

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYAAT EMBUCivil Case 116 of 2005

JANET KARIMI NJIRU.....PLAINTIFF

VERSUS

SILVESTER NJIRU NJUE.....DEFENDANT

JUDGMENT

The Plaintiff has come to court by way of plaint claiming to have been married to Defendant under Kikuyu (Embu-Meru) customary law. Her marriage is not registered under any statutory law but it is recognized under the laws of Kenya. Therefore she has to prove the same.

In her reply to his statement of defence, she avers that her suit is within the provisions of Married Women Property Act 1882. However the defendant raises an objection in the manner of filing suit as contrary to provisions of married women Property Act which provides for such suit to be made under Originating Summons. Defendants therefore submits that the suit is incompetent and incurably defective have not been instituted by Originating Summons under Married Women Act Section 17. There is a difference here. Under the married Women Property Act the issue of marriage is not disputed. Therefore the question to be answered by the court is whose property is this? In this suit there are issues to be dealt with which need to be proved by witness evidence to be tested by cross examination. Also I have read the Judgment in Echaria Vs Echaria Civil Appeal No. 75/2001 relied upon by the Defendant. At page 37 (at the top) quote "In *Petitt Vs Petitt [1969] 2 WLR 966* the House of Lords while recognizing that the 1882 Act gave married Women full proprietary rights to the properties that they may acquire nevertheless emphatically held that Section 17 of 1882 Act was purely a procedural provision which did not entitle the court to vary existing proprietary rights of the parties. It is also clear from the case that "the procedure in Section 17 of 1882 Act is not all embracing for the disputes over property between husband and wife could be resolved by ordinary action". I therefore do not find that the suit is incompetent for having been commenced by plaint. However in the case of 1.V.1 1971 E.A, it was held that even in customary marriages parties can invoke the provisions of the married Women property Act 1882. On the issue of her contribution the plaintiff testified that she was married to defendant since 1981 at Nakuru. The Defendant was working with Ministry of Works and she was also working in the same Ministry. In 1986 they both transferred to Embu. Then they settled in Blue Valley Embu Town where they had purchased a plot and built thereon 14 units occupied by tenants. The family comprising of 4 children named in the plaint were also residing in same plot. The house was built in 1982. Both husband and wife were working as mentioned above. The parties were also given land by the Defendant's father in the village called Kianjokoma. Plaintiff states that they developed that land by building a Timber house from the year 1996. Her contribution was from her salary. Her exhibit shows that in February 1998 she received cash Shs.3585/=. For the 1998 she was paid Shs.30,134/= this sum included arrears of salary. And the year 2000 for September she received Shs.4,875/=. These payments are shown in Exhibit 3. She was retrenched in the year 2000. Exhibit 4 is the letter she received on 6/9/2000. She was paid Shs.246,615/= She said she used the money to build in Blue Valley. Since she retired in the year she has not been able to obtain any employment. During her employment she used to earn about 3720 on average. She also in cross-examination said her husband Defendant ID 0282665 was receiving her salary. She said that the

parties were farming tea and coffee. In cross-examination she said there were 4 large units which were fetching Shs.3,100/- each for one month by way of rent and small ones fetching 800/= each rent. The rentals are kept by Defendant because he was collecting the rents himself. She said that when Defendant married her he had nothing. On the issue of finances the defendant said that at the beginning her salary was about 10,000/=.

On the part of the Defendant he denied receiving any financial help from plaintiff in purchasing his land or in the developing it. Finally he said he did not know how his wife spent her money.

On the issue of marriage the evidence is that the plaintiff and defendant started cohabiting as husband and wife in 1981 and continued cohabiting and children were born to them. It is clear there was no formal marriage but the husband defendant said that he did visit the home of the plaintiff and met some relatives. He says he never paid any dowry. However the court takes Judicial notice that in customary settings dowry not paid at any fixed time and that under customary settings dowry is bride wealth for the brides family and it is unbelievable that parents of a girl would fail to inquire as soon as possible as to how their daughter is living with a man and whether there is promise of dowry. Continued cohabitation without promise of dowry would not be possible. In this case I am prepared to believe that there was a promise of payment of dowry sometime in the course of cohabitation and that constituted a valid marriage. In addition there was evidence that the defendant held out the plaintiff as his wife supported by Exhibit 4, 9, 10 & 6. Also it is to be noted that the Defendant's witnesses very grudgingly gave evidence of such a marriage. And there is no dispute that it ended in the year 2003

It is my finding therefore a valid marriage existed between the parties.

