REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 11 of 2006 (O.S.)

C P M ……
APPLICANT

VERSUS

V K M…….... RESPONDENT

JUDGMENT

In his amended Originating Summons (OS) dated 18th July 2007, and brought under **Section 3A** of the **Civil Procedure Act** and **Order 36 Rule 5** of the **Civil Procedure Rules**, **Charles Philip Mason** (the Applicant) seeks orders:-

1. "That the joint ownership in respect of L.R. No. Kilifi Plot 224 Sec. IV MN Kilifi be severed.

2. That the applicant be allowed to buy the Respondent's share if any of the said property.

3. That the Deputy Registrar be empowered to sign any documents that the Respondent may refuse to sign.

4. That an order do issue declaring that the Respondent is accountable to the applicant in respect of all the household goods amounting to Kshs.7,000,000/- and that the applicant's share thereof be debited from the Respondent's share of the matrimonial property, if any.

5. That an order do issue declaring that the Respondent is accountable to the applicant in respect of the two motor vehicles namely [Particulars withheld] and [Particulars withheld] both of the Toyota Chaser make purchased for Kshs.900,000/- each and that the applicant's share thereof be debited from the Respondent's share of the matrimonial property, if any.

6. That this Honourable Court be pleased to grant such further or other relief as may be just in the circumstances.

7. **That the defendant/Respondent be condemned to pay the costs of this application and incidental thereto."**

The application is based on the grounds that the parties who at the time of acquiring the suit property were husband and wife are now divorced; that the Respondent having on several occasions physically and verbally attacked the Applicant and has further issued threats to the Applicant, the parties are now incompatible and cannot stay together; that the Respondent has removed all the movable assets from the

suit house and is attempting to dispose of it by way of lease or sale; that the Respondent has disposed of the motor vehicles bought by the Applicant but registered in her name.

After the close of the pleadings the parties took directions that the matter be heard and disposed of by viva voce evidence. When the hearing commenced, they recorded a consent that:-

1. "**The fact that there is a marriage between the parties is not in issue though there is a divorce cause pending before the Chief Magistrate.**

2. It is also not in issue that the suit property is registered in the joint names of the parties and that both desire severance of title.

3. **The only issue in this matter is each party's contribution to the acquisition and development of the suit property and therefore the share each is entitled to."**

Soon after recording that consent the Applicant was, on 28th February 2008, granted divorce vide a decree issued in **Mombasa CMC Divorce Cause No. 17 of 2005**. At the hearing of this OS both parties testified but neither called any witnesses.

The Applicant's case, as it emerges from his affidavits and his oral testimony in court, is that he met the Respondent in Dar es Salaam, Tanzania in 1996 and they married on 23rd October 1999 at a marriage ceremony held at the East African Inland Church, Mombasa. After living and cohabiting in Mombasa, Dar es Salaam, Thailand and Canada they returned to Kenya and decided to settle in Mombasa. Their union has not been blessed with any issue.

The Applicant testified that on 14th September, 2001 he bought **ALL THAT** piece of land situate North of Mombasa Municipality in Kilifi District containing by measurement Nought Decimal Three Nine Six Four (0.3964) of a hectare or thereabouts and known as **Subdivision No. 224 (Original Number 179/27) Section IV** (the suit property) for Kshs.2,650,000/-. He produced a receipt for the first instalment of Kshs.1,100,000/- but said he lost the one for the balance of Kshs.1,550,000/-. Both of these sums were taken from the Respondent's account No. 01501-308398-00 at Standard Chartered Bank Kenya Limited, Makupa Brach Mombasa into which he said he had, on 24th August 2001 and 5th September 2001, transferred a total of Kshs.10,101,700/-. He produced as **Ex. 2** copies of the credit advices and statements of the Respondent's bank account showing those remittances. After purchasing the piece of land he said he engaged the services of an architect and a contractor and had a residential house constructed on it at a cost of Kshs.21,546,000

The Applicant further testified that all the amount used in the purchase of the said plot and the construction of the house thereon and much more was transferred to the Respondent's said account at Mombasa from his sources between 24th August 2001 and 29th October 2002. A total sum of 247,500 Canadian dollars was transferred from his retirement accounts that he held in Canada prior to the marriage while 140,000 dollars being the net purchase price of his father's house at Abbotsford British Colombia, Canada was a loan to him from his father. That sum was also transferred from his account to the Respondent's account in Mombasa, making a total of 387,500 Canadian Dollars which, at the exchange rate of Kshs.50/- to 1 Canadian dollar, translated to Kshs.19,375,000/-.

