed to achieve his ill motives that the court should bear in mind that despite all his claims, plaintiff has not adduced any evidence to demonstrate that he was a qualified accountant properly possessed of the requisite knowledge to enable him single handedly manage the said department.

As to laying claims of contributing towards purchase of the Kilifi property, Mr. Mrima asks this court to consider the fact that plaintiff never operated any bank account and the joint accounts they had were simply on the motion of the defendant's attempts to make her husband comfortable. Whatever other roles he played in negotiations for property sale or purchase were in his capacity as defendant's husband and not a co-owner.

Mr. Mrima submits that the property in Kilifi was acquired from the profits made during the sale of the two business and plaintiff had no input. It just happens that the Title bears both plaintiff and defendant's names purely on humanitarian considerations by the defendant and that, she did not intend to create any beneficial interest to the plaintiff and he is not entitled to any share at all.

He refers to the case of **Abiba Tirindi v Karl Hasenfuss, Hcc (Msa) 245 of 1997** (*unreported)* where Hon. Justice Waki *(as he then was)* ordered reversion of a property registered in the names of Abiba Tirindi after he found out that she had made no monetary contribution to its acquisition. Mr. Mrima urges this court to therefore find that since all the money was actually from the defendant, she is the rightful owner despite the registration being in joint names, and plaintiff should be restrained form interfering with the property and not allow plaintiff to hide under the umbrella of having his name in the title documents.

As regards the insurance bonds, Mr. Mrima submits that the policy bond does not state the proportions held by each of the parties and plaintiff cannot press that it should be on a 50:50 basis saying the policy bond did not just drop from the sky but was as a result of direct sale of the defendant's businesses to which plaintiff had no entitlement. He urges this court not to allow plaintiff to reap where he did not sow.

He refers to section 1 of the Married Women's Property Act which deals with the capability of a married women to hold property and enter into contracts as a feme sole and argues that it is legal that a married woman acquires property and enters into business or contracts independability and the mere fact of a marriage subsisting does not confer any interest and/or rights to the husband.

Further to that, counsel invokes the provisions of Section 1 (3) which is that:-

"***Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bond her separate property unless the contrary be shown"***

In that regard, he submits that the contract entered into between the defendant and CITIBANK leading to the financing of the purchase of [infomation withheld] Nursing Home formed a contract feme sole and the plaintiff had no room and whatever resulted from the contract feme sole is only to the benefit of the married woman.

To support this position, Mr. Mrima cites the decision in **Pettitt v Pettitt (1969) 2 AELR 385,** where the House of Lords held that a husband's claim (which was brought under section 17 of the Act, must fail in that the wife had bought a freehold property entirely out of money provided by her husband and the property stood in her sole name, and the husband's undertaking of internal decorative works and building of a wardrobe in it, laying and construction of an ornamental wall and a side wall in the garden, the labour he provided and the expenditure thereof, could not make the husband to be entitled to a beneficial interest in the proceeds of the sale of the property as the works done were normally done by a husband in a family and that the improvements were only of an ephemeral character and there was no justification of such imputation of the spouses common intention that the husband should acquire some beneficial interest in the property. Mr. Mrima's contention is that if even where the husband has made an input in terms of manpower and expenditure, that does not entitle him to a share of the property, then what about the

present case where the husband made no contribution to either acquisition or improvement of the property and he quips that plaintiff's claim ought to honourably fail Another English decision cited is **Gisseng v Gisseng (1970) 2 All ER 750,** where the husband purchased a home and had it conveyed in his sole name. There was no express agreement as to how the beneficial interest in the house should be shared. The wife provided some money for furniture and improvements, but it was not suggested that her efforts or earnings made it possible for the husband to raise the purchase money for the house.

The court in considering whether the wife was entitled to a beneficial interest in the house held that since there was no agreement between the spouses regarding the house, to which both contributed its purchase, the registered owner evinced no intention that the other spouse should have a beneficial interest in the house. Yet in the present case, the title for the Kilifi house is in both spouses names. To this Mr. Mrima submits that what the court ought to consider is that the plaintiff made no contribution to its purchase at all since the purchase stemmed from funds raised from proceeds of sale of defendants businesses and there is no basis for infering beneficial interest to the plaintiff herein.

