



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Civil Case 70 of 2002**

**C W K.....APPLICANT**

**VERSUS**

**Z M K.....RESPONDENT**

**JUDGMENT**

The applicant filed an originating summons which was brought under Section 17 of the Married Women's Property Act 1882. She sought a declaration that the following properties were held by the respondent in trust for her:-

- (a) Nakuru/Piave/[particulars withheld]
- (b) Nakuru/Piave/[particulars withheld]
- (c) Nakuru/Piave/[particulars withheld]
- (d) Nakuru/Piave/[particulars withheld]
- (e) Nakuru/Piave/[particulars withheld]
- (f) Plot No. [particulars withheld]
- (g) Plot No. [particulars withheld] at Elburgon
- (h) Plot No. [particulars withheld] at Njoro
- (i) Rongai Gicheha Block [particulars withheld]
- (j) Nakuru/Piave/[particulars withheld]
- (k) Kiamunyi B Plot No. [particulars withheld]
- (l) Motor Vehicle Registration Number[particulars withheld] Datsun by make.

Alternatively, she sought a declaration that she had a legal equitable and contractual right over the said properties in trust for the children of the marriage between her and the respondent and was entitled to control, use and occupation of the parcels of land as matrimonial property. She also sought a perpetual injunction to restrain the respondent from selling or disposing of the

said properties.

In her affidavit in support of the originating summons, she stated that she was a Secondary School teacher and that she got married to the respondent in 1995 in accordance with Kikuyu Customary Law and in 1997 they solemnised the marriage. They were blessed with two children, K M K and M M K who were aged 5 and 3 years respectively as at March 2002 when the suit was commenced.

She claimed that the respondent treated her with cruelty and she filed separation proceedings at Naivasha law courts and a separation order was granted. She claimed that she contributed directly and indirectly to the acquisition of the properties aforesaid and so she was entitled to a share thereof.

In her oral evidence, she stated that when she married the respondent they were staying at **Rongai/Gicheha Block [particulars withheld]** which property belonged to the respondent's father who later transferred it to her husband. She claimed to have contributed towards acquisition of the above named parcel of land and in particular she stated that in 1997 she obtained a loan of Kshs.133,000/- from Mwalimu SACCO and they used the money towards development of all their Nakuru/Piave Plots which she said were adjacent to one another. She produced some receipts to prove that she had bought some building materials towards development of the aforesaid properties.

The applicant further testified that in 1995 they constructed a matrimonial home at **Rongai/Gicheha Block [particulars withheld]** which was valued at Kshs.686,000/- and her husband requested her employer, the Teachers Service Commission, to pay her owner-occupier house allowance based on the value of the said house. Before she could be paid the said allowance by her employer, the chief of Njoro location, one S. K. Njoroge, wrote a letter dated 13/7/98 to the Teachers Service Commission to confirm that she was staying in a house on the aforesaid plot.

The applicant further told the court that between 1998 and 2001 she was the one who was financing their house budget for food and other basic necessities including paying school fees for their first born since her husband was financing their acquisition of the property known as **Kiamunyi B Plot No. [particulars withheld]**. The husband was a lecturer at E U. She claimed that the respondent was intending to sell the suit properties and had instructed an estate agent to look for buyers for the same.

In cross examination, the applicant admitted that the property known as **Plot No.[particulars withheld]** was acquired by her husband in 1994 before they got married but she contributed to its development, she claimed. Regarding the parcels of land **Nakuru/Piave/[particulars withheld]** she said that her husband acquired the same between December 1992 and August 1995. She had however assisted in financing their development, she claimed. **Plot No. [particulars withheld]** at Elburgon was in the name of her father in law and did not belong to herself husband, she conceded, and as for **Plot No.[particulars withheld]** at Njoro she said that it belonged to her and she had already sold it. **Plot No.[particulars withheld]** used to belong to her father in law but he transferred it to her husband sometimes in 1989 before she even met him, she admitted. She, however, assisted in its development, she stated. And as for **Kiamunyi B Plot [particulars withheld]** she said that although the same had been purchased by her husband, she had contributed in its acquisition since she used to provide for the family when her husband was acquiring the same, she claimed.

