



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

Civil Suit 18 of 2005 (O.S)

MARY WAMBUI MWATHA..... PLAINTIFF

VERSUS

CHARLES MWATHA NJOROGE..... DEFENDANT

JUDGMENT

The parties herein were married in May, 1969 and their marriage bore four children the first one born in 1969 and the last one was born in 1978. The defendant herein thereafter started living with another woman and has two children from her. These facts are not disputed by the defendant. On the contrary, the defendant admits that he has married another woman and has also agreed that he married the plaintiff under a monogamous marriage system. Thus since 2002 the parties, according to the plaintiff, are separated although the defendant avers that he also considers the plaintiff as his wife and stays at both houses.

He denies also that he has any intention to sell any of the properties acquired by him.

It is further admitted by the plaintiff that the defendant has bought and registered the following properties in the name of the plaintiff, namely

- (a) **3½ acres of land at Juja Thika.**
- (b) **¼ acre plot at Juja Thika**
- (c) **¼ acre plot at Ruiru Thika**
- (d) **1050 shares with Standard Chartered Bank.**

However, his averments that he has given ¼ acre plot to each of their four children is not either proved or admitted by the plaintiff. She further averred that the plots at Juja are in dry and unproductive areas and the plot at Ruiru was sold by her to buy an old car. In short, she does agree that those assets are given to her by the defendant.

On the other hand, the defendant has agreed that the plaintiff has always been employed and at the time of retirement her salary was Shs.19,000/= in 2003. Although in his affidavits and submissions, questions were raised that she has not proved her income in Ann.'1' to his replying affidavit, the defendant has produced the proceedings before the Land Registrar which he himself has agreed that her salary was about Shs.20,000/= and his salary never went beyond Shs.10,000/=. His averments that he became a

businessman in the real estate and was buying, developing and selling the landed properties. He had to take loan by charging the properties and he annexed charges on two properties i.e. Ngenda/Githunguchu/T.3 Kiambu District and Dagoretti/Rutumitu/532. However, I must state that what are annexed were only the first pages. No evidence as to the repayments, discharges etc is before the court.

Apart from the fact that the parties separated due to the defendants relationship with another woman, there is no evidence that the parties has prior differences in the marriage.

In her further affidavit sworn on 11th July 2005, the plaintiff specifically averred that she used her income to pay for rent, water, electricity and telephone bills and for food and household expenses, as well bought her own clothes and that is why the defendant was able to save his entire salary and income to purchase the properties which he registered in his names. She further averred that during construction of the matrimonial property at Dagoretti/Ruthimitu/764, she sold her plot at Ruiru for more than Shs.500,000 which sale was renegotiated by the defendant through his own lawyers and thus she did not have documents for said transactions (see paragraphs 6 and 11 of the affidavit).

These averments are not controverted by the defendant in his affidavits.

With these facts on record the plaintiff, claims that the properties acquired during cohabitation was acquired and/or generated from the joint efforts and funds from both the parties.

She thus asks for following prayers.

1. THAT this Honourable Court be pleased to find and declare that the immovable property hereunder set out, was acquired through and by the joint efforts and funds of the plaintiff and the defendant herein, to wit:-

- (a) *Dagoretti/Ruthimitu/764 (plot with building and matrimonial home)***
- (b) *Dagoretti/Ruthimitu/765 (plot with buildings)***
- (c) *Dagoretti/Ruthimitu/764 (undeveloped plot)***
- (d) *Ngenda/Githunguchu T2 (undeveloped plot)***
- (e) *Ngenda/Githunguchu T3 (developed plot with 1 Flat and 10 apartments) – rented***
- (f) *Ngenda/Githunguchu T3 (undeveloped plot)***
- (g) *Plot in Kahawa West***
- (h) *Motor vehicle – Datsun 1200***
- (i) *¼ plot on L.R. Dagoretti/Ruthimitu/593***
- (j) *4 acres at Gatundu Title No. Ngenda/Githunguchu/907.***

4. THAT the costs of this suit be awarded to the Plaintiff.

The issues that arise for determination, are

- (1) Were the properties mentioned in prayer No.1 as aforesaid, acquired with the joint funds and efforts of the plaintiff and the defendant.**
- (2) If so, what properties and portions of the said properties the plaintiff is entitled to.**

I have already given facts in brief of the matter averred by both parties. I may also state that the averments made by the defendant that some of the properties were acquired before marriage have not been supported by any evidence. On the contrary the valuation reports produced in the list of documents from the defendants, show that properties LR No.Dagoretti/Ruthumuti/764, 765 & 766 were registered in the names of the defendant on 6th April, 1987 after seventeen years of marriage.

The plaintiff, from the facts averred by her claims that the three properties at Dagoretti/Rithumuti/764, 765 and 766 should be registered in her sole names substantiates her claim by averring that their matrimonial home is on one of the properties (plot No.164) and after retirement she does not have income and those properties were acquired when she was substantially contributing towards house hold expense which made it possible for the defendant to acquire thereon.

She concedes the other properties to the defendant.

She further stated that plot 765 has animal sheds and office. Plot No.766 and Dagoretti Ruthumitu/593 are undeveloped plots which she asks to be registered in her names.