Drawing from a local decision of **Mbugua v Mbugua 2000 KLR** where the court in considering the wife's interest in a property held by the husband in his sole name, the wife's claim under section 17 of the Act failed in that the properties had been purchased solely by the husband and considering that she had no knowledge of building construction, the fact that she made visits to the site during construction would not by itself entitle her to any share therein. The court went on further to say:-

"…***in order to succeed on an application under section 17 of this Act, it is incumbent upon the applicant to show that she contributed directly or indirectly to the acquisition of the properties claimed. The fact that the property was acquired during coverture is not itself sufficient to entitle the Claimant to share in it."***

Mr. Mrima's contention is that the **Mbugua case** is similar to the present case where plaintiff made no contribution at all to the purchase and management of the businesses and his visits to the businesses and any other small things he did, did not confer any right to the property at all.

So far the decisions Mr. Mrima has cited address instances where property is registered in the sole name of one spouse – but what about where it is in the joint names, despite the fact that one party may have made no financial contribution?

Mr. Mrima submits that, there is a general rebuttable presumption that such property is held in equal shares – however he contends that this presumption is rebuttable if it is demonstrated that the position has changed and that this has been echoed by the Court of Appeal on a 5 judge bench decision in the case of **Peter Mburu Echaria v Priscilla Njeri Echaria , C.A. of Kenya CA No. 75 of 2001 at pg 18** that:

"***This is a course of rebuttable presumption …Equal contribution results in a joint tenancy unless there is contrary evidence to show that irrespective of the registration there was no equal contribution…."***

Mr. Mrima also points out that in the **Echaria case**, the Court of Appeal went through various of its earlier decisions where it awarded parties equally, including the case of **Kamore v Kamore (2000) EALR 81** and made the following observation at pg 19 and 20:-

"***However, study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the Court appreciated that for the wife to be entitled to a share of the property, she had to prove contribution towards the acquisition of the property. The Court considered the peculiar circumstances of each case and independently assessed the wife's contribution as equal to that of the husband…The Court in Kivuitu's case did not lay any general principle of equal division as suggested…"***

Mr. Mrima's submissions is that the said various judicial decisions captured in the quotation in **Echaria's case** referred to African couples whose contributions range from the domestic manual chores to actual

financial contributions which status is quite different from the parties herein who are British Citizens and have all along lived in England until recently.

Mr. Mrima argues that it can be safely deduced that since plaintiff made no contributions at all in the acquisition and management of the businesses which upon sale gave birth to the insurance policy bonds, the land and house at Kilifi and the motor vehicles in issue, then plaintiff's claim must fail.

What about the motor vehicles [particulars withheld]? Defendant maintains that she bought these motor vehicles although when plaintiff left the matrimonial home, he left with motor vehicle [particulars withheld] and motor vehicle Mercedes Benz [particulars withheld] ML without her consent. She says she bought the Benz using her own funds but since she had already brought in another motor vehicle registration [particulars withheld] (also Mercedes Benz) duty free, she had no option but to have it registered in plaintiff's name so as to bring it to Kenya, but like the house, she had no intention of conferring any beneficial interest of the motor vehicle on the plaintiff. She asks that plaintiff be ordered to produce the accounts for motor vehicle [particulars withheld] and pay earnings therefrom from the time he took it over from the defendant until the date he returns it physically along with motor vehicle [particulars withheld].

The Married Women's Property Act 1882 is an English Statute whose application into our legal system is recognized by virtue of its being a statute of general application in England on the 12th August 1897.

One of the main purposes of the Act was to make it fully possible for the property rights of parties to the marriage to be kept entirely separate – which means that the fact of marriage does not result automatically into common ownership or co-ownership (see **Pettit v Pettit (1969) 2 WLR 966** as expressed by **Lord Morris of Borth – Y- Gest at pg 975 paragraph H).**

This case also dealt with the question of beneficial ownership of property, recognizing that it depended on the agreement of parties which must be determined at the time of acquisition.