He said that the Respondent did not contribute a penny to the purchase of the land or the construction of the residential house thereon as she was not engaged in any gainful employment. Instead, he claimed, she used all her money, and a lot more of his, on luxuries like throwing lavish parties and travelling to various parts of the world. He refuted the Respondent's claim that his father had given them his house at Abbotsford British Colombia, Canada as a wedding gift. He was categorical that his father gave him the purchase price of that house as a loan which he has not finished repaying.

The Applicant also denied receiving any money from the Respondent while they were in Canada or at any other time at all and her claim that she bought any building materials. He produced receipts and vouchers

(**Ex.6)** for a total of Kshs.15,125,603/- in support of some of the payments he made to the contractor through the architect which included the cost of materials used in the construction of the house. He said he has misplaced the receipts for the other payments but he was firm that the total cost of construction was about Kshs.21,546,000/-. Regarding the Respondent's claim that she supervised the construction of the house, he produced the agreement **(Ex. 8)** he entered into with an architect who he engaged as the Project Manager.

In the circumstances he urged me to find that he contributed 100% to the acquisition of the said piece of land and construction of the posh residential house on it. In event I find that the Respondent is entitled to a share of the property, he prayed for an order giving him the option to buy off her share.

Apart from acquiring the suit property the Applicant said that he fully furnished the house with furniture that he imported from Thailand and Canada and from his father's house in Abbotsford British Colombia, Canada as well as some he also bought locally. He claimed that in his absence the Respondent took away all of it together with other items, including, clothing, cutlery, books, electronics and many others all of whose total value is in excess of Kshs.7,211,800/-. Attached to his affidavit sworn on 18th July 2007, is a list of those items and others allegedly taken away by the Respondent. If I find that the Respondent is entitled to a share of the suit property, he urged me to deduct that sum from her share as well a sum of Kshs.1,800,000/- being the value of two Toyota Chaser motor vehicle registration numbers [Particulars withheld] and [Particulars withheld] which he bought in the name of the Respondent and which the Respondent has since disposed of.

That, in a nutshell, is the Applicant's case.

On her part the Respondent does not oppose this application. As a matter of fact she states that due to the incompatibility of their lives severance should be granted. As far as she is concerned, since the suit property is registered in their names as joint tenants, they each have an equal share of it and the issue of the proportionate contribution of each to its acquisition does not arise.

The Respondent's case as can be gathered from her affidavits and her testimony in court is that soon after their marriage on 23rd October 1999 they went to Canada and stayed in a rented apartment as the Applicant's former wife was still occupying his house. After one year they moved to the Applicant's father's house at Abbotsford in British Colombia, Canada and stayed with him for five months after which he transferred to them that house as a wedding gift and moved to a nursing home in Toronto. After sometime they sold it for 100,000 Canadian Dollars which sum they later on transferred to her bank account in Mombasa as the Applicant did not have an account in Kenya. They used that amount to purchase a piece of land at Kilifi and the balance, together with their individual contributions, was utilised in the construction of a residential house thereon. According to her the house cost the about Kshs.18,000,000/- to construct.

While in Canada and before they decided to come back to Kenya in 2002, the Respondent said that she used to do odd jobs like working in old people's homes and restaurants. She also used to buy various items from Thailand and Germany and sell them in Canada. As she did not have a bank account there she said she gave all her earnings totalling to an equivalent of Kshs.3.6 million to the Applicant.

When they came back, together with the furniture that they got from the Applicant's father's house and some other household items they bought in Canada, she imported a container full of goods like, computers, cell phones, jewelry, wigs, shoes, handbags and clothes in respect of which she paid custom duty of Kshs.400,000/-. She sold those items locally and together with the business she carried out she earned a total of Kshs.4 million the whole of which she used to purchase building materials for the construction of the suit property. She dismissed as unfounded the Applicant's contention that she did not contribute to the acquisition of the suit property.

