



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 16 of 2004**

**LUCY NDUTA NDIRANGU .....APPLICANT**

**VERSUS**

**SAMUEL NDIRANGU NJOROGE.....RESPONDENT**

**JUDGMENT**

Before me is an Originating Summons dated 2<sup>nd</sup> June 2004 filed by Wambui Ngugi & Company advocates on behalf of LUCY NDUTA NDIRANGU, against SAMUEL NDIRANGU NJOROGE. The Originating Summons seeks for the following orders:-

1. THAT a declaration do issue that properties known as

(a) THIKA MUNICIPALITY BLOCK 17/431

(b) THIKA MUNICIPALITY BLOCK 19/900

(c) KIAMBU/GATUANYAGA/114

(d) WITEITHIE MEN & WOMEN GROUP – *share certificate No. 101 comprising of one share and a plot.*

(e) GATHAITE FARMERS CO-OPERATIVE MAKUYU PLOT NO. 37 *with all buildings and developments thereon acquired by the joint funds and efforts of the applicant and respondent during their marriage and are registered in the name of or in the possession of the respondent are owned jointly by the applicant and the respondent.*

2. THAT a declaration do issue that the respondent holds the said properties in trust for the applicant.

3. THAT the said properties be settled for the benefit of the applicant in equal shares and or in such manner and proportion as this honourable court deems fit and just.

4. THAT the respondent himself, his agents and/or servants be restrained from alienating, encumbering or in any other manner disposing off the said properties.

5. THAT the respondent be condemned to pay the costs of this application and incidentals thereto.

The originating summons was supported by an affidavit sworn on 8<sup>th</sup> June 2004 by **LUCY NDUTA NDIRANGU**. In the supporting affidavit it is deponed that the applicant and the respondent acquired the subject assets during their marriage. That the applicant was working with the Government as a copy typist between 1971 and 1998. That the applicant contributed in the acquisition of the property through her earnings and emotional and moral support. That the two divorced and a decree absolute was issued by court on 16<sup>th</sup> April 2004. That prior to these proceedings the applicant had made a complaint to the District Officer in 1989 and the matter was decided in her favour but the respondent had refused to give her the determined portion of the matrimonial property, but instead threw her out of their home.

In reply the respondent **SAMUEL NDIRANGU NJOROGE** filed a response to the originating summons. He averred that the prayers of the applicant were already in divorce case No. 9 of 2002 and therefore it would be duplication and confusion if proceedings were allowed to continue herein. He further contended that the applicant held some properties in her own name and therefore the allegation that the respondent held property as trustee for the applicant did not arise. He accepted acquiring property during marriage with the applicant but denied that the applicant contributed or had an interest in the property. He contended that it was the applicant who chased him away from the matrimonial home and retained his documents.

Before the matter came up for hearing the respondent by a document dated 19<sup>th</sup> July 2005 and filed in court on the same 19<sup>th</sup> July 2005, made an offer of property to the applicant as follows:-

- (a) *ONE ACRE farming land*
- (b) *ONE residential plot No. 17/431.*

He stated that his offer was based on the fact that the properties held by him are:-

- (a) *a total of SEVEN acres (approx.) of land*
- (b) *two residential plots*

and that, apart from the claimant, there are four sons and one daughter who were entitled to the properties of their father. The respondent also filed an affidavit sworn by himself on 20<sup>th</sup> February 2006 to support the same offer.

The applicant then filed a supplementary affidavit sworn by herself on 13<sup>th</sup> March 2006. She deponed that they acquired properties together with the respondent during their marriage. In particular she was the one who acquired plot No. 114 Gatwanyaga Settlement Scheme, but registered it in her husband's name. In their matrimonial case the District Officer (DO) made an order for division of a plot, because her husband had now re-married. Though in the case it was decided in that case that she should get the house, she would rather have 4 acres out of the land title No. **KIAMBU/GATUANYAGA/114** and the defendant (respondent) should get 2.25 acres plus the house. She averred that they had acquired land title reference No. **MAKUYU/MAKUYU BLOCK 2(GATHAITI) 950** which the defendant (respondent) sold without her consent or authority. That though the defendant (respondent) had intimated that he was willing to give her one plot and one acre, he had not indicated the piece of land that he was willing to give her. That the defendant (respondent) should give her two plots within Thika Municipality being **THIKA MUNICIPALITY BLOCK 19/900** and **THIKA MUNICIPALITY BLOCK 17/431** as he had already sold the Gathaiti land which was over 2 acres.

