



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)  
Civil Suit 1186 of 2004**

S M .....PLAINTIFF

VERSUS

F W K alias

P W K .....DEFENDANT

**JUDGMENT**

The Plaintiff and the Defendant are disputing over ownership of plots known as **L.R. No. Dagoretti/Riruta/[particulars withheld]** and **Dagoretti/Riruta/[particulars withheld]** situate at Ngando area off Road 200 metres from Racecourse. Both parties claim these plots to belong to each of them.

Between 1972 and 2004 these two parties lived together under a relationship which the Plaintiff described as boy and girlfriend while the Defendant described it as that of husband and wife. Out of this union, the parties had two children, **Geoffrey** and **Harriet**. Both are now grown-ups.

During the year 2000 while this relationship subsisted, the Plaintiff saw an advertisement in the East African Standard newspaper of 7<sup>th</sup> February 2000 wherein a firm of auctioneers, Watts Enterprises were to sell by public auction several plots, amongst them **Dagoretti/Riruta/[particulars withheld]** and **Dagoretti/Riruta/[particulars withheld]** on 9<sup>th</sup> February 2000 at their View Park Towers premises Nairobi.

The Plaintiff went home and informed his girlfriend or wife (the Defendant) about it and in fact sent her to view the plots before offering to bid for them.

The Defendant said she went to view the plots and found they were in a suitable area and when she informed the Plaintiff about it both parties accepted to go and bid and, if successful, buy the properties.

Before the day of the auction the Plaintiff went to his bank, Kenya Commercial Bank Limited, Kipande House Branch where he withdrew Kshs.100,000/= for which a banker's cheque was drawn in the name of the auctioneers.

That on the 9<sup>th</sup> February 2000, the Plaintiff and Defendant attended the auction and it was the Plaintiff who did the bidding there.

On being declared the highest bidder, it was the Defendant who was issued with the receipt for the payment of the 25% - exhibit 2 as Kshs.175,000/=.

Though the Plaintiff testified that he paid a deposit of Kshs.100,000/= when the auctioneer who

conducted the auction, **Onesmas Macharia**, appeared in Court he produced a receipt (Defence exhibit 2) which shows that in fact Kshs.175,000/= was paid as the initial deposit. According to **Onesmas Macharia**, the Plaintiff asked him to issue exhibit 2 in the name of the Defendant.

That later the Plaintiff applied for and had another bankers cheque drawn in the name of Cooperative Bank of Kenya

were owed loan money by the owner of the two plots which were being sold, in the sum of Kshs.450,000/= which he said he sent to the auctioneers. It is dated 14<sup>th</sup> February 2000.

According to the Plaintiff he had sold his house at *Uhuru Estate Phase 3 [particulars withheld]* to one *N G* for Kshs.1.5 million part of which he utilized to purchase the two plots.

That he authorized the Defendant to be registered as proprietor of the two plots as trustee and because he had no Pin Number then.

That after he obtained the Pin Number in the year 2001 he asked the Defendant to retransfer the plots to his name but she refused and this is why this dispute arose and the case was filed in Court on 4<sup>th</sup> November 2004.

During cross-examination the Plaintiff stated that the Defendant was only his girlfriend as he had his own home with a family and only used to visit her.

That the Defendant lives in one of the plots *L.R. No. [particulars withheld]* while receiving rent from 61 rooms on *L.R. [particulars withheld]*.

That he is the one who educated the two children he had with the Defendant and that he filed this case not because of differences with the Defendant but because he is the one who purchased the suit plots with his money.

The Defendant also testified in this case and said the Plaintiff was her husband having married her in 1972, paid dowry and built a house for her mother in Muguga.

That though the Plaintiff had another wife, he had left her to come and stay with the Defendant.

That their union gave forth to two children, namely **G M** and **W H M**, 30 and 25 years respectively.

She testified that she was a business woman owning a lorry which helped her fetch charcoal, firewood and water for sale.

That because she left for her work early, she used to give her money on daily basis to the Plaintiff to bank it in his own account since they were husband and wife.

The Defendant testified that she is the one who bought the disputed plots because the money used to buy them was the one she gave to the Plaintiff to bank for her.

That when the Plaintiff saw the advertisement he asked her to go and see if she liked them before they bought them. That she went with him to view the plots and approved of them.

That later they went and talked to the auctioneers who were to sell the plots and they told them that since there were many bidders the Plaintiff was to pay something in advance which he did.

Then during the day of the sale she went to the place with the Plaintiff and she was the one buying the plots.

That later the two went to the bank and withdrew a sum of Kshs.450,000/= which the Plaintiff paid to the

auctioneers in the presence of her son whom the plaintiff asked to witness that he was returning her money to her.

