



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

**Civil Case 50 of 2002**

**J.N.M..... PLAINTIFF**

**VERSUS**

**J.A.M..... DEFENDANT**

**JUDGMENT**

The parties herein were married on 19<sup>th</sup> November, 1991. They cohabited in several places in the Republic of Kenya and have three children. They all are presently adult.

The wife after filing separation and Maintenance cause No.[...] filed this Originating summons dated 29<sup>th</sup> February 2000 under Section 17 of the Married Women's Property Act of 1882, the British Act which is applied to Kenya under section 3(1) of the Judicature Act. By the time the matter trial commenced the parties were divorced.

The wife in her affidavit in support sworn on 10<sup>th</sup> February, 2000 claims in paragraph 9 that she had, from her own funds, during subsistence of the cohabitation purchased several household goods. She further claims that similarly she contributed and acquired jointly with the Respondent following properties:

1. Land Title Number [.....] and also contributed to purchase building materials for the house erected on the said property which the Respondent registered in his sole name.
2. Vehicle Registration No. [...] – Pick-Up and
3. Vehicle Registration No. [...]Peugeot 405 Saloon.

With these averments, she prays for declaration that the above properties are owned jointly by them and prays that the same be sold and proceeds thereof be divided equally between the parties.

She, of course, prayed for costs of the O.S. and any further or other relief deemed fit.

The Respondent took issues with the claims and the matter commenced for trial before Aluoch J (*as then she was*) and she heard the case of the Plaintiff/wife. She also directed that the matter the to proceed with hearing from where she left. As the matter was very old, this court agreed to do so.

The Plaintiff, in her testimony, stated that she worked as a Senior Agricultural Officer

with[PARTICULARS WITHHELD] since 4<sup>th</sup> April, 1977. Over and above the income from the job she had dairy cows at Ngong Plot and sold milk, vegetables and chicken. She hired and paid two house girls who were knitting sweaters and she sold them to augment the family income. She also bought food, clothes and bought household goods mentioned by her in her affidavit, I have already mentioned them. She also testified that they purchased the Land [.....]in 1982 and a loan was taken to construct the house which was their matrimonial home. She produced some receipts for lump sum received by her and also pay slips from 1994 as according to her the earlier receipts were left at home as she was thrown out of the house with only clothes on her. She produced banking slips for sale of farm produce in 1993 which were in her office and others remained in the house. According to her, the Account in her name in Barclays Bank was used by the Respondent, but she could not withdraw from his Account. She testified that she has a cheque signed by him but counterfoil is with her. She further stated that she used to travel out of country on duty and used to get allowances which she used for shopping for the family. She also used to give the allowance to the Respondent to repay the loan.

About  $\frac{3}{4}$  of the loan was repaid which amounted to about Shs.327,440. She also confirmed that she was doing zero grazing farming on the land and had 7 cows and a bull by the time she left. She purchased the first cow which reproduced others. According to her, the Defendant sold those cows for between Shs.35,000 to Shs.60,000 and bought a car[.....] from the proceeds which is registered in the name of KEF, P. O. Box Chuka, but stressed that the Defendant uses the vehicle and that her search failed to get any society etc. registered under the said name. According to her the value of the said vehicle would be around Shs.280,000 and that of the house as per the valuation report dated 30<sup>th</sup> September, 2004 is Shs.2.8 million. The Pick up used by her on the farm could be worth KShs.350,000/-.

After she was thrown out of the matrimonial house, for a while she stayed with her brother with her one child as others were out of the country. She then purchased a plot admeasuring 30 ft by 50 ft in 1996, and constructed a house from her own funds and the house is yet furnished fully due to lack of funds. She maintained the child she went with.

She stated that the Defendant has re-married his old girlfriend with whom he had a son. She also stated that the Respondent was earning net pay of Shs.1,910/-, and the loan was deducted from the same. She reiterated that the land is registered in the name of the Defendant. She did produce some of pay slips which are between 10,000 and 12,000 for the year 1994. She has also produced credit slips in her Bank, a cheque issued in the name of the Defendant in the sum of Shs.7,000 from her Bank A/c which was not paid with remarks "cheque irregularly drawn", several Demand drafts to be payable to their son in Allahabad, India, some Bank drafts to another son in Nagpur India from Bank of Baroda Ltd. Some receipts for purchases made by her, photograph of the cows, receipts for search for the motor vehicle [.....]and her passport to show that she travelled out of the country as alleged.

In her cross-examination it was stressed that the land is owned by the Defendant and that sale agreement and loan application were also in the name of the Defendant. She insisted that she used to give money in cash from her traveling allowance and income from the farm produce, but she agreed she did not keep any receipts and confirmed that the repayments were not made by the Defendant alone.

In response to questions as regard her purchase of the plot and construction thereon, she said that she bought the shares for Shs.120,000 by installments beginning from May, 1994 and denied that she started paying since 1990. She stated that she was forced out of matrimonial home in January, 1994. She denied that the Defendant has paid even a single cent towards the purchase.