Besides the said cash contributions the Respondent testified that the suit property could not have been constructed without close supervision. As the Applicant was shuffling between Bangkok in Thailand and Dar es Salaam in Tanzania she claimed to have cooked for the workers on the site, bought building

materials and generally supervised the construction of the house. She has, after construction of the suit property, also been maintaining it.

On completion she said she did landscaping and dug a well both of which cost her Kshs.1 million. She therefore made a cash contribution totalling to Kshs.8.6 million in the acquisition of the suit property. She said this sum, together with the supervision she did and the cooking for the workers, entitles her to an equal share of the suit property.

As regards furniture and household items she said she took into the house some of her own and contributed to the acquisition of the others that they bought from Canada and Thailand. She disputed the value of Kshs.7 million that the applicant placed on them and said that it cost much less than that. She denied taking any piece of furniture or other items from the suit property and claimed that during her last visit to Dar-es-Salaam she discovered that, if anything, it is in fact the Applicant who had taken most of the furniture to his house there.

As regards the two vehicles, she said they jointly bought them in her name. She denied disposing of them herself and said they both sold KAP 527M when the Applicant was not working and used the money for their upkeep. KAR 116P was involved in an accident when under the charge of their driver Ali and written off. She sold the salvage for Kshs.50,000/- and used it to pay the bills in respect of the suit property. In conclusion she said that the value of the vehicles cannot therefore be brought into the severance of their respective shares in the suit property. She urged me to find that she is entitled to half share of the suit property.

This OS is not brought under **Section 17** of the English **Married Women's Property Act of 1882** (MWPA) which, in Kenya is, under the Judicature Act and as was stated in **I Vs I [1971] EA 278,** an Act of general application. It is, as pointed out earlier on in this judgment, brought under **Section 3A** of the **Civil Procedure Act** and **Order 36 Rule 5** of the **Civil Procedure Rules**. Although no issue was raised on that I wish to observe that, in my view, the procedure followed in this case is perfectly in order. Apart from Section 17 of the MWPA disputes in inter-spousal property rights can also be ventilated even in an ordinary plaint as was done in **Ndungu Vs Ndungu [2000] LLR 3497 (CAK)**; by an ordinary originating summons in the Chancery Division as was done in **Pettitt Vs Pettitt [1969] ALL ER 385, [1969] 2 WLR 966**; or, as was stated in **Kamore Vs Kamore [2000] 1 EA 80,** by seeking a declaration where a trust is claimed.

Whatever mode that is adopted what is important to note is that the legal principles to be applied in such disputes are more or less the same. For this reason the English decisions on Section 17 of the MWPA, especially those of the House of Lords in **Pettitt Vs Pettitt (supra)** and **Gissing Vs Gissing [1970] 2 ALL ER 780** which dispelled some erroneous notions hitherto held in earlier decisions and put the law on the right footing are therefore important and of persuasive authority in this country.

Both **Section 17 of the MWPA** and **Order 36 Rule 5** of the **Civil Procedure Rules** are procedural provisions. A reading of both makes that quite clear. The relevant part of the former is as follows:

"In any question between husband and wife as to the title or possession of property, either party…may apply by summons or otherwise in a summary way to any judge of the High Court of Justice…and the judge…may make such order with respect to the property in dispute…as he thinks fit…"

Order 36 Rule 5 of the **Civil Procedure Rules** provides that:

"Any person claiming to be interested under a deed, will, or other written instrument, may apply in chambers by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the person interested."

These provisions being purely procedural, they do not entitle the court to vary the existing property rights of the parties. While considering a claim brought under the provisions of Section 17 of the MWPA, in **Pettitt Vs Pettitt, [1969] 2 ALL ER 385,** for the determination of the parties' rights, Lord Reid stated

thus at page 388 that:

"The meaning of the section cannot have altered since it was passed in 1882. At that time the certainty and security of rights of property were still generally regarded as of paramount importance and I find it incredible that any Parliament of that era could have intended to put the husbands' property at the hazard of the unfettered discretion of a judge (including a country court judge) if the wife raised a dispute about it. Moreover if this discretion, if it exists, can only be exercised in proceedings under s. 17: the same dispute can arise in other forms of action; and I find it even more incredible that it could have been intended that such discretion should be given to a judge in summary proceedings but denied to the judge if the proceedings were of the ordinary character. So are the words so unequivocal that we are forced to give them a meaning which cannot have been intended? I do not think so. It is perfectly possible to construe the words as having a much more restricted meaning and in my judgment they should be so construed. I do not think that a judge has any more right to disregard property rights in s. 17 proceedings than he has in any other form of proceedings."