At the hearing of the originating summons, Mrs. Ndungu, appeared for the applicant, while the respondent appeared in person. Mrs. Ndungu for the applicant submitted that the properties in question were acquired with the joint efforts of the two parties during their marriage. The applicant was a copy typist. Already there was a divorce and a court order for sharing one of the assets. That asset was

identified in the supplementary affidavit. The applicant agreed to forego the house. She was also asking for two other plots, as the respondent had already sold a piece of land, which was matrimonial property. The respondent on his part submitted that he had made an offer to the applicant. The house that the applicant referred to was a building under construction in 1988. He supervised the construction, and it was his sole effort as he used to earn Kshs.1660/= per month while the applicant earned Kshs.175/= per month. He contended that there was no way that the applicant could have built a house.

On plot No. 114 – the documents on balloting showed that it was balloting for freedom fighters in 1962 and it was for his father. He got the plot in the name of his father before he got married to the applicant.

On plot No. 950 Makuyu he submitted that he did not sell it. The plot emanated from a society registered in 1962 in the name of his father. His father sold part of it and gave him part of it which was plot No. 1026. He denied selling the plot.

He conceded that he sold one town plot at Thika, but concluded that the sale was with the knowledge of the applicant. He sold the plot because they had taken a sick child to Pangani Nursing home and were unable to pay the hospital bills.

He contended that he was offering the applicant one acre of land because she was the first wife and had children. That was why he was offering her the biggest portion.

He urged the court to consider that the applicant chased him away from the matrimonial home and exposed him to shame and took away the children.

I have considered the pleadings filed herein and the submissions on both sides. There is no dispute that the applicant and the respondent were husband and wife. They have now divorced.

The originating summons was filed under the provisions of Section 17 of the Married Women's Property Act 1882 of England. That English Act is applicable to Kenya in terms of Section 3(1)© of the Judicature Act (Cap. 8). Several court cases in Kenya have applied Section 17 of the Married Women's Property Act (1882) as a procedural section. Married women can own property during the subsistence of their marriage.

Both parties appear to mention children in their documents as filed and in submissions. Children can inherit or can be given property by either or both parents. They cannot be considered, however, in issues to do with controversies on division of matrimonial property. They are not part of the marriage. They are merely issues of the marriage. Therefore I will not consider property rights of children in my determination of this matter on division of property between former spouses.

In cases of contest on alleged matrimonial property, the court has to consider the following issues. Firstly, is there or was there a marriage between the contesting parties. Secondly, was the property in question acquired during the substance of the said marriage. Thirdly, did the claimant (wife) contribute to the acquisition of the property. Fourthly, if the answer to the third question is in the affirmative, what should be the distribution between the spouses or former spouses.

On the issue of the marriage between the applicant and the respondent, there is no dispute at all. I have already indicated so in this judgment. They both agree that there was indeed a marriage between them. I find that there existed a marriage between the parties. However the said marriage has now been dissolved.

I now turn to the second issue, that is, whether the assets in question were acquired during the subsistence of the marriage? The assets listed in the Originating Summons are five (5) in number. The applicant says in paragraph 2 of the supporting affidavit to the originating summons, that she was married to the respondent on 2<sup>nd</sup> October 1971. There is no dispute on this. She also avers in paragraph 8 of the same affidavit that a decree absolute was granted on 16.4.2004. Again, there is no dispute on this. Before divorce, the two appear to have been staying separate, but the specific date of their separation is

not given. The applicant holds that all the properties were acquired during the subsistence of the marriage. The respondent maintains that some of the assets devolved to him from his late father before the marriage between the parties herein.

