REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL CASE NO. 2125 OF 2000 (O.S)

VIRGINIA WANJIKU NJOROGE…..……....……....… APPLICANT

VERSUS

FRANCIS NJOROGE ….…… RESPONDENT

JUDGMENT

e t she notice the advertisement for sale thereof in Nation Newspapers. This case has a long history. It started with the Applicant herein, namely; Virginia W. Njoroge filing a suit being H.C.C.S. No.534 of 1992. The claim made in the said case against Francis Njoroge the Respondent herein was that the joint tenancy between them, in respect of property known as Land Reference Number 1160/161 situate at Karen, Langata, Nairobi (hereinafter refereed to as '***the suit property'***), be severed and be partitioned equally between the two.

The suit was heard and determined vide Judgment delivered on 7th October, 1993. The Respondent being aggrieved, filed an Appeal, being Civil Appeal No.44 of 1999. The Court of Appeal after hearing the said appeal, referred the matter back to the High Court and found that the claim filed by way of a plaint was improper and directed that fresh cause be filed under Married Women's Property Act of 1882.

Thus the present cause was filed by way of an Originating Summons on 19th December. 2000 and was supported by the affidavit sworn by the Applicant on 19th December, 2000. The affidavit was struck out having been declared as incompetent and a fresh affidavit sworn by the Applicant on 20th February, 2005 was filed. Thereafter a further affidavit was sworn by her on 16th May, 2008 under the directions of the court.

The Applicant prays in the originating summons that :

(a) A declaration be made that the suit property (L.R.No.1160/161 situate at Karen-Langata, Nairobi) is owned jointly by the parties.

(b) The Applicant be allowed to divide the suit property.

(c) The Applicant be allowed to occupy one of the houses on the suit property.

(d) Costs of the Originating Summons be borne by the Respondent.

The affidavit in support of the O.S. sworn on 20th February, 2005, by the Applicant narrates the history of the acquisition, her contribution towards purchases of several properties during cohabitation and later on sales of many properties except the suit property. She has, in short, stated that since 1966,

the year of their marriage, she has been gainfully employed and ran several businesses acquired during the marriage. She paid rent, paid deposits, and repayment of loans, gave one of the properties (at Ngara) registered in her name to the Respondent to enable him repay loan taken by him. She mentioned the support and assistance given to the Respondent's brothers during the marriage. She sold some properties to meet family financial claims and the remaining portion of her properties was given to her son (Ngong/Ngong/3116.)

As regards the suit property, she averred that she noticed the advertisement for sale thereof in the Nation Newspaper. She followed it up and negotiated to buy the same at the price of Shs.180,000. She went ahead even after the Respondent did not show much interest in the suit property and paid Shs.18,000 as a deposit. She obtained a loan of Shs.135,000. She managed to construct the second house thereon and also houses for chicken and cows. She used the income from Dairy products and poultry to repay the loan. The Respondent, according to her, is in exclusive possession of the suit property since 1980. She annexed documents to support her averments namely, letter approving the loan, withdrawal of money for the deposit etc.

The Respondent responded to the above averments vide his replying affidavit sworn on 23rd March, 2001. The issue of competence of this originating summons filed after the divorce of their marriage , and of limitation, were determined by separate ruling delivered in this cause and thus I am not going to refer to or determine any of those issues. Similarly the issue of Moses Kariuki being an illegitimate child of the Applicant before the marriage is not relevant to the present cause, there being no further averment to the effect that the said child was not accepted and/or did not live with them. On the contrary, in his evidence in the earlier case (pages 145 (143 sic) the Respondent had stated categorically that he had one son, and referring to the aforesaid son.

He denied that any of his relatives lived with them or were given any assistance. In paragraph 7 of his affidavit he avers that he alone financed all the projects and properties acquired during the marriage. In clause (f) of the said paragraph he averred that he repaid the loan on the suit property by monthly instalments of Shs.1,732 and, in paragraph 9 thereof, has stated that he himself financed the rest of development and structures thereon stating, as did the applicant, that there was only one house on the suit property at the time of its purchase.

He complained that the Applicant without his knowledge took a loan of KShs.490, 000/- on the land bearing title Ngong/Ngong/3116 and sold the other properly known as Ngong/Ngong/3117 without his knowledge. He alleged that the Applicant squandered and wasted the matrimonial properties to her advantage and claimed that because of these facts he be allowed to retain the suit property.