The other law Lords held the same view which was also adopted in **Gissing Vs Gissing** and locally in **Echaria Vs Echaria Civil Appeal No. 75 of 2001** and even in other decisions prior to it.

I agree with Lord Morris of Both-Y- Gest statement in **Pettitt Vs Pettitt (supra)** at **p. 393** that "the status of marriage [*per se* does] …not result in any common ownership or co-ownership of property." I also concur with him that the notion of "family assets" is devoid of any legal meaning and is just but a lose terminology which refers to assets separately owned by spouses but used for the enjoyment of the family.

Therefore whether the property in which one claims an interest or share is registered in the name of another or in the joint names of such claimant and another and whether one originates proceedings by OS under **Section 17** of the MWPA or under **Order 36 Rule 5,** as has been done in this case, or by plaint or by originating summons for a declaration of trust, the same settled legal principles of property ownership apply. It follows therefore that, though in this case the dispute is between husband and wife, their rights in the suit property must be adjudged on the settled principles of property ownership.

What then are these principles and when do they apply?

As Lord Upjoin put it in Pettitt Vs Pettitt (supra) at p. 405, these are "the principles of law applicable to the settlement of claims between those not so related while making full allowances in view of that relationship." They include, for instance, gifts and where appropriate, the settled principles of trust law.

So save where property is conveyed by one person to another as a gift and there is evidence of that, before one is entitled to a share in the property registered in the name of another, one must prove that one provided the purchase price or contributed to its acquisition. In such case one's contribution must be proved by evidence and a resulting trust will not be easily imputed apply. See **Echaria Vs Echaria (supra).**

Before I delve into the facts of this case, I need to say something about the presumption of equality made in some local cases.

Counsel for the Respondent, relying on the Court of Appeal decision in **Kivuitu Vs Kivuitu, [1991] KLR 248**, and in particular the statement of Gachuhi J.A. that:

"The fact that property is registered in their joint names means that each party owns an undivided equal share therein,"

asserts that such registration *ipso facto* connotes equality. And the Court of Appeal, while dealing with two properties registered in the names of the parties as joint tenants, stated in **Essa Vs Essa[1995] LLR 384 (CAK)** that:

"Where property acquired during the subsistence of a marriage is registered in the joint names of the

spouses, the law assumes that such property is held by the parties in equal shares."

But this is just a presumption and as we know presumptions are rebuttable by evidence. In **Echaria Vs Echaria** the five judge-bench of the Court of Appeal observed that the presumption of equality arising out of the registration of the properties in the joint names of the parties in the above cited cases and in particular in **Kivuitu Vs Kivuitu** is an incorrect statement of the law on the point. With profound respect to the five judges of the Court of Appeal, I do not agree with that proposition. In the absence of evidence, at the time of acquisition of a suit property, of the parties' intention to the contrary, I do not think there is any warrant to jettison that presumption. I am happy that that is an obiter dictum which is not binding on me. In that case the Court of Appeal was dealing with property registered in the name of one of the parties. So the issue of ownership arising from joint registration was not before it.

The correct position, in my view, is that the presumption of equality in such cases is a mere presumption which, like any other presumption, is rebuttable by evidence. Where there is evidence of a party's contribution to the acquisition of a property, I agree with Lord Denning's decision in Bernard Vs Josephs, [1982] 2 ALL ER 162 that "a conveyance into joint names does not necessarily mean equal shares." He added: "If the conveyance contains an express declaration of the shares, that is decisive." But where the conveyance, even to husband and wife, does not contain any such declaration, as is often the case, he went on to say that "the shares are to be ascertained by reference to their respective contributions, just as when it is in the name of one or the other only." That view was shared by the Lord Justices of the English Court of Appeal in their unanimous decision in Goodman Vs Gallant, [1986] 2 W.L.R. 236 where they stated:

"**We respectively agree with Lord Denning M.R.'s observation that a conveyance into joint names does not necessarily mean equal shares, for it does not necessarily have this meaning when the conveyance contains no declaration of the beneficial interests."**

As stated in the consent of the parties set out herein above the only issue for my determination in this case is whether or not both the parties contributed to the acquisition of the suit property and if so what proportion each party contributed. This is what I now want to consider.

