



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

Misc. Appli. 398 of 2006

MATHIAS SCHAFER APPLICANT

- Versus -

ALICE NJOKI MUNGAI

THE REGISTRAR OF TITLES

THE ATTORNEY GENERAL RESPONDENTS

J U D G M E N T

This action was commenced by an originating summons dated 1st February, 2006, and brought under section 28 of the Matrimonial Causes Act, Cap 152 Laws of Kenya; section 17 of the Married Women's Property Act, 1882 and any other enabling provisions of the Law. The applicant thereby sought from the court the following orders –

1. **THAT** a declaration be issued that the property known as Plot Number 7255/1/MN Mombasa and the house thereon known as House Number 179 is solely owned by the Applicant or such order as to the ownership thereof as may be just.
2. **THAT** the 1st Respondent do pay to the Applicant Kshs. 12,000/= from October, 1998, that being the monthly rental attracted by the said House No. 179 and which rent the 1st Respondent has been collecting unjustifiably to the exclusion of the Applicant since October 1998 and such payments are to be computed up to and including the time when the ownership of the property known as Plot Number 7255/1/MN and the house thereon known as House No. 179 will be determined by this Honourable Court.
3. **THAT** the 2nd Respondent be compelled to rectify the register to reflect the Applicant as the sole owner of the property known as Plot Number 7255/1/MN Mombasa and the house thereon known as House Number 179.
4. **THAT** the costs of this summons be provided for.

The Application is supported by the affidavit of Mathias Schafer, the applicant himself, sworn on 1st February, 2006. It is premised on the grounds that –

- (a) The applicant and the 1st Respondent herein are now divorced and there are no issues to their former union.

(b) In October, 1998, before the said union, the Applicant purchased the property known as Plot Number 7255/1/MN and the house thereon known as House number 179 in the joint names of the 1st Respondent and himself though the 1st Respondent made no direct or indirect contribution towards the purchase of the said property.

(c) Since October 1998 to date (i.e. 1st February, 2006) the aforementioned house No. 179 has attracted a monthly rental of Kshs. Twelve Thousand (Kshs. 12,000/=) which rent the 1st Respondent has been collecting from the said premises unjustifiably to the exclusion of the Applicant.

(d) Since the 1st Respondent made no contribution towards the purchase of the said property, and that property was not acquired during the subsistence of the said union, the 1st Respondent is not entitled to claim any proprietary interest in the said property.

(e) It is only fair and just that this Honourable Court grants orders sought herein.

Although the 1st Respondent was served by substituted service on orders of the court, she did not enter appearance. Directions were subsequently given that the matter do proceed by affidavit evidence.

On 5th July, 2007, Mr. Maroro, the learned Senior Principal Litigation Counsel, representing the 2nd and 3rd Respondents, applied to be excused from participating in the proceedings. His reason was that the Registrar of Titles was only a nominal defendant who was joined for the purpose of enforcing any orders which the court may make. His request was granted.

At the request of the Advocates for the Applicant, judgment was entered against the 1st Respondent for failure to enter appearance. When the matter came to court thereafter, Ms. Ngugi for the Applicant relied on the grounds set out in the body of the application as well as the supporting affidavit.

It is to be noted from the aforesaid grounds and the supporting affidavit that the suit property was acquired by the Applicant before he married the 1st Respondent. However, the property was registered in their joint names since the time of purchase. I feel reluctant to buy the idea that the 1st Respondent did not make any contribution. If the parties were not married, and the first Respondent did not make any contribution, then why was her name included in the title? It was on the title even before the parties got married, and the agreement for sale, which is exhibited in these proceedings, shows clearly that she was one of the two purchasers. Were it not for the fact that the 1st Respondent did not enter appearance, and the depositions herein are therefore uncontroverted, this is one case in which it would have been appropriate to call for legal arguments on the issue as to whether property acquired in such fashion is not to be treated as matrimonial property. Indeed, by a letter dated 2nd March, 2004 and addressed to the 1st Respondent by the Applicant's Advocates, the applicant had demanded payment of only half the rent which had been paid. I think that this was the right thing to do then, and remains the right to do now, since the property is still in the joint names of the Applicant and the 1st Respondent.

For the above reasons, I make the following orders –

1. With effect from the date of this order, the property known as Plot Number 7255/1/MN Mombasa and the house thereon known as House Number 179 is hereby declared to be owned solely by the Applicant MATHIAS SCHAFER to the exclusion of the 1st

Respondent.

2. The moneys collected by way of rent in respect of House No. 179 standing on Plot No. 7255/1/MN Mombasa from the date of filing of this suit until today be shared equally between the Applicant and the 1st Respondent on a 50 – 50 basis
3. The Registrar of Titles do rectify the register to reflect the Applicant as the sole owner of the aforesaid property known as Plot Number 7255/1/MN Mombasa and the house thereon known as House No. 179.
4. Each party to bear its own costs.

Dated and delivered at Mombasa this 30th day of May, 2008.

L. NJAGI

JUDGE