In his further affidavit sworn on 7th May, 2008 (which was filed after directions to do so were given by the court), the Respondent annexed documents to show his contributions towards the purchases of the suit property. He averred that initial deposit of Shs.18,000/- was sourced from his business. The receipt enclosed is dated 9th March, 1973 issued in joint names of the parties. The Applicant has on the other hand, in her affidavit in support enclosed a Bank Statement in her name showing debit of the said sum in March, 1973.

He also produced a receipt of a cheque for the sum of Shs.27,000/- given to their Advocates as well as a receipt for stamp duty similarly paid in the sum of Shs.9,210/-. The Account from where those payments were made is in the Respondent's name. Moreover, further payments made and receipts of two mortgage Account, namely 201862831 (56) and NA 2346 are different Accounts. No explanation to show the discrepancy and/or difference is forthcoming.

He further averred that he had made substantial renovations on the suit property and currently has undertaken renovations costing Shs.200,000/-.

At the time the Applicant left matrimonial home, the outstanding loan on the suit property was Shs.86,142/- which he has paid. He further alleged that between 1st November, 1999 and 28th January, 1992 the Applicant withdrew a sum of Shs.504,666/25 from their joint Account without his knowledge

and has refused to give its account. According to him, she also carried away household goods worth Shs.800,000/- on 4th May, 1982.

He reiterated that she sold their business known as Den Stores wherein he had invested Shs.154,822/-, the three motor vehicles wherein he contributed Shs.12,700/- business known as Eskimo Den wherein he has invested Shs.218,455/-, as well as properties known as Ngong/Ngong/3116 and Ngong/Ngong/3117. He added that the Applicant has not accounted for any of the monies realized from those sales. He lastly stated that he paid up a loan of Shs.93,869.85 taken by the Applicant and guaranteed by him to the Barclays Bank.

In Response, to his further affidavit as aforesaid, the Applicant denied the Respondent's contribution towards the initial deposit of Shs.18,000 and reiterated what she had stated in her supporting affidavit. She further alleged that the Respondent has produced the receipt (although in their joint names) for the first time before the court and stressed on the fact that the receipts at Shs.27,000/- and Shs.9,210/- are in their joint names. She further produced a letter dated 22nd May, 1973 from Habenga Corporation Ltd. (Ann.3) which shows that she undertook to pay Shs.27,000/- which was then sourced from the business. She has shown that till that time, the correspondence regarding the suit property were in her name. It was only the time of loan application that she included their joint names and further denied any knowledge of the letter dated 25th April, 1973 (Ann.FN.5) produced by the Respondent. She produced a copy of the loan application (Ann.4), which is signed only by her. She raised suspicion as regards the authenticity of Ann. FN5 produced by the Respondent. She pointed out that the letter Ann. FN5 is dated 25th April, 1973 and the FN7 is dated 16th April, 1973. Thus the details which are annexed to the application (FN7)could not have been supplied along with the letter of 16th April, 1973 (this fact is apparent from the contents of FN5 which acknowledge the receipt of application FN7) what, in my view, is not before the court is the completed form as asked by the Bank giving details. The letter FN5 is addressed to both parties. The application form (Ann.4) annexed to replying affidavit is also dated 16th April, 1973. These facts though in confused state, are relevant factors to be considered by the court.

She also rightly pointed out that some of the receipts are in their joint names. She further averred that in the year 1979, after building a guest house, the family moved in there and rented the main house for Shs.4,000/- She moved out completely in 1980 giving control of the whole suit property to the Respondent. The repayments of loan, thus according to her, was from the rental income received by the Respondent. The failure to pay rates to the City Council, according to her, is a default by the Respondent who was solely receiving rental income.

As regards averment of withdrawal of money by her, she accepted having received Shs.450,000 from the agent, Tyson Limited and not Shs.504,666/25 as alleged by the Respondent. She also denied having removed household goods and claimed that they never had goods worth Shs.800,000/- in any event.

She also explained the sales of properties by her. She averred that Eskimo Den was sold by both of them to off set mortgage (which fact is not on record) and the sale price was also used to educate the Respondent and their child. The proceeds were further utilized to purchase and set up Den stores which was sold as she feared for her safety after harassment by thugs. She denied that Respondent contributed anything towards its purchase or towards purchase of motor vehicles. She reiterated her earlier averments in respect of properties known as Ngong/Ngong/3116 and Ngong/Ngong/3117. She added that she purchased both the properties solely on her own resources and they were thus registered in her sole names.