Section 107 of the Evidence Act places the burden of proof upon anyone who asserts a fact. Justice Amin must have had this section in mind when he stated in Koinange Vs Koinange, [1986] KLR 23 at p. 43 that "It is a well established rule of evidence, that whoever asserts a fact is under an obligation to prove it in order to succeed". In this case the suit property is registered in the names of the parties as joint tenants and both of them claim to have contributed to its acquisition. They therefore have the burden of each proving his or her contribution.

I have carefully considered the evidence on record and read the Exhibits produced. That the amount used in the purchase price of the suit piece of land and for the construction of the residential house thereon was taken from the Respondent's account No. 01501-308398-00 at Standard Chartered Bank Kenya Limited, Makupa Brach, Mombasa is not in dispute. It is also not in dispute that the Applicant remitted from his accounts in Canada to the Respondent's said account 247500 Canadian dollars which at the rate of Kshs. 50/= to one Canadian dollar works out to Kshs.12,375,000/=. I therefore find that, from his retirement accounts in Canada the Applicant contributed a sum of Kshs. 12,375,000/= to the acquisition of the suit property. What is in dispute, however, is: on whose behalf or for whose benefit was the sum of 140,000 Canadian dollars, equivalent to Kshs.7,000,000/=, being the proceeds of sale from the Applicant's father's house at Abbotsford British Columbia Canada remitted to the Respondents said account. The Applicant says that sum was given to him by his father as a loan while the Respondent claims that the amount represents the proceeds of sale of the Applicant's father's house which he had given to both of them as a wedding gift.

The Respondent's claims that Applicant's father transferred the house to both of them as a marriage gift after which they sold it and remitted the proceeds thereof to her account in Mombasa. She did not produce any document in support of that claim. The transfers of the house to them and from them to the purchaser thereof must surely have been in writing but she did not exhibit any copy thereof. And according to her

they sold the house for an equivalent of Kshs. 100,000/= which is clearly wrong as the amount remitted to her account was Kshs. 140,000/= and not Kshs. 100,000/=. In the circumstances I prefer the Applicant's version of the story to that of the Respondent.

Having watched the demeanour of both the parties in the witness box, I must say that the Respondent did not impress me as a truthful witness. For instance she said that she imported some goods for sale locally in respect of which she paid duty of Kshs. 400,000/=. Asked for proof of that she did not produce any document, even the receipt for that payment. She also claimed that she used all her earnings from the goods she imported and sold locally as well as further earnings from her local business to purchase some of the materials that went into the construction of the suit house. She did not produce even one receipt to support that claim either. In short she has not produced a single document in support of her claim.

I take cognizance of the fact that in affairs of husband and wife it is not normal to find meticulous records with documents in support of everything they do and as was stated in **Balfour Vs Balfour, [1919] 2 K.B. 571; [1918-19] All E.R. Rep 860** many of the domestic arrangements between man and wife do not possess the legal characteristic of a contract. All the law Lords in **Pettitt Vs Pettitt** said more or less the same thing. That notwithstanding, however, they were emphatic that there should be some evidence from which the court can imply or impute the intention of the parties.

I have carefully perused the construction agreement between the Applicant and the architect- **Ex. 8**. Nowhere does it state that the employer was to do any supervision. The architect was the lead consultant. With him were structural, mechanical and electrical engineers as well as a quantity surveyor. From the contractor's vouchers- **Ex.2**, I am satisfied that this was not a labour contract. I therefore find that the Respondents claims that she bought some building materials and that she cooked for the workers on the site are utterly false. In the circumstances I am satisfied and I find that the Respondent's claims of both monetary and non-monetary contributions to the acquisition of the suit property have no basis and are therefore not true.