That a week later they went to the Lands Office and title deeds for the plots were issued in the Defendant's name. That even she at that time had no Pin Number and that question did not arise.

She testified that at that time the Plaintiff called the Defendant's brother and other people to tell them how the two parties had cooperated in this matter and that the Plaintiff never asked her at any time to transfer the plots back to him.

That during the years 2001 and 2002 the Plaintiff went away and stayed with his elder wife at Waithaka without coming to her house but in the meantime the Defendant was continuing with renovating the rooms on the wooden structures constructed on the two plots. That when the Plaintiff came there in 2002 and saw the work she had done on the plots he got angry and did not talk to her.

That she had got money from her women group to renovate the rooms which numbered sixty (60). And during all this time the Plaintiff asked came round only to collect money from the matatu he had bought and given to her son to do business with.

According to her, a dispute between her and her husband started in the year 2004 when the Plaintiff her to transfer the plots to him alleging it was him who bought them.

The Defendant claimed the plots as hers because the Plaintiff kept her money. That she had even accepted to be giving him Kshs.5,000/= per month from the plots but he had refused. She concluded that the Plaintiff was her husband and had children with her and that he should leave her plots.

During cross-examination she repeated that the money for buying the plots was hers from her business although the Plaintiff withdrew it from his bank account at Kenya Commercial Bank Limited Kipande House.

That the Plaintiff never gave her receipts when she handed him her money for banking.

That it was her who was having a lot of money at the time since the Plaintiff was a Civil Servant earning very little salary.

That the parties had lived as husband and wife for along time and that their first born was 35 years old and that the Plaintiff had even stood surety for her when she stopped giving birth.

That it was true the Plaintiff had a house which he sold but he used this money to buy a matatu, not the plots.

That though the parties went to Ardhi House together, the Defendant did not hear the Plaintiff say he wanted the Defendant registered as proprietor of the plots because he himself had no Pin Number.

**Onesmas Macharia** testified as to the conduct of the auction on 9<sup>th</sup> February 2000 and that though both parties in this suit were there it was the Plaintiff who did the bidding and paid the initial deposit and also made the final payment but that the witness was asked to issue the receipt in the name of the Defendant **F W K**.

This is the evidence I have heard and recorded in this matter. The Plaintiff's evidence is that it is his money he used to buy the suit plots and that part of the money came from the sale of his house in **Uhuru Estate Phase 3 [particulars withheld]**. He indeed produced an agreement of sale of the property – **House No. [particulars withheld]** to one **N M G** dated 3<sup>rd</sup> September 1990 (see Plaintiff's exhibit No. 9).

No evidence was adduced as to whether the whole or what part of this money was banked in his bank account at Kenya Commercial Bank Limited Kipande House or which other bank and when.

On this aspect, the Defendant said indeed the Plaintiff sold his house but that he used the money to buy a matatu vehicle which he gave to her son G M to do business with. That in fact, after the Plaintiff left the Plaintiff's house in the 2001, he only came there to collect money from the matatu business.

The Plaintiff did not say anything about owning a matatu vehicle but he said in the cross-examination that it is the Defendant who had bought the matatu and a lorry when the two were living together.

Further, there is no dispute that it is the Plaintiff who withdrew money from his Kenya Commercial Bank Limited account at Kipande House Branch to pay the initial deposit. Though he said this initial deposit was Kshs.100,000/=, he directed the auctioneer to issue a receipt in the name of the defendant.

But copy of the deposit receipt produced by the auctioneer and dated 9<sup>th</sup> February 2006 though issued in the name of the defendant, showed the deposit was for Kshs.175,000/=. There was no explanation for the additional Kshs.75,000/= though DW1 said it was brought by the Plaintiff in cash.

Also on 14<sup>th</sup> February 2000 the Plaintiff purchased a bankers cheque from his Kipande House Branch of Kenya Commercial Bank Limited for the balance of Kshs.450,000/=. This cheque was drawn in the name of Co-operative Bank of Kenya, the lender to the owner of the suit plots who had defaulted in repayment of the loan to warrant their sale by public auction. No receipt for this payment was produced, but the Plaintiff alleged it got lost; there was no dispute that this receipt too was issued in the name of the Defendant to necessitate the titles to both plots being issued in her names.

The auctioneer, DW1, told the Court the Plaintiff was the one who competed with the other bidders at the auction and he emerged the winner but that he told DW1 to issue the deposit receipt in the name of the Defendant. He gave no reason to the auctioneer for this action.