These are the facts as per affidavits filed by both parties.

After hearing of applications made by parties and several appearances before the court, the matter came before me for further directions on the manner of expeditious hearing and determination of the same, on 24th April, 2008.

After discussion a consent order was recorded as under:

1.The evidence led by both parties in H.C.C.S. No.534/82 be a part of the record of this cause.

2.The parties are at liberty to file further affidavits as regards subsequent actions or facts within 14 days.

3.The parties to provide Record of the Court of Appeal in respect of Civil Appeal (Nairobi) 44 of 1999.

4. The income derived from the suit property be deposited henceforth in an interest earning A/c in the names of both the counsel.

Thereafter the hearing commenced on 22nd May, 2008 and finalized on 13th August, 2008. Several interesting and challenging issues were raised and particularly submissions were made on the Five Bench Judgment of the Court of Appeal delivered in the **Civil Appeal No.75 of 2001 between Peter Mburu Icharia (And) Priscilla Njeri Icharia.**

The court had to take time to deliver this ruling due to complexity of the issues as well as due to perusal, on its own, of the voluminous record of Court of Appeal.

The evidence led by both parties in the earlier case i.e. H.C.C.S. No.534/1982 are on pages 143 to 165 (by the Respondent herein) and on pages 167 to 180 and 206 to 232 (by the Applicant herein).

(The pages are recorded as per the copy of Record of Court of Appeal in Civil Appeal No.44 of 1999 given to the court).

I have endeavoured to peruse the same in compliance with the consent order as to the manner in which the present cause was to be heard.

I may state at this juncture that the Respondent has categorically accepted/conceded that the Applicant was very hard working lady and was solely running the affairs of Hardy Estate. The Respondent was paying money in the accounts of the Applicant on his own volition, so that she could manage her affairs but has fallen short to show from which business he was paying those sums of money. He has further conceded that all the properties (Ngong etc) were registered in the name of the Applicant although he has stated that he had sourced the money. Once again he has failed to show exactly from which business or income he had sourced the same.

The evidence was also led from the Applicant that she had sold property to repay the loan taken by the Respondent, and has conceded that as she was chased away and debarred from carrying on her farm business since 1980, the Respondent paid her loan guaranteed by him.

The issue of business known as Den store and Eskimo Den has been detailed by both parties as having been sold. Similarly, the details of their sale and re-purchase (pages 143 (141) to 146(144), 146(144) are also on record.

The issue of Mwananchi Riverside Store has been mentioned by me in earlier part of this judgment to observe the claim by the Respondent that only due to the production of the Profits and Loss Account of the said company by him, the loan from Savings and Loans Kenya Ltd was obtained.

I have also detailed the issue of payment of initial deposit of Shs.18,000/- by the Applicant, and the Respondent's claim that the said sum was sourced by him, as well as the further payment of Shs.27,000/- in respect of the purchase of the suit property.

The receipts of monthly instalment produced by the Respondent were initially issued in the joint names of the parties and I have observed the two different account numbers shown on the receipts issued.

I would agree with the Applicant that since around 1975 the main house on the suit property was rented

after the family moved in the guest house constructed by them and the repayments were made from the rental income. It is also on record and not disputed that the guest house also was thereafter rented by the Respondent and the whole suit premises was in exclusive possession of the Respondent who was receiving the rent therefrom and using the rental income received to repay the loan.

As a matter of fact consent order dated 15th September, 1982 by Court of Appeal makes it clear which stipulated that:

1. That **the applicant do hand over possession of the vacant house on plot Karen/Langata 1160/161 – to M/s Tyson and Habenga Ltd. within 7days hereof, with instructions to manage the same and to let it as soon as possible at the best rent available;**

2. Out of the rental income, Messrs Tysons and Habenga Ltd. to pay the existing mortgage instalments and interest thereon, which pending such letting shall be paid by the applicant from his own resources; the balance of rental income if any to be deposited by Messrs Tysons and Habenga Ltd. in an interest earning savings account;

3. That the applicant do continue to occupy and use the house and land at present occupied and used by him free of rent;

4. That the applicant undertakes not to sell or charge the suit property or any part thereof until determination of the respondents suit No.534 of 1982.

I clarify that 'the applicant' referred to in the said consent order is the Respondent herein.

There was also an order made on 23rd January, 1992 that each party to get Shs.100,000/- from the rental income received by Savings and Loans on account of Tyson & Company Ltd.