The Respondent's bank statements produced by the Applicant as **Ex.2** and some vouchers he also produced show that he remitted a total of Kshs. 33,197,063/= to the Respondent's said account between 24th August 2001 and 28th April 2005. I therefore believe his evidence that he solely acquired the suit property. I also accept his figure Kshs. 21,546,000/= as the approximate cost of construction of the house and that the sum of Kshs. 15,125,603/= contained in the vouchers **Ex. 6** is part payment thereof.

That is, however, not the end of the matter. As I have said the suit property is registered in the names of both parties as joint tenants. Counsel for the Respondent has categorically submitted that that registration *per se* connotes equality. Having found that the Respondent did not contribute to its acquisition, the determination of the exact legal position and effect of such registration is, in my view, of vital importance.

A joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares, or, in the legal parlance, without words of severance.

There are two major characteristics of a joint tenancy. They are: the absolute unity of interest that exists between or among the joint tenants, and the right of survivorship.

In the characteristic of the unity of interest between or among the joint tenants, there is, to use the language of Blackstone **(see Blackstone, vol. ii. p. 182),** a thorough and intimate union between the joint tenants. As opposed to a tenancy in common where each tenant owns an undivided (equal or unequal) share in the property, joint tenants have a unity of interest, that is to say, that, although as between themselves joint tenants have separate rights, the interest of each is the same in extent, nature and duration and as against everyone else they are, in reality, in the position of one owner. From the fact that each joint tenant is seised of the whole it follows that in actions as to the joint estate one joint tenant may not sue or be sued without joining the others, and a judgment for possession against one joint tenant is not an effective judgment. **(See 39 Halsbury's Laws of England, 4th Edition Par. 530).**

This unity of interest is fourfold, consisting of the unity of title, time, interest and possession. All the titles are derived from the same grant or conveyance and become vested at the same time; all interests are identical in size and duration and there is unity of possession, since each tenant holds the whole in the sense that, in conjunction with his co-tenants, he is entitled to claim possession and enjoyment of the whole, yet he holds nothing in the sense that he is not entitled to the exclusive possession of any individual part of the whole.

The other major characteristic, which is also the distinguishing feature of a joint tenancy, is the right of survivorship. On the death of one joint tenant his interest automatically devolves to the other joint tenant or tenants by *jus accreescend* (right of survivorship) and this process continues until there is but one survivor, who then holds the land as the sole owner. Owing to this doctrine of survivorship, no severance results from a disposition by will—*jus accrescendi praefertur ultimae voluntati*. The *jus accrescendi* takes precedence over any disposition made by a joint tenant's will, and the same principle applies if a joint tenant dies intestate; a joint tenancy cannot pass under a will or intestacy. It is for this reason that each joint tenant is said to hold nothing and yet he holds the whole. In other words, a joint tenant may become entitled to nothing or to all, according to whether he survives his fellow tenants.

With these principles in mind what then can we say is the legal position where property is conveyed to joint tenants without any declaration in the conveyance of their beneficial interests? In this case the Applicant transferred a colossal amount of money to the Respondent's account in which she was the sole signatory. She could have dissipated it if she wanted to but she did not. From that amount he buys a piece of land and registers it in his name and that of the Respondent as joint tenants with the attendant consequences of such registration as stated above. If the Applicant died before severance could the courts equivocate and entertain a claim by any member of his family that the property solely belonged to him because he solely acquired it? From the legal position as we know it and as stated herein above, this is rhetorical question as the answer is obvious.

I agree with what the authors of **Chesire and Burn's Modern Law of Property, 16th Edition** state at page 242 that in such situation, that is, where property is registered in the names of two or more persons as joint tenants, without the addition of any restrictive, exclusive or explanatory words, the law feels bound to give effect to the whole of the grant, by creating an equal estate in them. In the circumstances I hold that the registration of the suit property in this case in the joint names of the parties connotes equality.