There are monies which are jointly held in an insurance policy bond. What was the source of the funds? Should the court presume that by virtue of the parties having been married then they are entitled to a 50:50 share on the same and the defendant should therefore be compelled to sign the forms assigning the policies from joint to individual ownership, so as to enable plaintiff acquire his lawful share. It is common ground that the funds which ended up in this insurance bond were from sale of the defendant's businesses – [particulars withheld]. Plaintiff admits that defendant had [name withheld] even before the coveture but that once they got married and SHE acquired [name withheld], then it became a joint business venture, much as he did not have the requisite qualification for running the business much less, the financial ability. It is his contention that he was involved in the management of the business and so indirectly contributed to the funds resulting from its sale. He was however unable to provide any tangible evidence of his role either as a manager or accountant, and his claims that he did the accounts for the business was not supported by any admissible documentary evidence, save for collection of figures on a paper which defendant told the court was not her official letterhead and the same were not audited nor produced as evidence before the court. The assertion that he attempted to introduce an accounting system which was rejected by the defendant's bankers has not been denied nor rebutted by the plaintiff. He was not even an employee in the business, having rejected offers for employment and his role was minimized to running errands on and off - little shopping here, replenishing supplies occasionally – and if this were to be quantified in terms of output, then it is so minimal as to probably amount to only 10% so on what basis would the plaintiff justify claiming half of what is in the bond, so as to warrant this court to compel the defendant to sign the forms in that regard. I would say none. All he is attempting to do is reap where he barely scattered any seeds.

In considering this situation, I am guided by the decision in **Muthembwa v Muthembwa CA No. 74 of 2002,** where the Judges of appeal had this to say:-

"***The third issue raised is whether a court handling an application under section 17, has jurisdiction to deal with shares in a company in which one or both spouses are shareholders. In Lillian Njeri***

***Mungai v Dr. Njoroge CA No. 191 of 1995 Kwach JA*, rendered himself thus**

"***The application under section 17 of the Married Woman's Property Act 1882 could only deal with property held by the respondent as a husband. It would not cover shares held by the respondent in a limited company in which the wife also held shares in her own right"***

In that regard, the wording of section 17 is clear. The jurisdiction of the court is to determine a question or question between husband and wife principally, as to title to or possession of property where each spouse has a definite number of shares in a company as in the **Lillian Njeri Mungai** case, no question would arise as to title to the share in issue. But in certain cases particularly in companies …where the property cannot be split without dealing with the respective shareholding of the parties, a court may, in an application under section 17, deal with the parties respective interest in the company. Section 17 does allow it. The section reads in pertinent part as follows:-

"***In any question between husband and wife as to the title to or possession of property, either party or any such bank, corporation, company, public body or society as aforesaid in whose books any stocks, funds or shares of either party are standing, may apply…and the judge of the high court of Justice … may make such order with respect to the property in dispute…as he thinks fit."***

The most applicable part is this:

"***And where, as in the instant case, matrimonial property is intertwined with company property, we think that injustice might result if the court declines jurisdiction under section 17, to deal with the whole property"***

The wording of that section clearly shows that the court is clothed with wide and unfettred discretion to make sure order or orders as the justice of the case may demand.

I have quoted extensively from the **Muthembwa case**, not because the major issue is how many shares is each party entitled to, but rather, because I cannot deal with the question of whether defendant should be compelled to sign the requisite forms assigning half the shares to the plaintiff, without taking into consideration the effect of that compulsion and whether it is the most fair thing to do. I have no doubt in my mind it would be unfair to compel defendant to sign off 50% of what she had toiled for, and for which plaintiff had only benefited by virtue of their relationship – never having made actual financial contributions.

Yet, I am not blind to the fact that whatever role, however minimal, the plaintiff played – that must be recognized, in more or less the same way a wife's role in helping keep things going in any set up would be considered. It must not automatically follow, that because the other spouse was so attached to the other by virtue of the union, he/she is entitled to 50% of the shares. to my mind the party so claiming must demonstrate clearly contribution and that has not been done in the present case. Again I cannot ignore the fact that they had the bond jointly and that the most natural presumption would have been that parties intended for equal share –

This is a rebuttable presumption. From what has been presented to this court. I would be doing a lot of injustice to compel the defendant to sign away 50% of the shares by ordering her to sign the relevant forms.

