



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**Civil Suit 56 of 2005**

**FESTINA KAMOKO JAMES.....PLAINTIFF**

**VERSUS**

**JAMES KIRERA .....DEFENDANT**

**J U D G M E N T**

Pursuant to the provisions of Section 17 of the married Women's property Act of 1882, Festina Kamoko James, plaintiff herein, took out Originating Summons against her husband James Kirera, the defendant herein in which she sought for the following orders:

(a) *An order declaring that the defendant holds*

(i) *South Tharaka/Tunyai A1480*

(ii) *South Tharaka/Tunyai A1479*

(iii) *South Tharaka/Tunyai A1474*

(iv) *South Tharaka/Tunyai A1475*

(v) *South Tharaka/tunyai A1473*

(vi) *South Tharaka/Tunyai A 1476*

(vii) *Likoni 76473/VII*

*As matrimonial property for his benefit and in trust for the plaintiff.*

(b) *A declaration that the defendant and the plaintiff hold equal rights and or interest in the aforesaid properties as beneficial owners.*

(c) *An order of perpetual injunction restraining the defendant from transferring, alienating, selling or otherwise disposing of the aforesaid properties or interfering with the plaintiff's peaceful occupation*

*thereof.*

*(d) An order directing the defendant to account for all properties in his possession and all other benefits and income received to the plaintiff.*

The Originating Summons is supported by the affidavit of Festina Kamoko James.

The defendant opposed the Originating Summons by filing a replying affidavit he swore on 6<sup>th</sup> April 2005. This court gave directions on 7<sup>th</sup> October 2005 to the effect that oral evidence be tendered in support and against the Originating summons. The plaintiff was allowed to prosecute the Originating Summons *ex parte* when it became clear that the defendant did not attend court despite having been served with a hearing notice.

The plaintiff, Festina Kamoko James, was the only witness who testified in support of the Originating Summons. She told this court that she was married to the defendant for 52 years under the Tharaka Customary Law and rites. Their marriage was blessed with three children namely; Jackson Ndio, Anne Ngaimo and Juliet Gaithe. These children are all adults. She claimed that the properties listed in the Originating Summons were acquired during their marriage. She complained that the defendant attempted to marry another wife with a view of making her to benefit from the matrimonial property. The plaintiff accused the defendant of selling one plot to one Julius who in turn put up a permanent building on the plot. She further claimed that the defendant has sold two plots to Kimanthi and Njeru and is in the process of transferring the same upon the removal of the caution. The plaintiff also admits that the above persons have put up permanent structures. She said she contributed in purchasing the property by using the proceeds of her animals. The plaintiff further stated that the defendant is in the process of selling the plot at Likoni in which she is residing on. She prayed to be paid part of the proceeds of the plots the defendant sold.

I have already said that the defendant did not attend court when the Originating Summons came up for hearing. In the absence of that, I am of the view that it is only fair to see what the defendant said in his replying affidavit filed against the Originating Summons. In that affidavit the defendant states that the plaintiff did not participate nor contribute in purchasing the property listed in the Originating summons hence she cannot claim a share of the property. The defendant also stated that he had subdivided the land known as South Tharaka/Tunyai "A"/2 to enable him transfer the same to his children and not solely for sale. He admitted having sold 5 acres to obtain money to meet his medical care and finance the survey fees on subdivision. The defendant accused the plaintiff of chasing him away from the matrimonial home in conjunction with his daughter called Juliet Karithi.

I have considered the evidence tendered by the plaintiff. I have also taken into account the replying affidavit filed by the defendant and of course the oral submissions made by Mr. Adhoch advocate for the plaintiff. The issues which have emerged for my decision are:

First whether or not the plaintiff contributed in the acquisition of the properties listed in the Originating Summons. Secondly whether the concept of a resulting trust can be inferred. What is not disputed is that the plaintiff and the defendant are husband and wife whose marriage is undergoing difficult times. The defendant has invoked the provisions of Section 17 of the married Womens Act of 1882 to determine her rights over the property listed in the originating summons. The plaintiff claims she contributed in their acquisition while the defendant denies that assertion.

It is trite law that even if the property is registered in the name of one spouse, and there is evidence that the other contributed towards the acquisition of the property then both parties have proprietary interests in that property, hence the person in whose name the property is registered is deemed to be holding the property in trust beneficiary for himself and the other person. The position in Kenya is that where a disputed property is not registered in the joint names of the spouses but is registered in one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportion of financial contribution. In this case the plaintiff claims that she contributed in the purchase of the property listed in the originating summons. She does not state how much she raised. She does not state where and

when the properties were acquired.

In my view it is not just enough to state that one is entitled to a share of the matrimonial property by virtue of a contract of marriage. I have carefully considered the plaintiff's evidence in conjunction with her affidavit in support of the originating summons sworn on 14<sup>th</sup> March 2005. In my view her evidence did not establish how she contributed to the acquisition of the property so as one can infer that she is a beneficial owner. It is not enough to say that one sold her herd of animals to contribute the consideration. It is important to state how much one paid and who sold the land to the defendant. It is not shown how the plaintiff acquired the cows the plaintiff alleged she owned. In end, I find that the plaintiff has failed on a balance of probabilities that there was contribution on her part. In the absence of proof on the first issue, then it is obvious that the second issue must fall on the wayside. This court cannot make a finding of presumption of advancement or presumption of resulting trust in favour of the plaintiff in the absence of cogent and credible evidence.

For the above reasons the originating summons is ordered dismissed with no order as to costs.

**Dated and delivered at Mombasa this 23rd day of February, 2007.**

**J.K. SERGON**

**J U D G E**

In open court in the presence of Mr. Adhoch for the plaintiff/Applicant.

N/A for the defence.