I have perused all the documents filed. I see no document dated 1962 as the respondent would wish the court to believe. The earliest document appears to be a share certificate for **GATHAITE FARMERS COOPERATIVE SOCIETY LTD** which was dated 13<sup>th</sup> February 1973. That date was after the marriage between the two which took place in 1971. It is therefore my finding that all the assets herein were acquired during the subsistence of the marriage, as there is no allegation or evidence that any of the assets in issue were acquired after the dissolution of the marriage in 2004.

The third issue is whether the applicant contributed to the acquisition of the assets. This is a matter of evidence, and has to be established by the person who alleges the same. The fact that only one spouse is the registered proprietor of the assets is not a factor against a spouse who contributed to the acquisition of the assets – see **KARANJA – vs – KARANJA 1976 KLR 307** in which Simpson, J (as he then was) stated at page 311.

“I can see no reason to hold that where an African husband and wife in Kenya are both in salaried employment and both contributing to the household expenses and education of the children, these English authorities are not applicable. Their way of life may still result in the registration in the husband’s name with the full approval of the wife of any property purchased while the marriage subsists but this does not necessarily exclude the imputation of a trust in favour of the wife”.

In our present case all the assets in question appear to be in the name of the respondent, however that does not mean that the applicant does not have a proprietary interest if she can show evidence of contribution. The applicant’s position is that she was a copy typist during the marriage earning a salary from the Government until she retired. She does not state in the documents filed, nor in the submission as to how much or to what extent she contributed to acquisition of the assets. The burden was on her to prove, on the balance of probabilities, her contribution to the acquisition of the assets. The fact that she was married to the respondent, and that she was working and earning a salary, per se, did not mean she contributed to the acquisition of the assets.

However, the respondent appears to admit her contribution to the acquisition of the assets by offering to give her some assets on the ground that she was the elder wife and has children. Since the applicant has not come out in evidence to show that she contributed to the assets more than what the respondent is stating, it is my finding that her contribution to acquisition of assets is less than that of the respondent. The uncontroverted evidence is that she was earning Kshs.175/= per month while the respondent was earning Kshs.1,660/= per month. One could talk of emotional support. I think it is on both sides. A married woman provides emotional support to a husband and a married man provides emotional support to a wife. The decision in **KARANJA –vs- KARANJA** (supra) clearly alluded to contribution of the wife to the household expenses and education of the children. In our case there is no such evidence of contribution of the applicant.

The next issue for my decision is the division of the assets. This follows from my findings on the contribution in the acquisition of the assets. From her income, the applicant must have contributed much less than the respondent in the acquisition of the assets. She does not say that she paid for expenses of the upkeep or education of the children. She does not indicate how much she contributed for food or other domestic expenses. Though she stated in paragraph 4 of her supplementary affidavit that she was the person who acquired Plot No. 114 GATUANYAGA settlement scheme, which is registered in the name of the respondent, she does not state how much she paid for the same. She now wants even to change what she was awarded by the Resident Magistrate’s Court Thika in Divorce Cause No. 2 of 1989. She was given two (2) acres from plot No. 114 GATUANYAGA on the 28<sup>th</sup> October, 1989. The decision of the Thika Court cannot be charged, unless the parties agree.

Consequently, and from the facts before me, I affirm the decision of the learned Thika Magistrate on the subdivision of plot No. 114 Gatuanyaga in the decree dated 28<sup>th</sup> October 1989. The applicant will have

the will have the two (2) acres awarded to her by the magistrate, which included a permanent house.

I also order that the applicant do get plot No. THIKA MUNICIPALITY BLOCK 19/900 absolutely. It is slightly bigger than the plot offered by the respondent.

I order that each of the parties will bear their respective costs of these proceedings as this is a family matter.

Dated and Delivered at Nairobi this 7<sup>th</sup> May 2007.

**GEORGE DULU**

**JUDGE**

In the presence of –