I am aware that plaintiff needs funds by virtue of his minimal contribution to the business whose sale gave birth to the funds secured in the joint bonds. No alterntive suggestions were offered as to what percentage of the shares plaintiff would or should be entitled to other than the 50% but my own assessment is that at most he is entitled to only 10% of those shares and that indeed this court has not

been called upon to determine what portion of the shares each party is entitled to. Yet to leave it on the basis that since proportion claimed isn't proved, I make no orders, would only be compounding the problem, which would result in the funds remaining in the insurance bond, unavailable to either party. I am persuaded that to break this impasse, I must determine, which I hereby do, that plaintiff is only entitled to 10% of the shares in the bond. To that extent then I direct that the defendant do sign the relevant forms to enable the account be split in that proportion – thus will enable plaintiff to access his funds.

Then there is the Kilifi house which plaintiff refers to as the matrimonial property, whilst defendant terms it her holiday home which she acquired before the marriage. I do not believe she is being truthful because from her own evidence the funds used to acquire that house were from the sale of her two businesses – which event took place after they had married.

Plaintiff insisted that part of the funds transferred from the joint account towards purchase of that house comprised his financial contribution. Those funds have their roots solely from defendants own resources. I have no doubt in my mind that the Kilifi house was the matrimonial house in which the parties cohabited, having relocated from the UK to Kenya. The majority of furniture was shipped from the UK by the defendant who says she simply moved her household items from the [particulars withheld] residence in the UK.

The fact that the house was registered in the joint names of the parties creates a presumed equal ownership – an undivided equal share.

Gachuhi J. A. in the case of **Kivuitu v Kivuitu (1991) 2KAR 241** laid emphasis on the legal consequences resulting from the registration as joint tenant to this effect.

"***The fact that the property is registered in the joint names means that each party owns an undivided equal share thereon….Because of the conveyance of the property to be held by them as joint tenants, there was a presumption at the time, that the intention of the parties was to hold the matrimonial home as joint tenants, provided that if one of them died, the other would take the entire ownership."***

The Court of Appeal acknowledged this position in **Peter Mburu Echaria v Priscilla Njeri Echaria Civil Appeal No. 75 of 2001,** holding that the joint tenants have a right to sever the joint tenancy in their life time in which case, the joint tenancy is converted into a beneficial interest in common in equal shares and that:-

"….***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 tenant"***

This position was also reflected in **Kamore v Kamore (2000) 1 EA 81,** that

"***where property is acquired during the course of coverture and is registered in the joint names of both spouse, the court in normal circumstances must take it that such property, being a family asset is acquired in equal shares."***

In the present case the parties registered the property in their joint names, lived in it but currently the plaintiff is not residing in it, for reasons he did not disclose but which defendant says is because he is three years old in another relationship – having taken a walk away from the home in the year 2006 and he has never returned. Plaintiff does not seem to insist on the physical structure as such, but that his share

in the same be recognized, computed and defendant be ordered to pay for its value equivalent.

Lord Upohn in Pettit v Pettit stated that:

"***But where both spouses contribute to the acquisition of a property, then my own view (of course in the absence of evidence, is that they intended to be joint beneficial owners and this is so whether the purchase be in joint names or in the name of one. This is the rules of the application of the presumption of resulting trust. Even if the property be put in the sole name of the wife, I would not myself treat that as a circumstance of the evidence enabling the wife to claim an advancement to her, for it is against all the probabilities of the case, unless the husband's contribution is very small. Whether the spouse contributing to the purchase should be considered to be equal owner or in some other proportion, must depend on the circumstances of each case."***

In the present situation, it's a reversal of roles, it is the husband seeking division of property, where the wife has demonstrated to having the financial muscle and the husband did not have any tangible source of income at all.

Locally Court of Appeal noted in **Echaria's case** that cases involving disputes between husband and wife over property acquired during marriage display a trend of the court giving the wife an equal share – as is demonstrate in **Essa v Essa Civil Appeal No. 101 of 1995, Nderitu v Nderitu CA 203 of 1997** (*unreported*), **Kamore v Kamore** and **Mereka v Mereka** – yet the principle in all these decisions is not equality of division but rather an appreciation that the wife is entitled to a share of the property by virtue of having proved her contribution towards the acquisition of the property – and that the court considered the peculiar circumstances of each case and independently assessed the wife's contribution as equal to that of the husband.

