



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Case 88 of 2002

LUCY WARUNDU NDIRANGU.....PLAINTIFF

Versus

DAVID NDIRANGU NJOGU.....DEFENDANT

JUDGMENT

This case is brought under section 17 of the Married Women's Act 1882. The plaintiff seeks her share of the immovable property acquired during the subsistence of the parties marriage. Prior to the hearing of this case, the plaintiff had obtained a divorce at the lower court and the decree was passed on 12th February 2002. Divorce was granted on the grounds of cruelty and adultery by an interlocutory application at the lower court. The court granted the plaintiff orders that the defendant would allow her back into the matrimonial home for the purpose of collecting her personal items. In the plaintiff evidence she stated that on 15th January 1994 the defendant came to the matrimonial home with a lady called Irene Njeri and proceed to chase her away from that home. The manner in which she was chased away she was unable to collect any of her personal items and hence why she moved the lower court for an order to return to collect her person effects. On that day that the defendant came with the lady Irene Njeri he told the plaintiff that he did not want a wife who only gives birth to girls. Before filing the present action she had asked the defendant to give her one of the family properties for her to settle thereon with her children. The defendant declined and hence the present suit.

The plaintiff said that they were married under the Kikuyu tradition in 1969. Later they solemnize that wedding in a church on 28.8.71. When she got married she was employed and was earning Kshs.250/= . On being married she did not resume to her employment but instead became a house wife. When she married the defendant he did not have much in terms of property. She on the other part had a post office account and was rearing pigs for sale. She brought some of those pigs to the matrimonial home. After two months of marriage she was able to sell those pigs to a company called uplands company ltd and the sale fetched Kshs.750/= . They both agreed to buy four more pigs and after two months they later added three more. They opened a joint account. At the time of marriage the defendant was not working but within 3 days he obtained employment at United Club. With his income he would buy feed for the pigs. At one time they agreed to construct a permanent house on the father in law's property where they were residing. To do so they closed their joint account and withdrew the money therein to be used for that construction. It was agreed that the plaintiff would supervise construction. By that time the defendant was working at Marshals. Whilst still at her father in law property she planted 800 coffee bushes. She used to sell the coffee to a factory and the payment was in terms of shares in 'coffee growers'. By the time the defendant chased her away they had accumulated 75 shares. She also planted bananas on the land which she used to sell. The income she got from these projects was what she used in the house expenses because the defendant would only give her Kshs.150/= at the end of the month and Kshs.50/= in the middle of the month. She also planted trees on her property and with her income she was able to

buy property **EUSONYIRO/ILPEJETA BLOCK 1/558**. She got this property by buying shares in a land buying company. The property is 11.5 acres. She had the property registered in the defendant's name. She said that she did so because she never expected that the defendant would never chase her away. She also from the coffee proceeds and other income generating projects purchased two plots from a land buying company where she had one plot registered in the defendant's name and the other in her name. He was allocated **Block III** and she was allocated **Block II**. On being chased away she was unable to retrieve the documents relating to this transaction. She however went to the lands office and was able to trace the property registered in the defendant's name, namely **NGOBIT/SUPUKO BLOCK 111/1186**. She found that the defendant had sold this property and she produced the green card to prove the same. She also was able to purchase a plot in Nanyuki but has never been able to trace documents relating to it. Her father in law gave land which intended to be for both her and the defendant namely, **LAIKIPIA/SALAMA MURUKU BLOCK 1/463**. That property is eight acres. In respect of property **GATARAKWA/GATARAKWA BLOCK III/778** the plaintiff said that it was purchased by one of their daughter and it was not true the defendant purchased it for her. The plaintiff said that she was claiming the house that they built on their father in laws property. She also said that on that property she had constructed two water tanks capable of holding 3,000 gallons. When she was chased away by defendant, she left behind items of property which she had purchased during the marriage. She took the court through a long list of those properties in fine details such as beddings, beds, utensils, crockery, and cooker amongst many others. The court was impressed with her memory of all items of property because she was able to state the number trays, cups and plates that she left behind. She also claimed car spare parts worth Kshs.30,000 that had been purchased by the defendant to use in his business from their joint income. On the property there were animals and chicken. In the stores, she had food, both beans and cereal. There was also food in the farm not yet harvested. The farm produce she used to sell and the proceeds she used to bank in her account at Standard Bank. She exhibited the Bank book of that account. She said that when the defendant chased her away he was not working.

