



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
Civil Case 1027 of 1996**

ROBERT KIRERA KINOTIPLAINTIFF

VERSUS

MARY KANYUA KINOTIDEFENDANT

J U D G M E N T

The parties in this case were married on or about 21st February 1981. The Plaintiff is a registered owner of the parcel of land bearing Title Ngong/Ngong/1496 (referred to as “*the suit property*”) since 4th December 1985. According to the Plaintiff when he charged the suit property on 10th July, 1993 to secure an advance of Kshs.1,102,500/=, the defendant/wife agreed to stand as guarantee.

The said loan fell in arrears in June, 1995 and the Plaintiff sub-divided the suit land in six plots – and entered into agreement to sell five sub-plots leaving the sixth sub-plot where the matrimonial home is situate.

The Defendant then lodged a caution on 5th March, 1996 claiming licensee’s interest. The Plaintiff has challenged this caution and seeks to remove the same.

In substantiation of his claim, the Plaintiff adduced evidence and reiterated what is contended in the Plaint dated 25th April, 1996.

From the documents produced in a bundle it is shown that the subdivision of the suit property was as at 4th April, 1995 and he entered into sale agreements for the five sub-plots from 22nd September 1995 to 25th January, 1996.

The Defendant then lodged a caution on 5th March, 1996.

The Plaintiff has produced correspondence starting from 10th November, 1995 to June 1996 as regards the position of the outstanding loan and negotiations as to lifting the caution lodged by the Defendant.

These correspondence show that at least from 16th April, 1996 the Defendant was aware of the arrears on the loan which from 16th April, 1996 was of Kshs.345,024/25 the letter of 15th March, 1996 mentions the same at Shs.1.7 million with interest. However it shows the same at that Kshs.1,590,983.95 as at 6th March, 1996 and it became increased beyond the anticipated amount of Kshs.1,885,000/= which was expected to be received from the sale of sub-divided plots. The arrears according to the evident Shs.250,000/=, still remained outstanding on the last portion where the matrimonial property is situate. I must note that the Plaintiff has not shown how much was received from the sales and how much was

deposited to the Bank to off-set the arrears of the mortgage.

It is also agreed by the Plaintiff that both of them were working. The Defendant rose to the post of a Lecturer from a Teacher in 1991. He also agreed that he was out of country during 1987-1988 and the construction was going on during that period. He denied, however, that she either contributed in cash or kind to the construction. In re-examination he said he bought the materials and his father supervised the construction, they were people from home (while in cross-examination).

Without showing any proof, he stated that in 1993 his salary was between Shs.40,000/= to Shs50,000/= and in 1996 he was earning around Shs45,000/= to Shs55,000/=. He had not brought any payslip despite the Notice to produce had been served. The payable instalments as agreed by him was Shs.20,182 with effect from 16th September, 1993 and he failed to pay the same from the second instalment i.e from October 1993 to February 1994. Same was the fact from September 1995 to August 1996. He also agreed that in August 1996 he paid the Bank Kshs367,185/= and the instalment was reduced to about Shs.7,000/= and from August 1998 to December, 1999 the same was Shs.6,000/= per month. But the arrears were Shs.122,904/= in December 2002 and eventually it accumulated to Kshs.354,550/=.

Despite these facts, he denied that he had any part to play in accumulation of those arrears. He also agreed that sale realized Shs.1,885,000/= and the balance due was Shs.1,624,890/15 and still he could not explain the aforesaid arrears on the house.

It is not denied that their relationship was strained which culminated to her leaving the matrimonial home with the children in November 1995.

In the end he stated and I quote ***“she did not have the right to put the caution being a part-owner --- She was living with the children on the property”***.

He stressed that because of her non-appointment of a trustee, as agreed during negotiation the delay occurred till court order was obtained and properties sold.

I have specified that he admitted there was a surplus after the arrears due was paid in full from the sale-proceeds.

The Defendant in her testimony stated that she was the one who identified the suit property and she gave to the Plaintiff Shs.50,000/= towards down payment. Apart from her teaching job she was running a poultry business and she used the income in buying materials to construct the matrimonial home. When the Plaintiff went to U.K., she supervised the construction and bought the materials needed. She specified all such materials bought by her. The house was completed by the time the Plaintiff came back to Kenya in October, 1988. She was against the idea of loan for improvement on the house proposed by the Plaintiff but he promised to repay from his business and salary. She was forced by him and his father to stand guarantee. He did not use any amount on the house and has not bothered to tell her how he had used the loan amount, and has not talked about its repayment with her. She was not involved in subdivision of the suit property or the proposed sale. She is, since 1995, living with the children when the Plaintiff is enjoying the property.

In March 1996, she came to know about the sale of a plot from one Faith Kanambu and being aware, then she pledged the caution which was to protect her interest as a contributor, wife and mother. She did not appoint a trustee because the Plaintiff did not comply with other agreed conditions.

In cross-examination she also added that upto 1989 the family was living in the compound of Limuru Girls as she was the Deputy Head Teacher. She said that at the time of buying the suit property she did not even think of putting her name which she would do to-day. In 1995 she was forced to leave the house without collecting any of her or her children's belonging.

She denied that the Plaintiff ever informed her about the financial problems and when she became

aware of the problem she was already out of the home with the children. In short she said she contributed in the purchase of the land as well as construction and maintenance of the family home. She stressed that the Plaintiff refused to repay the loan taken even though he was capable and he was the cause of problem. She did what she did to preserve the interest of herself and her children.

This is the evidence before me. It is quite obvious from the evidence that both the parties were working and earning. In absence of any stronger evidence, I cannot accept that the Defendant did not contribute towards the suit property. During cross-examination of the Plaintiff it became quite clear that the arrears of the loan, was due to non-payment of the instalments. He did not explain how he came about the financial constraints when he was earning a handsome salary and the Defendant was also earning from her job as well as from the business.

It is pertinent to note that despite the receipt of sale proceeds he did not complete the repayment. It is on record that he could have paid the full amount and also some balance on his hand.

It is again a common ground that the Defendant moved out from the matrimonial home with the children due to strenuous relationship between the couple.

Some of the sale agreements were entered into after her departure from the matrimonial home and she did not contravene any law lodging the caution to preserve her interest as a married woman. The Plaintiff has similarly failed to prove any damages due to lodging of caution by the Defendant.

Without anything further, under the circumstances of this case, I do find that the Plaintiff has not proved his claim on balance of probability.

In the premises, I dismiss the Plaint with costs.

Dated, Delivered and Signed at Nairobi this 8th day of October, 2007.

K.H. RAWAL

JUDGE