



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

**MILIMANI LAW COURTS  
Civil Case 37 of 2004**

**ESTHER NJERI KARIUK.....APPLICANT**

**VERSUS**

**SAMUEL KARIUKI NJUGUNA.....RESPONDENT**

**JUDGEMENT**

The Applicant Esther Njeri Kariuki moved to this court, vide the originating summons dated 16<sup>th</sup> day of November 2004 and filed on the 1<sup>st</sup> day of December 2004. Five prayers are sought namely:-

1. *That it be declared that properties movable and immovable acquired by joint funds and efforts of the applicant and the Respondent being the following are owned jointly by the Applicant and the Respondent*

*(a) Land LOC 2/Gacharage/1371 measuring approximately 2.5 hectares and registered in the Respondents name*

2. *That this Honourable court, be pleased to order the division of the said property.*

3. *That this Honourable court be pleased to grant such further or other relief as may be just in the circumstances.*

4. *That the respondent be condemned to pay costs of this application and incidental thereto.*

The respondent was duly served, engaged counsel who entered appearance on the 29<sup>th</sup> day of March 2005 and filed on the same date but filed no response.

The claim of the applicant is contained in the supporting affidavit. The salient features of the same are as follows:-

- She married the Respondent under Kikuyu customary law in the year 1972.
- They have seven children between them enumerated in paragraph 3 of the supporting affidavit namely
- Anne Wanjiku Kariuki born in 1973.
- Paul Njuguna born in 1976
- Patrik Wainaina born 1978

- Jane Waithera born in 1980
- James Gathogo born in 1984
- Margaret Nyambura born 1986
- Danson Wanjihia born in 1988

All the children are now adults

- That in the year 1972 she was carrying on a business of selling paraffin from which she earned 200.00 per day.
- The proceeds from this business together with in put from the Respondent was utilized to purchase the suit land.
- She planted 6,000 tea bushes on the said land, tended the same while the Respondent was away in Nairobi where he used to work.
- They had a happy marriage till 1990 when the Respondent started neglecting her and the children, forcing the Applicant to solely tend for the children.
- She was chased away in the year 1996 and then she went back to her parent's home.
- She sued the Respondent in Kiambu court for maintenance and the court, ruled that both of them should be sharing equally the proceeds from the sale of tea and that both registered as a holder of tea Account No. KG/IK16/068 but the respondent refused.
- By reason of that refusal, she became aggrieved and then filed these proceedings seeking her rightful share of the said land.

Due directions were taken and matter ordered to proceed by way of Viva Voce evidence. On 1/10/2009 the court, being satisfied that the Respondent had due notice but has chosen not to involve himself in the proceedings, allowed the applicant to tender her evidence exparte. The evidence was a reiteration of the content of the supporting affidavit whose salient features have already been set out herein. She stressed the following:-

- They were indeed man and wife with the respondent
- They have the enumerated children who are all adults.
- They jointly acquired the suit land and had it registered in the name of the Respondent as the head of the family.
- Upon separation she filed a suit for maintenance and she was ordered to be receiving half of the proceeds of sale of Tea from the said land but the respondent refused to share the same with her.
- The dispute went before the D.O. and police who advised that the two do share the property but the Respondent refused and she was advised to take the matter to court, hence these proceedings. She therefore seeks the reliefs enumerated.

At the close of the proceedings, counsel filed written submissions and after reviewing the content of the pleadings and evidence invited the court take note of the following:-

- In Kiambu court maintenance cause No. 1282/96, the court recognized the rights of the applicant when it ordered that she be getting half share of the proceeds of sale of tea from the suit land.

- The parties went before Kigumo police station in a bid to enforce the court orders in the Kiambu case, and both parties signed an agreement to respect the said orders.
- The matter went before the D.O. Kigumo who deliberated upon the matter and ruled that the applicant should get 2.5 acres out of the said land with the Respondent and his second wife getting the rest of the land but the respondent did not comply.
- By reason of what has been stated above, the court, is enjoined to hold that the applicant has proved her case on a balance of probability and allow the relief sought.

On case law counsel drew out the following principles for the guidance of the court

- (i) A matrimonial home is everything that is put on it by either spouse with the interest that the home and the chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole. It matters not in this context whether the asset is acquired solely by the one party or the other or jointly or by their joint efforts.
- (ii) If both spouses have substantial beneficial interest but it is not possible to be entirely precise in calculating their respective shares, the ownership in equal shares almost necessary follows.
- (iii) A claim of beneficial ownership must be based on the proposition that the person in whom the legal title is vested holds it as a trustee in trust to give effect for the beneficial interest of the claimant as *cetui que trust*.
- (iv) The court, is invited to be guided by the decision in the case of KARANJA VERSUS KARANJA where the CA held that “*the 1882 Married women property Act of England was applicable in Kenya and that customary law is subject to any written law.*”
- (v) *That where property has been acquired jointly, it should be treated as joint property irrespective of whether it is registered in the name of one spouse or not.*
- (vi) *The wife’s contribution in the form of back up income and indirect contribution cannot be ignored.*