The defendant in his defence said that before separation it was his wife who requested him to leave his employment so that they could work together in the business of slaughtering animals for sale. However on leaving that employment the order for slaughter had been cancelled. He was then unemployed and that it was then the plaintiff began to mistreat him by denying him food. It was then that he decided to start his own business of selling 2nd hand goods. At one time he was informed by his father in law there was an occurrence at his home. On going to his home he found the plaintiff moving their household things. Also out of 140 goats and 22 cows which they owned he only found 44 goat s and six cows. On 15.1.94 the plaintiff and one of their daughter attacked him and then began to scream claiming that it was him attacking them. In respect of all the properties the plaintiff had said she purchased he said that they belonged to him. The house the plaintiff claimed to have supervised construction he said was built by his brother. On being asked by his advocate to comment about the pigs, in answer he said " I don't know about the pigs". He also denied that the plaintiff planted coffee bushes. The property given by his father, he said that the father divided it between him and his sister. He said that the plaintiff was all along a mere housewife whilst he was in employment and therefore concluded that it was he who purchased all those properties the plaintiff is claiming. He then gave a detail of his employment record from 1964. He said that his income always went to support his family. In respect of the property at Ngobit he said that he had also purchase a plot for his wife in her name and he had the documents in respect of that transaction which he would be willing to surrender to the plaintiff and which he exhibited as defence exhibit no. 1.

It is clear from the evidence tendered before court that the plaintiff evidence was very clear and very detailed. Indeed one can say it was too detailed. The plaintiff in very clear testimony was able to tell the court under what circumstance she was able to purchase each of the properties she is claiming half share. That was contrary to defence testimony. On being asked by his counsel, he gave a blanket answer that the properties being claimed by the plaintiff were his and he purchased them from his income. The plaintiff came out as being very forthright honest and believable witness. She displayed much knowledge about what they owned as a family. Had this case come before the court of appeal decision of the case **CIVIL APPEAL NO. 75 OF 2001 between PETER MBURU ECHARIA versus PRISCILLA NJERI ECHARIA** when the legal profession was labouring under the notion that the wordings in *Section 17* was to the effect that the courts could make orders it considered fit with respect to matrimonial property and it was understood to mean that as a matter of right the wife could get half share of matrimonial property

registered in her husband's name on making such an application; this court would have without hesitation awarded the plaintiff the prayers she seeks. Indeed this was the manner in which Lord Denning decided in the case brought under that section namely: **HINES versus HINES (1962) 1 WLR 1124** where he said:-

“it seems to me that the jurisdiction of the court of a family asset under section 17 is entirely discretionary. Its discretion transcends all rights, legal or equitable and enables the court to make such orders as it thinks fit. This means as I understand it that the court is entitled to make such

order as it appears to be fair and just in all the circumstances”.

In the case of **Echaria (Supra)** where the court of appeal at length examined previous decisions of *Section 17* they commented as follows

“in the light of those authorities it is our respective view that both Omollo Ag JA and Kwach JA though undoubtedly guided by a noble notion of justice to the wife were ahead the parliament when they said that the wife’s non monetary contribution have to be taken into account and a value be put on them”.

The court of appeal then went on to inquire why it had taken parliament more than 125 years to enact a law relating to matrimonial property in order to free the country from a law we inherited from England. I would only add my voice to that inquiry.

The position now in respect of case under *Section 17* is that the wife in the case where the property is registered in the husband's name has to prove contribution towards acquisition of that property. The standard of proof of such contribution is on a balance of probability. The plaintiff in her evidence did not produce any documentary evidence to support her statement that she was not only instrumental in sourcing the property they acquire as a family but that she also paid for the purchase of those property from money she had accumulated through her own individual effort. However in acquiring those property she proceeded in having them registered in her husband's name except for one which she registered in her name which is in Ngobit area. That property in her name she was unable to remember registration particulars. The plaintiff was hampered by lack of documents to prove the purchase. Those documents had been left at the matrimonial home. The plaintiff's evidence of being chased away from the matrimonial home was supported by the lower court order of 1st September 1994 ordering the defendant to allow her back into the matrimonial home to collect her personal effects. What however the plaintiff lacked in documentary evidence she made up for it in a clear testimony of how through her own effort in selling items that she produced from the land, and even goat meat she was able to buy the properties she is now claiming. At the beginning they had a joint account which was closed to enable them use the proceed to construct a permanent house. That house was on her father in law's property.

As stated before the plaintiff was painstakingly able to number the pieces of crockery in her house. From the coffee proceeds she purchased the property in Ngobit area. The defendant sold his property in that area and by his exhibit No. 5 it is evident from that consent that the purchase price was Kshs. 580,000. Again through her own effort she was able to buy another property. In respect of the coffee shares which she said were 75 she was unable to put value on those shares.

Having considered in totality the evidence that was adduced before court, the judgment of the court is :

- 1. The plaintiff is awarded Kshs.1000,000/= as the value of the crockery, household goods and animals that were left in the matrimonial home.**
- 2. The plaintiff is awarded judgment for Kshs.290,000/= being half of the sale price of the property sold by the defendant which was registered in his name in Ngobit area.**
- 3. The plaintiff will be given the documents relating to her property which was produced by the defendant as defence exhibit No. 1.**

4. The plaintiff is awarded the costs of this suit.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 14th day of November 2007

BY. M. S. A MAKHANDIA

JUDGE