The Plaintiff testified that he requested the titles to the suit plots to be issued in the names of the Defendant as trustee and also because he had no pin number. But in the same breath he and the auctioneer confirmed that the Land Registry did not at that time insist on any proprietor of land to have a Pin Number for his or her name to be entered on the register, nor was any witness from that registry called to shade light to the Court on this aspect of the case. Even then there was no evidence that at that time the defendant had a Pin Number or what number it was.

On this very aspect the Defendant testified it is her money which was used to buy the suit plots. That she used to sell charcoal, firewood and water and that this money she gave to the Plaintiff to bank in his account on daily basis. That she had a lorry she used to bring the charcoal, firewood and water for sale.

However, she gave no records to show how much money she gave to the Plaintiff for banking and when. The Plaintiff said in cross-examination that the Defendant had her own account but that there was no money there. This evidence was not refuted.

If this was so, why did the Defendant not ask the Plaintiff to bank her money in her account rather than banking it in his own account?

The Defendant gave the Court the impression she had a lot of money and that the Plaintiff had nothing and that the Kshs.600,000/= used to buy the plots came from her firewood, charcoal and water trade.

If this was true, why did she not use the same source to renovate the rooms on the wooden structures constructed on the plots rather than go and borrow money from women group, though Court was not told how much money was used to do the said renovations?

Of the relationship between the Plaintiff and the Defendant, the Plaintiff called it mere friendship while the Defendant said it was that of husband and wife.

But the period of this relationship was not short. It lasted between 1972 to 2001. That is twenty nine (29) years. Out of this relationship two issues were born. They are grown-ups. It went to such extend

that the Plaintiff bought the suit plots at a public auction and directed that they be registered in the names of the Defendant a wise move given that the Plaintiff has a first and established family.

It was not a simple relationship to amount to that of girl and boyfriends. To my mind the bond between the parties herein was strong enough to amount to that of husband and wife albeit, under Customary Law.

I accept the evidence of the Plaintiff that he paid Kshs.650,000/= for the plots from his account with Kipande House Branch of Kenya Commercial Bank Limited. This price is exceeded by Kshs.25,000/= as shown on defence exhibit 2. There is no explanation for this excess.

But the suit plots were purchased during the subsistence of the marriage between the parties. In fact the Plaintiff asked the Defendant to go view the plots and recommend if they were suitable before they were purchased, and she did approve of them. She went with the Plaintiff to the bank when he drew out a banker's cheque for Kshs.100,000/= for the initial deposit and also attended at the auction.

At that auction the Plaintiff directed that the receipt for the deposit be issued in the name of the Defendant, and I believe even that for the final payment was similarly issued in the name of the Defendant.

And when the titles were issued to both plots at the Lands registry, the Plaintiff also directed that these be in the names of the Defendant.

Though the Plaintiff said he did this because he had no Pin Number and that he got it in the year 2001, he did not ask the Defendant to retransfer the plots to him until the year 2004.

Then it is the Defendant who alone did the renovation on the rooms on the wooden structures constructed on the suit plots. All these important facts are not contravened by the Plaintiff.

What do these facts tell any reasonable person? That the acquisition and development of these plots was through a joint effort by the Plaintiff and the Defendant and each of them had a financial interest therein. This is why the Defendant had volunteered to be paying the Plaintiff a sum of Kshs.5,000/= per month from the income derived there-from.

This dispute, in my view, should be governed by the Married Women's Property Act 1882 being an Act of general Application in Kenya. In times past, An African Woman was presumed to own nothing at all and all she owned belonged to her husband and that she was a chattel of her husband. But all those presumptions no longer hold any water as women now occupy important positions in public life through employment and business ventures – Per *Gachuhi* and *Masime JJA* in *Kivuitu v Kivuitu [1991] 2 KAR 242-4.*

In the present case the Defendant was engaged in the business of buying and selling charcoal, firewood and water. She owned a lorry to assist her transport these commodities for her business. The Plaintiff did not dispute this evidence.

It was agreed that when the plots were purchased, there were temporary structures thereon, with 61 rooms on plot Number *Dagoretti/Riruta/[particulars withheld]* and 9 rooms on *Dagoretti/Riruta/[particulars withheld]*. According to the Plaintiff each room fetched Kshs.1,000/= in rental income at the time.

The Defendant was allowed to occupy or she occupied a space on plot number *Dagoretti/Riruta/[particulars withheld]*. She used her own resources to renovate all these rooms though she said she renovated only 40. She did not intimate how much she gets as rent from the premises per room.

But she contributed directly to the purchase and development of these two plots and I believe this is why the Plaintiff allowed that the purchase receipts at the auction be issued in her name and that the plots

be registered in her name at the Lands registry; see ***Chapman v Chapman [1969] 3 ALL.E.R 476*** and ***Falconer v Falconer [1970] 3 ALL.E.R. 449***.