On case law the court, was referred to the case of PETTITT VERSUS BETTITT (1969) 2A9R 385 where it was held inter alia that “*a husband was not entitled to an interest in his wife’s property merely because he had done in his free time jobs which husbands normally do. Since the improvements carried out were generally of an ephemeral character and there was neither fraud nor a mutual intention agreement for the husband to gain a beneficial interest.*”

KARANJA VERSUS KARANJA (2008) IKLR 171 where it was held inter alia that “*the fact that the property acquired after marriage is put into the name of the husband alone and that the husband has evinced no intention that his wife should share in the property does not necessarily exclude the imputation of trust nor preclude the wife in appropriate circumstances from obtaining a declaration that the property acquired by virtue of a joint venture is held on trust for them both.*”

The case of KIVUITU VERSUS KIVUITU (1991) KLR 248 where it was held inter alia that “*the fact that the property is registered in the joint names of husband and wife means that each party owns an undivided shares therein.*”

TABITHA WANGECHI NDERITU VERSUS SIMON NDERITU KARIUKI NAIROBI CA NO. 203 OF 1997 where it was held inter alia that “*the indirect contribution by the wife to the family income by looking after the welfare of the family must form a basis just like any other financial contribution by reason of which wife was entitled to 50% share of the property.*”

Due consideration has been made by this court, of the pleadings in the record, the evidence adduced

and the principles of case law referred to the court, and in this courts', opinion, the following questions have arisen for the courts determination.

Whether the applicant gets a walk over in her claim by reason of the Respondents failure to respond to the same or whether she is required to prove the claim to the required standard irrespective of any response being fuleded by the Respondent or not.

2. Whether on the facts presented the applicant has proved her claim on the required standard.

3. What are the final orders herein?

In answer to question 1, the court draws inspiration from the provisions of order VI rule 9 (1) CPR which makes provision that failure to controvert a pleading operates as an admission subject to proof of the said claims by the required standards. This provision was clarified by the CA in the case of BACHU VERSUS WAINAINA (1982) KLR 108 where it was held interalia that *"at the exparte hearing, the plaintiff was under a legal duty to prove his case against both the defendants (2) that the burden of formal proof is the same as that required in any civil case."*

Also the case of KABUGI AND ANOTHER VERSUS KABIYA AND 3 OTHERS (1987) KLR 347 also a court of appeal decision where it was held interalia that *"the burden on a plaintiff to prove his case remains the same throughout the proceedings even though the burden only becomes easier to discharge where the matter is not validity defended. The burden of proof is in no way less and because the case is heard by way of formal proof."*

Applying these guiding principles to the plaintiff's case herein it is clear that irrespective of the Respondents non participation in these proceedings the applicant is called upon to prove her case on a balance of a probability. Having found so, the task of this court, is to determine whether the applicant has satisfied that requirement. In this courts', opinion, she has done so for the following reasons;-

1. It is uncontroverted that she was married to the respondent.
2. That she jointly contributed to the acquisition of the property.
3. That three other forums have ruled in her favour namely the Kiambu maintenance cause No. 128/1996, Kigumo police station commander, the District officer Kigumo.
4. She has produced documentary evidence to support her case namely:-
  - (i) Certificate of search exhibit 1.
  - (ii) Judgement in Kiambu maintenance cause no. 1282 of 1996 exhibit 2.
  - (iii) A letter from Kigumo police station exhibit 3.
  - (iv) A determination by the District officer Kigumo exhibit 4. All of which stand uncontroverted. The court, therefore proceeds to make a finding that the applicant has proved her case on a balance of probability.

Having ruled that the applicant has proved her case on a balance of probability the court, proceeds to make the following orders:-

1. An order be and is hereby made and declared that the suit land parcel number LOC.2/Gacharage/371 be and is hereby decided to be jointly owned by the applicant and the Respondent herein in equal shares.
2. That the Respondent who is the current registered owner of the suit land holds a half share of the said property in trust for the applicant.

3. That the said trust be and is hereby ordered to be brought to an end.
4. That the current title be cancelled and separate titles be issued in favour of the applicant and the Respondent each owning a half share.
5. That the respondent will pay costs of these proceedings to the applicant under such other and further relief, it is ordered that the Respondent is directed to sign transfer forms to effect the transfer of the half share of the suit land in favour of the applicant.
6. In default of no. 5 above the Deputy Registrar of this court do so sign upon the court, being moved by the applicant for orders to so authorize him to sign the same.
7. There will be liberty apply.

DATED, READ AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF NOVEMBER 2009.

**R.N. NAMBUYE**

**JUDGE**