As regards motor vehicles she reiterated what she said in her examination-in-chief. She was asked about her motor vehicle [.....]which was bought by her when she was a student in Canada but agreed that it was cleared by the Defendant using family resources, from the Dollars sent to him by her.

She denied that the educational and other costs of the three children were solely paid by the Defendant but she agreed that tuition fees were paid by him and other costs were paid by her. In any event she has produced slips for money remitted to Allahabad and Nagpur by her.

She refused that the Defendant should keep the land and she should keep the plot by stating that the Defendant also has ancestral land whereon they have jointly constructed a house. In any event, so far as her evidence is concerned she has bought the plot after the cohabitation ceased and after she was thrown out. She in re-examination stressed that she gave authority to the Defendant to withdraw money from her account as she was traveling a lot, and whenever Defendant fell short of money she always paid him. She also reiterated that since January, 1994 she never resumed cohabitation with the Defendant.

Defendant in response to the Plaintiff's case, testified that the suit property was purchased for Shs.37,000 on 19<sup>th</sup> May, 1982. He stated that he was assisted by his brother-in-law called K when he gave him shs.10,000. According to him they were married in 1979 but rectified to state that it was in the year 1977 and they were living together as husband and wife when the property was bought. He reiterated that he bought the property without any contribution from the plaintiff. He obtained loan of Shs.202,120 and paid the same through salary deduction. He produced Bank statements which showed that he was paying standing orders through his bank. I do note however that the standing orders were shown in the Bank statements starting from December, 1992 to December, 1993 only.

As regards purchase of the cow, he stated that it was bought jointly and nothing much happened as they broke up. According to him vehicle [.....] was bought in 1989 with a government loan repaid through his salary and he sold it to raise money for the fees for son for his education in India, that was also in 1989. He did not state when and for how much it was sold.

The other motor vehicle [.....] does not belong to him and was given to him by the church till they pay for his services rendered to the church by him in 1995. He had to go to U.K. for four months course in September, 1994 and in his absence three animals died and denied that they were sold by him.

As regards her plot at Kasarani he testified that he gave her Shs.10,000 as money from her U.S. scholarship were not sufficient. He produced photographs of her house. I do not understand the production of the photographs and their connection to any contribution from him. In any event the plot was bought and house was constructed after the cessation of their cohabitation. Neither in her cross-examination nor in his evidence, is it shown that since January, 1994 there was any resumption of cohabitation between the two.

As regards her own car, [.....], he stated that he paid Shs.50,000 to clear the same from Mombasa Port. In any event he did agree that while he was buying properties, the plaintiff contributed by looking after other expenses and that they did all these as a family.

According to him (by producing the valuation reports for both properties) her property is higher in value than his property at Ngong.

He produced receipts for what he paid for his sons since 1996 to 1997 and showed that total of Shs.630, 870 for his expenses in Allahabad was paid. For his daughter he said he paid Shs.140,467/35 from 1995 to 2002. He also showed that he paid Shs.684,984 for the third child. However, those were statements without documents to support all entries.

In cross-examination he agreed that the plaintiff was a guarantor to the loan taken by him. He agreed that she was employed throughout their cohabitation and that she also had side businesses. He reiterated that she was earning throughout and was looking after other expenses of the house while he was paying for properties. He also agreed that she used to send money when she traveled out of the country. After agreeing that his net pay was Shs.1,910/- as at December, 1990 he disagreed however to the contention that it was her salary and income from side businesses that made it possible to acquire properties. He for the first time stated that he was earning extra income by matatu between Nairobi and Meru and that he used to earn allowances from local trips.

He also agreed that on separation they had the cows which were valued at Shs.20,000 each and denied that she left eight cows.

As regards CAR [.....]S he agreed that he was waiting for the church to transfer in his name.

He denied that after selling the cows, he bought the aforesaid vehicle.

After agreeing that the construction on Kasarani plot started after separation but before divorce, but then relented and stated that materials were sent from Ngong house. He could not give the details of the plot purchased by the Plaintiff, but testified that the off cuts of fencing were used in Kasarani Plot. He further agreed that Pick-up was a family vehicle.

He then concentrated on educating the children and she got opportunity to develop the property. He also agreed that two children on obtaining majority were sent to the Plaintiff and they were given freedom to stay with her.

On evidence of the remittance by the Plaintiff to two children in India, he commented that they were ad hoc payments and stressed that the responsibility of their education and up-keep was his. He denied that he instigated the children against her, though this evidence is of no importance to this case.

He also agreed that he has no receipt for Shs.50,000 spent by him for release of the motor vehicle [.....] or the payment of Shs.10,000 for the plot purchased by the Plaintiff after separation.

He denied that a cheque for Shs.7,000 taken by him was stopped by her because it was to pay for his foster son from second wife.

The above is the evidence before the court.

The counsel submitted written submissions to support their respective cases.

Both counsel after evaluating the evidence, relied on the coveted case of Peter Mburu Echaria Vs. Priscilla Njeri Echaria (C.A. No.75/01).