I may also note here that the Applicant has given details of her applcation for loan in excess of her capacity to repay in respect of the properties owned by her. I further note that she applied for such loans after she was chased away (according to her) from the matrimonial home and was trying to settle in her new life on her own.

She has in addition agreed that she has taken Shs.450,000/- from the rental income.

Lastly I do note that the Respondent has not produced the account of rental income from the suit property before the court.

The Respondent has averred that he had made further improvements in the suit premises after the Applicant had moved out from there. The Applicant has averred that she had erected structures for poultry and dairy farming on the suit premises and was running a successful business thereon.

The aforesaid facts are observed in brief, as per the record of the court. Both the learned counsel filed skeleton submissions and made oral submissions thereon.

The following facts are undisputed:

1. The suit property i.e. Land Ref. No.1160/161 is registered in Joint Names of the parties and was purchased during cohabitation.

2. Properties known as Ngong/Ngong/3116 and Ngong/Ngong/3117 are registered in the name of the Applicant.

3. The Applicant and the Respondent both were working for gain. The Applicant till 1973 and the Respondent till 1970.

4. The Applicant ran family businesses.

5. Both parties were running individual Bank Accounts.

6. Since around 1980 the Respondent is in exclusive possession of the suit property which is earning rental income.

7. A consent order before the Court of Appeal as stated herein above was recorded between the parties.

The only issue from the pleadings and facts on record is whether the Applicant is entitled to a share of the suit property and if so, in what portion.

I think I should deal with the Respondent's case first as he has raised several issues namely; he has purchased several properties during the coveture including suit property, the Applicant having not contributed anything towards the purchase of any of the properties, as well as having sold two properties (Ngong/Ngong/3116 and Ngong/Ngong/3117); the Applicant having withdrawn Shs.450,000/- from the Rental income of the suit property. With these facts, the Respondent has contended that Applicant is not entitled to get any share in the suit property. It was stressed that in the interest of justice, the Applicant having benefited as stated hereinbefore, he should be allowed to retain the suit property solely.

In the written skeleton submissions filed by the Respondent, the above contentions are reiterated.

I shall begin with averments made as regards the suit property. It was submitted that the evidence of the Applicant that she paid Shs.18,000/- as a deposit on 29th March, 1973 through her accounts in Savings and Loan is not credible because in her evidence in the earlier case, she produced a passbook of East African Building Society which showed that she did not have sufficient funds. The said exhibit as well as those documents annexed by the Respondent are from Barclays Bank and not from E.A. Building Society and the documents produced by the Respondent are not legible. I may further state that even if there was contradiction in her evidence as alleged, the said contradiction cannot be relevant or fatal to her credibility because Ann. VWN 2 annexed to her affidavit sworn on 19th December, 2000 shows clearly that there is deposit of Shs.18,000/- in her account on 28th March, 73 and there was a debit of Shs.18,000/- on 29th March, 1973. This confirms her averment of the payment of deposit of Shs.18,000/- from her account. Once again, the correspondence as regards the transactions of the suit property clearly show and support that it was the Applicant who sourced the property and paid deposit of Shs.18,000/-.

Despite averments made by the Respondent that he paid the said deposit from his own resources, there is no document to prove that he paid the said deposit or how he sourced the same. The loan of Shs.135,000/- which he claims he got as a result of the supporting document from his business is, even if it is true, not a proof of the payments of the whole sum by him. I have already observed as regards the receipts enclosed by the Respondent and the fact that after the separation, the rental income was received by him and during the process of the suits, there was a consent as regards the mode of deposit of the rental income as well as repayment of instalments. I have detailed these facts in the earlier part of this judgment and do not intend to reiterate the same.

Other contradictions stressed in the submissions made by the learned counsel for the Respondent as regards her concession that he was also paying the loan sometimes as against her assertion that she was paying on her own during three years when the Respondent was studying. I do not think that concession made during her questioning could go against her averments made. However, the Respondent has agreed that he retired from his job earlier than the Applicant and that he has studied during the cohabitation.

I also note that his evidence on the payment of Shs.27,000/- towards the further deposit was paid jointly as well as I do note that her evidence that she took loan from relatives and withdrew some money from her account with EABS cannot go against her credibility. She has consistently said that the said sum was paid jointly and then tried to show how she obtained money to share towards its payments.