The Court of Appeal stated in **Echaria's case** that the presumption of equality in properties registered in joint names, is rebuttable – and I am persuaded the litmus paper test is summed up in one word - CONTRIBUTION. The couple purchased the land and had the same registered in joint names. A contractor was then engaged to do the construction as per the plaintiff's exhibit 12. (construction contract) and a site clerk cum supervisor named Robin Nixon did the supervision. During the construction, the parties were not in Kenya. I have already addressed the issue of financial contribution in the light of the root of the funds used in the purchase – financially the plaintiff was really a" dormant" contributor – his contribution was purely by virtue of his name and being yoked to the defendant as a husband, but not that he had the hard cash. However he has shown that he was involved to some extent in ensuring that the works met their specifications – should this then entitle him to half the property or its financial value thereof? Mr. Mrima submits that this court should be guided by the consideration made by Hon. Waki J (as he then was) in **Abiba Tirindi v Karle Harsenfuss HCCC (Msa) No. 245 of 1997** (unreported) where the Honourable judge ordered reversion of a property registered in the names of Abiba Tirindi, after he found that she had not made any monetary contribution to its acquisition, but all such moneys were given by the defendant, who was then deemed as the rightful owner despite the registration thereof.

The judge found that on the basis of contribution, the plaintiff had nothing to offer as she could not explain how she came to acquire the property and have it registered in her favour. He urges this court that, in the same way, the plaintiff herein should not be allowed to hide under the umbrella of having his name in the title documents in a clear scenario of not having made any input or at all. What is the jurisprudence developed by local decisions? Initially the approach was recognizing that contribution may be indirect as was stated by Simpson J in **Karanja v Karanja (1976) KLR KLR 307 pg 311 par b, c, d** that:-

"…***payments by the wife need not be direct payments towards the purchase of the property, but may be indirect such as meeting household and other expenses including expenditure on clothing for the wife and children and the education of the children, which the husband would otherwise have to pay, and***

***even though the husband may never have evinced an intention that his wife should have share in the property, the wife may in the circumstances of the case be entitled to a declaration that the property … is held wholly in the part in trust by virtue of its acquisition as joint venture."***

This found confirmation in the case of **WN v NK Civil Appeal No. 203 of 1997** which held that:-

"***1. A wife's contribution, more often than not took the form of a bench up service on the domestic front rather than a direction financial contribution. It was incumbent upon a trial judge hearing an application under section 17 of the Married Women's Property Act to take into account this form of contribution in determining the wife's interest in the assets under consideration."***

However this approach seems to have been watered down the **Echaria case** by clarifying that equal division was not a rule without taking into account the proportionate contribution of each spouse.

The peculiar circumstances of this case is that the defendant was simply a joy riding husband whose contribution cannot be apportioned at 50:50 ratio – much less even the indirect contribution, as the couple did not have children resulting from the union. The plaintiff made no major financial investment in the property. From the plaintiff's own testimony, his contribution to the Kilifi Property can be reduced to (a) negotiating for the purchase of the property, (b) choosing the design and architect, and (c) signing the contractual document (ex 12) for the construction work – I think that is contribution which can be quantified and given a value which would not warrant ordering for the sale of the property unless the defendant is unable to pay. I would consider that contribution at 20% the value of the property. I therefore direct that valuation of the property be done by a valuer acceptable to both parities and orders be made that the defendant do pay the plaintiff 20% equivalent in money value of the property. The defendant will pay the valuation costs initially (seeing as the plaintiff is financially changed) and recover half the cost of valuation from the plaintiff's ultimate share. Naturally in the event that defendant does not comply then the property shall be sold and proceeds thereto apportioned at 20% in favour of plaintiff and 80% in favour of defendant.

As for the two matatus, no evidence was presented to this court as to who did the actual purchase, nor were log books availed to confirm in whose names the motor vehicles were. However both parties stated that each is keeping one of the vehicles. I really have nothing tangible on which to make concrete orders regarding the fate of the two vehicles and that part of the claims remain not proved.

Each party will bear its own costs of this suit.

Delivered and dated this **28th** day of **October 2009** at Malindi.

**H. A. Omondi**

**JUDGE**