I have briefly observed the evidence before me in this case. It is not in dispute that both parties were gainfully employed during the span of cohabitation from 1977 to January 1994. It is also conceded by the Defendant that they purchased the land and Pick-up as a family and that while he was acquiring the properties, the plaintiff was looking after other expenses of the household. Both of them have produced the receipts for household purchases as well as the remittance to the children in India. The Defendant produced the Bank Statements showing payments by standing order only for 1992 to 1993.

The Plaintiff has conceded, on the other hand that the  $\frac{3}{4}$  of the loan was repaid upto the time when she was forced out of the matrimonial home. There is also an admission that on separation the Plaintiff left cows (the figure differ between the parties) but it is not in dispute that they are not now on the suit land. According to the Plaintiff, they were sold and as per the Defendant they died when he went out of the country for four months. When the Plaintiff has shown by the production of her passport that she has been sent out of country on duty and earned allowances, the Defendant fell short of showing his extra income of allowances from local trips or otherwise. He has also fell short of satisfying the court that the cows acquired during the cohabitation died during his short span of absence of four months, even if at all. He agreed that the value of each cow could be Shs.20,000.

On the other hand it is admitted as well as proved by the Plaintiff that she acquired the plot at Kasarani after the separation. I may take her ability to acquire that plot as a proof that during cohabitation also she earned and contributed towards the family acquisitions as she was capable to do so, which fact in any event is candidly agreed by the Defendant. Moreover, I also see that the payments and receipts produced by the Defendant for the children are mostly after the separation and such contribution, if any, were not during the cohabitation.

Section 17 of the Married Women Act clearly defines the rights and obligations of the married couple in respect of acquisition of the matrimonial properties during coverture and the long line of cases have

crystallized that aspect of law.

I would observe, before considering the jurisprudence for this issue as well as Echaria's case (*supra*) that each case shall depend and be decided on the facts and circumstance thereof, and that no case is same. I shall further observe, that, in my considered view, Echaria's case did not propound a principle of law that each party has to strictly prove his/her contribution by productions of receipts to prove the exact payments in shillings and cents.

I have endeavoured to capture in the case of Helen Wanjiru Mwangi vs. Samuel Njuguna Mwangi {H.C(O.S)} No.23/02 Nairobi (unreported), the power of the court to determine or establish the contribution by a married person.

As far as in the year 1970, in the case of Gissing Vs. Gissing (1970) 2 All. E.R. 782 the concept of indirect contribution was conceived.

At page 788 of the said case the following observations were made namely:-

“Contributions are not limited to those made directly in part-payment of the price of the property or to those made at the time the property is conveyed into the name of one the spouses. For instance, there can be a contribution, if by arrangement between the spouses one of them by payment of the household expenses enables the other to pay by the instalments”. (*emphasis mine*)

This is what is shown to be arrangement between the parties in this case as admitted by the Defendant. The concept of indirect contribution is not lost to our jurisprudence even after Echaria's case (*supra*). As rightly pointed out by Ms. Mwangangi, the learned counsel for the Plaintiff, the case of Burns vs. Burns (1984) All E.R. 244 was observed with approval from the Court of Appeal. The Burns' case echoes the Gissing case (*supra*) when at page 252 it is observed, namely:

“If there is a substantial contribution by the woman to the family expenses, and the house was purchased on 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 instalments”. (*emphasis mine*)

In the premises, I do not accept the contention raised by the Defendant that the Plaintiff is not entitled to any share to the acquisitions of the Land. The only question is what was the extent of her contribution?

The Plaintiff has agreed that the 75% loan was paid by the time she left the matrimonial home. It is thus obvious that she did not contribute anything thereafter and she concentrated on acquiring the plot at Kasarani for herself. But the motor vehicle Reg. No. KXF [PARTICULARS WITHHELD] was admittedly acquired from her contributions fully. As far as the other motor vehicle namely K[PARTICULARS WITHHELD] is concerned, the evidence is not clear as to how it was purchased and in any event it is not registered, till present, in the name of the Defendant, and thus I shall keep my hands off over the said motor vehicle.

The upshot of all the above is that I allow the O.S. as per the following orders:

1. The suit property i.e. L.R. No. [PARTICULARS WITHHELD] was acquired and developed with joint efforts of the parties and I direct that the share of the Plaintiff be ordered as 40 per cent.
2. The motor vehicle K[PARTICULARS WITHHELD] is jointly acquired with equal shares between the parties.
3. Both parties have agreed to the valuation of the suit property. In the premises, the Defendant shall pay 40 per cent of the valuation thereof i.e. 40% of Shs.2,800,000/- to the Plaintiff.
4. The Defendant agreed to have sold the motor vehicle K[PARTICULARS WITHHELD] agreed to have been jointly acquired and thus he shall pay Shs.150,000 estimated half share of the proceeds

thereof.

5. The costs of the O.S. be taxed accordingly to be payable by the Defendant.

6. The payments to be made as directed hereinbefore shall be with interest at court rates.

Orders accordingly.

Dated, Signed and Delivered at Nairobi, this 27<sup>th</sup> day of October, 2009.

**K.H. RAWAL**

**JUDGE**

**27.10.09**