The assertion that the two Ngong properties were purchased by substantial contribution from the Respondent also is not very appropriately shown by the testimony of the vendors in H.C.C.S. No.534/82.

As a matter of fact DW 3 Chief Joseph Kelashei's evidence shows to the contrary {pages 249(247), pages 250(248)}. He said that he sold the land to the Applicant and got substantial sums from AFC and a lawyer. He agreed in cross-examination that he took the Applicant to AFC and helped her obtain the loan so that she would pay all the money. He did not know however whether the loan was repaid.

Moreover, in his testimony before the court in H.C.C.S. 540/1982, the Respondent has conceded that he got the two properties registered in the names of the Applicant, as he trusted her. If so, then why he got the suit property registered in joint names in the year 1973 during which period apparently there were no problems in the marriage?

Apart from the oral evidence, I do not have any proof of the payment by the Respondent in respect of the two properties which are registered in the names of the Applicant.

As against that there is evidence that the properties were registered in the name of the Applicant, loans were taken and as per her uncontroverted evidence, she was unable to pay the instalments. AFC then permitted her to sub-divide and sell one portion and other portion now stands in the name of their son. I also note here that the Respondent accepted the said son of the Applicant as theirs in HCCS No.534/82, now he denies that he was his son. I have already made my observations in respect thereto in earlier part of this judgment.

It is also on record that the Applicant was moved (as per her evidence) and/or did move on her own volition from the matrimonial home (as per the evidence of the Respondent) around 1980. She was managing family business before that time and derived income therefrom. After her moving, she did not have any income, and faced financial constraints.

In view of the aforesaid observations, it shall be difficult for the court to ascertain, with balance of probability, that the Respondent contributed either directly or indirectly (whether financially or otherwise) to the acquisition of the two Ngong properties. Thus, I would refrain from finding that there was any beneficial ownership of the Respondent in those two Ngong properties which are registered in the sole name of the Applicant, and I hereby do find so.

The Applicant is an absolute registered owner of the said properties as per Section 23(1) of the Registration of Titles Act, (chapter 281) and I do not have any evidence to hold a proposition that the Applicant holds the same as a trustee on behalf of the Respondent, as the Respondent has failed to prove the resulting trust.

I do thus find that Ngong properties i.e. L.R. Ngong/Ngong/3116 and L.R. No. Ngong/Ngong/3117 were not held by the Applicant in trust for the Respondent.

Accordingly, I shall reject the contention of the Respondent that he is entitled to own the suit property solely and exclusively.

With these findings, I am now left with determination of the issue of shares in the suit property held by each party.

The learned counsel for the Respondent has stressed that the Respondent having developed the suit property extensively after the separation and still is developing the same, his contributions to those developments should be taken into account while considering the severance of the joint tenancy. The learned counsel relied on the Court of Appeal case between **COSMAS K. MUTHEMBWA AND EUNICE KYALO MUTHEMBWA (C.A. No.74/01**)

It is very clear that in the said case, the only issue relevant to this case was that the contribution by a party to the development and improvement of the matrimonial property has to be taken into account and it was

found that value of such development or improvement should be ascertained for assessing contribution. However, it was stressed by the court that each case must be dealt with on the basis of its peculiar facts and circumstances.

The property in **Muthembwa's case *(supra)*** was owned by the husband, while the suit property herein is jointly owned by the parties, and it is on record that both parties claim to have contributed to its Development and some of the development claimed to have been made by the Respondent are made after the cohabitation ceased. It is also on record that after the guest house was built the main house was rented and the rental income was used to repay or service the loan on the suit property. Thus in my view the loan till the date of separation was jointly serviced. Thereafter, with the exclusive possession of the suit property, it was rented and income thereof was exclusively received by the Respondent who was servicing the loan and also the development because there is nothing before me which shows that the Respondent made further developments from his own resources apart from the rental income. With his exclusive possession and being sole beneficiary of the income, I am of a considered view, that the Applicant cannot be held accountable to contribute to the aforesaid expenses, and the Respondent cannot steal a march over her. That view was explicitly expressed in **Muthembwa's case (*Supra),*** and I quote:

"A party not in possession should not, in our view, hold accountable for loans obtained after cohabitation ceased as he or she could not possibly do anything in the matter. So a court ought to determine the respective shares and liabilities of the parties on the basis of the net matrimonial estate on the date cohabitation ceased, and the party <u>who seeks to retain the property should then bear the outstanding loans thereafter</u>." (*emphasis mine*)

With the above observations, I shall now go to the judgment of the Civil Appeal, **<u>Peter Mburu Esharia and Priscilla Njeri Echaria C.C.A No.75 of 2001)</u>**

It is to be understood initially that the property in question in the said case was registered in the name of the husband and that is not the case herein. Similar was the position in **<u>Kivuitu Vs Kivuitu (1991) 2 KAR 241</u>** wherein the Court of Appeal made its decision in respect of jointly owned property. This fact is emphasized by the learned counsel for the Applicant, and I do tend to agree with her.