The presumption of advancement also applies in this case. In **Silver Vs Silver, [1958] 1 W.L.R. 259, 261** Lord Evershed called the rule of equity when he said:

"**There is a rule of equity which still subsists, even though in this day and age one may feel that the presumption is more easily capable of rebuttal—a rule that if a husband makes a payment for or puts property in the name of the wife he intends to make an advancement to her."**

The Applicant, well aware that the Respondent had not contributed a penny to its acquisition, and being under no obligation at all, nonetheless had the suit property transferred to and registered in their joint names. What are we to infer from that act to have been his intention other than that he meant to give to the Respondent as a gift half of the property? I am clear in my mind that that is what he wanted to do and the presumption of advancement applies in respect of her half share of the suit property. The presumption also applies to the two motor vehicles the Applicant bought in the Respondent's name.

I am aware that in **Pettitt Vs Pettitt (supra)** Lord Diplock, deprecated the presumption of advancement as anachronistic which has no application in the modern property law when he said at page 414 that:

"**The consensus of Judicial opinion which gave rise to the presumptions of "advancements" and "resulting trust" in transactions between husband and wife is to be found in cases relating to the propertied classes of the nineteenth century and the first quarter of the twentieth century among whom marriage settlements where common, and it was unusual for the wife to contribute by her earnings to the family income. It was not until after World War II that the courts where required**

to consider the proprietary rights in family assets of a different social class. The advent of legal aid, the wider employment of married women in industry, commerce and professions and the emergence of a property-owning, particularly a real-property-mortgaged-to-a-building-society-owning, democracy has compelled the courts to direct there attention to this during the last 20 years. It would, in my view, be an abuse of the legal technique for ascertaining or imputing intention to apply to transactions between the post-war generation of married couples "presumptions" which are based on inferences of fact which an earlier generation of judges drew as to the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era."

We have no legal aid in this country and unemployment, especially among our women, is endemic. There are also statutory backgrounds to Acts like the English Matrimonial Homes Act of 1967 and the Matrimonial Proceedings and Property Act of 1970 which we do not have here in Kenya and which may have been an important factor lying behind the decisions of most of the English cases in this area of law. We cannot therefore slavishly import Lord Diplock's said notion into our jurisdiction where the socio-economic conditions are completely different from those that he said are obtaining in his jurisdiction. Instead we should develop our own version of common law in accordance with the local policy, ethos, economic considerations and the expectations of our people all of which we are the best judges.

It is also important to note that Lord Diplock and the other law Lords in the **Pettitt Vs Pettitt** case did not outlaw the presumption of advancement even in their advanced society but said it is to be infrequently applied and only in the absence of any evidence to the contrary. In this case in the absence of evidence, at the time of acquisition of the property, of the Applicant's intention to the contrary, I think this is one of the cases to which the presumption should be applied.

For these reasons I find that, at the time of acquisition, the Applicant intended to make a gift of one half of the interest in the suit property to the Respondent and the presumption of advancement applies in respect of that share. I accordingly declare that the Respondent holds 50% share in the suit property.

The Applicant seeks that Kshs. 7,000,000/= being the value of the furniture the Respondent spirited away from the suit property and Kshs. 1,800,000/= being the value of the two motor vehicles he bought in the Respondent's name, be deducted from the Respondent's share. As I have already said the Applicant having bought and registered the two vehicles in the sole name of the Respondent they are also caught by the presumption of advancement as gifts to her. They cannot therefore be brought into the severance of the parties' respective interests in the suit property.

As regards furniture, however, from the evidence on record, I am satisfied that the Respondent spirited away from the suit property furniture and other household items whose value is in excess of Kshs.7,211,800/=, but what the Applicant claimed is Kshs.7,000,000/-. That is the sum which sum shall be deducted from the Respondent's share of the suit property.

In the result I find that the parties are each entitled to an equal share or interest in the suit property. As they are now divorced and their lives are totally incompatible, I direct that the suit property be valued by a valuer jointly agreed by both of them and the Applicant buys off the Respondent by paying to her half the value of the property less the said sum of Kshs.7,000,000/= within ninety days. In default the property shall be sold and the proceeds thereof shall be shared as I have said. Upon payment to her of her share less the said sum of Shs.7,000,000/- the Applicant shall transfer her interest in the suit property to the Applicant or his order. Each party shall bear its own costs of this suit.

DATED and delivered at Mombasa this 8th day of October, 2008.

D.K. MARAGA

JUDGE.

DELIVERED this…….day of……..……..2008 by Hon. Justice Azangalala in the presence of

……...……for the applicant and…….....…….…..for the Respondent.