On the issue of distribution of matrimonial property it was held in IV.1 1971 alone that there is nothing to suggest that in African situation provision of Section 17 Married Women Property Act 1982 does not apply in Kenya. The significant points here are that the parties cohabited in same housed reading children for such a longtime and the parties were both earning a salary. The plaintiff was a member of subordinate staff and the husband was a storeman in the same department. Therefore whatever salary the Defendant was earning they must each have spent some income towards the cost of their family living. The plaintiff did disclose the amount of her earning. However the Defendant failed to disclose his salary. It cannot have been higher than the plaintiff's. Both were in subordinate class in the Government service. That the Defendant was collecting his wife's cash salary is not disputed. She said so and pointed out that in the back part of the payslip the personal identification number is written as evidence of receipt of salary.

The defendant did not disclose his income at all. He only stated that the purchase price for the plot was Shs.32,000/= from his own savings but did not disclose What was the cost of the construction of the 14 units of housing erected on the plot. Therefore as head of the family he was receiving the income of the plaintiff organizing the expenditure he did not disclose how he did it, but it must be concluded that in his investment the funds from his salary and that of his wife were utilized. The defendant has hidden from the court the amount of income utilized in these investment. Some investment was in constructing and renovating the home in Kianjokoma and the purchase and construction of the plot No. Gaturi/Githimu/3742. The plaintiff is also claiming a share of the home property Gaturi/Nembure/4126 and all other properties of the defendant acquired during marriage.

It is my finding that the plaintiff did contribute towards acquisition of the Defendant's acquired property particularly plot No. Gaturi/Githimu/3742. Lastly on the issue of distribution the plaintiff claims 50% share. I have read the authorities relied upon by the parties and also their respective submissions. The defendant relies on a line of decisions starting with *Essa V Essa* (1996) where it was stated that "The mere fact of marriage does not give one spouse an interest in the property of the other spouse..." and *Pettit vs Pettit* 1969 2 AILE R. 385 and Court of Appeal decision in *Case No. 79/97 Kimani Vs Kimani* (1997 EAR 553 (CAK) where it was said that the wife had not made any substantial contribution that enabled the husband to be relieved from family responsibilities so as to purchase any of the property claimed. There was no evidence adduced to imply a trust" The Defendant also relies on *Gissing Vs Gissing* 1970 2 ALL E.R 780 which also refers to the issue of trust- whether a spouse has a beneficial

interest in property. The plaintiff relies on the authority-

- HCC No. 307/1976 Karanja Vs Karanja
- Civil Appeal No. 74/2002 Muthembwa V.M.
- HCC Gathanya v Gathanya No 80/2003

In the latest Judgment in this line of jurisprudence is the Civil Appeal No. 75 of 2001 Echaria Vs Echaria which was decided by 5 Judges of court of Appeal on 2nd day of February, 2007. A full review was made of the decisions in matters relating to matrimonial property distribution to date. Points to be noted from that Judgment is that a wife does not acquire any beneficial interest in her husband's property by virtue of being married to him and that her contribution has to be ascertained. And after ascertaining the same the court has not only the power to make declaration but even to order transfer of shares to the rightful beneficial owner to give effect to its decision. The facts in this case are that the husband was collecting in cash salary for his wife from her employer she showed some payslips showing the ID number of the Defendant endorsed at the back she said that was evidence that he used to receive the money. There is no evidence to show of contradiction evidence, therefore the Defendant was acting as a trustee for her money.

In the case of Gissing Vs Gissing above mentioned it was held that a case of trust can arise where the wife has made substantial contribution that there would be a resulting trust in her favour and her claim in the interest in land held by a person whether a spouse or stranger there is a proposition that the legal owner holds it as a trustee. In the case where the Defendant was receiving the Plaintiff's salary the court has no doubt that the Defendant was able to fund the purchase of the Blue Valley property because of direct contribution made by the plaintiff. As there is no indication of the amount of funds spent in the purchase and development of the land. It is my find that the plaintiff has proved her contribution to the investments and the distribution has to be made on 50/50 basis. The defendant states that when the Plaintiff received her retirement benefits he opened a bank account for her. The Payment was made November 2000. By this time the property had been purchased and developed and the Defendant was receiving rents income.

After a considering all the above I find that there was a valid marriage of Plaintiff to Defendant and that the parties are no longer cohabiting together. I also find that the plaintiff did contribute financially to the acquisition of plot numbered **Gaturi/Githimu/3742**. There being no proper figures as to the contribution I find that her contribution is to be assessed on 50/50 basis. This is because the funds were in same account held by the Defendant. The plaintiff specifies that her interest is in plot No. 3742. There is no sufficient evidence as to how the Kianjokoma land is held or the value of its construction but the plaintiff is also entitled to half interest thereof.

The final orders are therefore that a declaration is made in favour of the plaintiff as prayer in prayer (a). That property will be subdivided equally and half of which will be registered in the name of the plaintiff. No order is made in respect of prayer (b). However costs of this suit is to be paid to Plaintiff by the Defendant. The subdivision costs of the plot Gaturi/Githimu/3742 shall be paid out of rental income collected by the Defendant.

Orders accordingly

Dated this 29th January, 2008.

J. N. KHAMINWA

JUDGE