In **Echaria's case (*supra*)**, the Court of Appeal specifically held that the decision in the **Kivuitu's case (*supra*)** was rightly made. The issue on which the court was asked to determine was whether the observations made in the said case by Omolo Ag. JA (as he then was), was ***obiter dicta*** namely:

"so that where such a husband acquires property from his salary or business and registers it in the joint names of himself and his wife without specifying any proportions, the court *<u>must</u>*** take it that such property being a family asset is owned in equal shares".**

In Echaria's case (***supra***), the issue was whether the finding in **Kivuitu's case** that non-monetary contributions made by a wife should be taken into account in determining the share of each house was reached ***per incurium***. From the facts of the case, it was held that the said holding in Kivuitu's case was ***held <u>per incurium.</u>***

I may go along so far, with the holding of Court of Appeal, but I do pause a question whether the Court of Appeal in **Echaria's case** (***supra***) was, as per the facts and submissions made before it required to determine the issue as regards joint tenancy? With utmost humility I do not see any reason for the Court of Appeal to observe: namely:

"**However, the joint tenants have a right to sever the joint tenancy in their lifetime in which case the joint tenancy is converted into a beneficial interest in common in equal shares. 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 tenants**".

I observe so because immediately after the said observations, the following passage from the text book of

Principles of Family Law by ***S.N. Cretney*** 4th Edition (1984) at 655 and 656, was quoted with approval:

"If the conveyance contains an express declaration of beneficial interests , that is conclusive or (at least) requires a high degree of proof of fraud or mistake if it is to be rebutted. If for example the conveyance states that the parties hold the property upon trust for themselves as joint tenants beneficially (which presupposes equality) it will be difficult for one of them subsequently to assert that he is entitled to more than 50 per cent of the sale proceeds".

I pause here and state that Section 23 of Registration of Titles Act (Cap 281) stipulates the same position. The certificate of title is a conclusive evidence of the indefeasible ownership of the person(s) named therein. The only way the same could be rebutted is with proof of fraud or misrepresentation.

Under Sections 102 (3) of the Registered Land Act (Cap 300), the Joint proprietors can agree or apply for severance of the joint proprietorship. It is clear that the parties herein want the severance of their legal interest. The Respondent herein wants the court to look into his contribution made towards the purchase of the suit property as well as his contributions made in other properties and to declare that he is an absolute owner of the suit Property.

Mrs. Thongori, the learned counsel for the Applicant, has produced a very recent unreported Judgment in the **HCCS No.11/06 (O.S.) between Charles Philip Mason and Venesa Kahaki Mason** delivered by Hon. Maranga J on 8th October, 2008. It is a very interesting judgment and I do commend my brother Judge. I have perused the same and I do agree with the findings made therein as per the facts and circumstances of the case.

I also agree that the Section 107 of the Evidence Act places the burden of proof to the party who asserts a fact. I have observed the similar view in this judgment. I have also made my observations on the issue of joint proprietorship and its implication as regards the matrimonial properties.

Looking to the facts and observations made so far by me, it shall not be justifiable for me to state that the Respondent has proved as per law of Land, as well as that of laws of trust to be entitled to the whole of the property in exclusion to the Applicant.

The Respondent has also failed to disclose the income derived by him from the Rents received in respect of the property. Against that the Applicant has agreed that she has withdrawn Shs.450,000 from the rental income. It shall be difficult for me, due to the non-disclosure by the Respondent as aforesaid, to decide which party has benefited more from the suit property so far. In the premises, I shall proceed on the presumption of equal benefit.

In the premises aforesaid, I do declare that the suit property be severed and both the parties be declared as tenants-in-common in equal shares.

The parties to bear their own costs, this being a family property.

Orders accordingly.

Dated and signed at Nairobi this 24th day of October, 2008.

K.H. RAWAL

JUDGE

24.10.08

Rahab Muringe Nderi Jecinta Mumbi Chege