Even if for one moment I was to find that the Defendant made no direct financial contribution towards the purchase of the suit plots, which I do not believe was the position, her viewing of the plots and approval that they were suitable for purchase, her attendance at the auction with the Plaintiff and her contribution to and supervision of the renovations process of the wooden structures on the suit plots, all would go towards her direct and/or indirect contribution in the purchase of these plots.

In ***Kivuitu's case*** the Judges went out of their way to compare:-

***“not too uncommon situation in Kenya where the wife is left in the rural home tilling the land and generally keeping such home going. The husband is in paid employment in an urban centre and probably sends money home to the wife at the end of each month. The wife may, apart from running the home, be growing and looking after crops such as tea, coffee, maize and such like. She may even be left with the children who attend schools. The husband, using money from his job, acquires property in the town. Can such a wife be said to have contributed nothing towards the acquisition of such property and can only depend on the charity of the husband.”***

OR:

***“an ordinary housewife in Nairobi and other urban centres where this type of dispute is likely to occur. She remains in the house preparing food for the family, and generally keeping the house going. She ensures that the children are in a position to go to school in clean uniforms and also that the husband goes to work in clean clothes and generally attends to work in clean clothes and generally attends to matters which enhance the welfare of the family. True, the money to do all these is often provided by the husband, but can it be said that such a woman is making no contribution to the family welfare and its assets?”***

**Judge Omolo**, then acting Judge of the Court of Appeal, who wrote the Leading Judgment with which **Gacuhi** and **Masime JJA** agreed, said:-

***“For my part, I have not the slightest doubt that the two women I have used as examples have contributed to the acquisition of the property even though that contribution cannot be quantified in monetary terms. In the case of the urban housewife, if she were not there to assist in the running of the house the husband would be compelled to employ someone to do the house chores for him, the wife accordingly saves him that kind of expense. In the case of the wife left in the rural home, she makes even a bigger contribution to the family welfare by tilling the family land and producing either cash or food crops. Both of them, however, make a contribution to the family welfare and assets. So that where such 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 courts must take it that such property, being a family asset is owned in equal shares.”***

This was the position in ***Kivuitu's case*** where, though the property was registered in joint names of the husband and wife, the husband argued that the wife was not entitled to any share therein as she had not made any financial contribution to its purchase. The Court of Appeal ruled that she was entitled to half share thereof.

In the present case, the suit properties were acquired during the Customary Marriage between the Plaintiff and the Defendant.

Though it was the Plaintiff who withdrew the money used to purchase them from his account at Kenya Commercial Bank Limited Kipande House Branch he instructed the Lands registry to register both in the names of the Defendant.

He did not include his name as either joint or half owner thereof. And though he testified that the

Defendant was registered on the plots as trustee, he adduced no evidence to confirm this trust.

So as the situation on the record stands and shows the Defendant is the absolute owner of the suit plots.

I believe, given the circumstances of the case the Plaintiff purchased the two plots with the sole intention of entrusting or giving them to the Defendant when love for each other was then very deep, but after the two parted for whatever reason, which was not disclosed to the Court, he has changed his mind and wants the property returned to him. But the Court should not be swayed by such change of mind.

Moreover, the Defendant testified as to how she had renovated 40 of the temporary structures built on the suit plots and though she did not quantify the amount of money spent, it must be quite substantial. Thus she must be taken as having made a direct financial contribution towards the purchase and/or improvement of the suit plots.

But being mindful of the fact that all the amount of Kshs.650,000/= to buy the suit plots was from the Plaintiff's account, that the reason for the differences between the two parties which caused them to separate was not disclosed and that the Defendant had in fact offered to be paying the Plaintiff Kshs.5,000/= per month from the rental income of the suit plots the dismissal of the Plaintiff's suit would be inappropriate in the circumstances of this particular case.

Neither can I direct that the parties share the rental income from those plots in whatever proportions due to the inconvenience of them meeting for that purpose.

Perhaps the most appropriate order I can make herein is for the Defendant to raise a sum of **Kshs.500,000/=** either through the sale of one of the suit plots, most probably **Dagoretti/Riruta/[particulars withheld]** or from whatever other source to pay to the Plaintiff within six (6) months from the date of this Judgment so as to make him feel compensated for the resources he put in to acquire the suit plots – see **Karanja v Karanja [1976] KLR 307**.

As to the costs of the suit since the parties lived close to twenty nine (29) years as husband and wife each of them should bear his/her own costs of the suit. There shall be leave to apply and these shall be the orders of this Court.

***Delivered, dated and signed*** at Nairobi this 27<sup>th</sup> day of June 2007.

**D. K. S. AGANYANYA**

**JUDGE**