The defendant in opposition to the claims of the plaintiff reiterated facts and contended that the plaintiff has not shown how much she contributed, that he has bought four properties in her name and how he could do so if he was incapable to buy other properties? He further mused that if the properties were acquired by joint efforts then the same would have been registered in their joint names. He denied that he relied on any of her support while acquiring any of the properties.

I have already observed the facts of the incomes of both the parties as well as total absence by the defendant that he has not received any contribution from the plaintiff even though he has accepted that her salary has always been higher than himself. I have no evidence as to when he started his business and how and when he applied for loan or repaid. He has not denied the contribution of Shs.500,000 after she sold her own property to construct the matrimonial home. While stating that he did not get any support from her, he did not deny specific averment by the plaintiff that she was solely responsible for all the household expenses.

I am further inclined to agree with the plaintiff that as there was no differences between the parties at the time of acquisitions, she did not deem it necessary to keep the receipts of the expenses incurred by her.

In any event, after contending as above, the defendant in alternative has offered that the two properties L.R. No.Dagoretti/Ruthumitu/764 is valued at Shs.8,500,000/= and plot No.765 is valued at Shs.2,400,000/. These two properties be registered in joint names of the parties and thus any party surviving would take the two solely.

The defendant obviously relied on the Court of Appeal case of **Peter Mburu EIcharia -vs- Priscilla Njeri Echaria C.C.A. No.75/01 (unreported).**

It is true that the court of Appeal in five Judges Bench did find, relying on the English Law of Trust. It is also true that in the said case the property was registered in the name of the husband and thus it bears relevance to the facts of the present case.

The court in ***Icharia's case*** accepted with approval the exposition of Law in English case of **Burns V. Burns (1984) I All E.R. 244.**

I shall quote following observations in the Burn's case (*supra*)

“... if the plaintiff or anybody else, claims to take it from him, it must be proved the claimant has, by some process of the law, acquired interest in the house. What is asserted here is the creation of a trust arising from common intention of the parties. The common intention may be inferred value there has been a financial contribution, direct or indirect, to the acquisition of the house.”

The following observations were made at page 252 (paragraph h) of the Burns' case (*supra*).

“If there is a substantial contribution by the woman to the family expenses, and the house was purchased on a 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 installments”.

Thus a payment could be said to be referable to the acquisition of the house, if for example, the payer either:

- (a) pays part of the purchase price or**
- (b) contributes regularly to the mortgage installments, or**
- (c) pays off part of the mortgages, or**
- (d) makes a substantial financial contribution to the family expenses so as to enable the mortgage installments to be paid”.**

The Court of Appeal, after quoting the above passage, observed,

“That list is not of course exhaustive.”

I do not have to reiterate that the plaintiff has undoubtedly averred which is not denied, that all her salary went towards family expense. The plaintiff undisputedly earned more salary (almost double) than that earned by the defendant, moreover she contributed Shs.500,000/= after selling her own property. I did not have to reiterate what I have already stated hereinbefore, and I do find that the plaintiff has definitely contributed substantially towards family expenses since 1969 upto 2002 which enabled the defendant to acquire properties which he has registered in his names.

I further do find that her contribution is substantial and from the facts of this case, I shall not hesitate to state and find, which I hereby do, that she is entitled to equal shares.

Lastly, I shall have to determine which properties shall be registered in names of the plaintiff.

After demand letter sent to the defendant he did respond stating that he did concede to transfer the three properties upon condition she earned the cautions placed by her on all other properties. It transpired that the issue was brought before the Land Registrar and hence I cannot agree that the defendant is bound by that offer made during negotiations. There are several properties acquired and I also accept that the defendant has registered three properties and given shares to the plaintiff. The fact that one of those assets was sold is not relevant for one to observe or hold against the defendant.

It cannot be ignored that the properties eyed by both parties are those asked by the plaintiff to be registered in her names.

The first property namely Dagoretti/Rithumitu/764 – the matrimonial property and is valued at Kshs.8,500,000/= that of 765 at KShs.2,400,000/. The property at plot 766 is Kshs.500,000/=.

I do not have any value for Dagoretti/Ruthimitu/593. None of these properties is the one amongst those which are registered in the name of the plaintiff. The value of those properties is also not before the court, but I shall hasten to add that her averments that those properties are dug and uncultivated is not denied by the defendant.

The first property which is matrimonial home is occupied by the plaintiff and apart from funding family expenses, she has paid Shs.500,000/= in construction of the home.

As against that Ngenda/Githunguchu/T.3 is valued at Shs.3,000,000/.

Looking at those valuations (which are disclosed and not denied). The plaintiff is claiming more than her equal shares, and it is not as per my observations and as per law.

In the premises aforesaid, I declare that the plaintiff holds 50 percent share in the property known as Dagoretti/Ruthumitu/765, Dagoretti/Ruthumitu/766.

(2) The plaintiff to take fully $\frac{1}{4}$ acre plot on L.R. Dagorettir/Ruthumity/593.

(3) Costs of the originating summons to the plaintiff.

K. H. RAWAL

JUDGE

9.10.08