With regard to Plot No. **Nakuru/Piave[particulars withheld]** she stated that she bought it jointly with the respondent although it was registered in the respondent's name alone. She claimed to have contributed in cash Kshs.20,000/- towards its purchase.

**Motor vehicle registration number [particulars withheld]** was purchased in January, 2000 at

a price of Kshs.235,500/-. The applicant alleged that she contributed Kshs.50,000/- towards its acquisition but the same was registered in the name of the respondent. Sometimes in 2001, the applicant gave out the motor vehicle to Stepman Motor Services and instructed them to sell it. That was done without the respondent's awareness and he even reported to the police that the motor vehicle had been stolen. Later, a dispute arose between the applicant and Stepman Motor Services over the motor vehicle and as at the time of this hearing, a suit was still pending before court.

Regarding Plot Number [particulars withheld], the applicant testified that she contributed Kshs.29,000/- and the respondent Kshs.35,000/- and bought the plot vide an agreement dated 12/2/96.

The respondent testified that he was a lecturer at E U since 1991. He had been a secondary school teacher since 1980 and became a lecturer at M T S C in 1987 and in 1991 he moved to M U. He got married to one G Kin 1978 and together they had six children.

The respondent further testified that he met the applicant in 1995 when she was a student at E U. She graduated on 24/11/1995, he added. He married her in 1997 under the Kikuyu customary law and they got two children. He said that the applicant deserted their matrimonial home in the year 2000 and took family properties including motor vehicle registration number [particulars withheld]. He was legally separated from her by a court order issued in Naivasha Civil Suit No.4 of 2001. The respondent denied having acquired any properties jointly with the applicant. He said that he bought plot numbers **NAKURU/PIAVE/[particulars withheld]** to **[particulars withheld]** between 1992 and 1994 through E U Workers Housing Co-operative Society Ltd. He produced a circular from the said society and a payslip for August 1992 as proof of the fact that he paid for the purchase of the said parcels of land through salary check off system. Thereafter he obtained title deeds for the parcels of land which were issued on 2/5/1996. He also purchased Plot No. **[particulars withheld]** in 1994 and he produced a copy of the sale agreement in respect thereof. He said that **Plot No. [particulars withheld]** belonged to his father, M M N and there was a semi permanent house thereon.

With regard to **Plot No. [particulars withheld] Njoro Site & Service**, he testified that the applicant sold the same to J K and M K in 1999. He produced a letter dated 27/2/2001, (D. Exhibit J) from the county council of Nakuru in proof thereof.

The respondent stated that Plot No. **Rongai/Gicheha Block [particulars withheld]** was acquired by his father in 1974 and in 1980 he transferred it to him and that is where his first wife and their children were living. Its title deed was issued in 1989. He further testified that he bought **Plot No. Nakuru/Piave/[particulars withheld] from S M on 17/4/2001.**

With regard to parcel of land registration number **[particulars withheld]**, the respondent said that he acquired the same between 1999 and 2001 through payroll deduction and by the time he was balloting for it, the applicant had already deserted him. He denied having received any help from the applicant towards its acquisition.

Regarding motor vehicle registration number [particulars withheld], the respondent said that he bought it on 8/1/2000 from Boniface M. Nginge and he produced a copy of the sale agreement but the applicant took it away in November, 2000 and gave it to Stepman Motor Services to sell it on her behalf and the same was sold at Kshs.140,000/-. The respondent said that he used to maintain his two families very well. He denied that the applicant used to give him her student allowance when she was at the university. He further denied that she spent a sum of Kshs.680,000/- to develop the property known as Rongai/Gicheha Block [particulars withheld]. His first wife and her children were living there and the applicant could not therefore have developed the same, he stated. In cross examination, he admitted that both himself and the applicant conspired and lied to the Secretary, Teachers Service Commission when he wrote a letter dated 30/10/1996 stating that as the applicant's husband, he was a small scale farmer and

businessman and that together they had built a house on the said plot and that she was therefore entitled to owner occupier house allowance. The applicant then obtained a letter from the chief of Njoro to support her application for the said allowance. Both parties knew that their area chief had his office in Salgaa but because the thief knew the truth regarding parcel No. **Rongai/Gicheha/Block [particulars withheld]**, that is, the house thereon was occupied by the respondent's first wife, the parties decided to unlawfully influence the chief of a different area to join them in their fraudulent act. As a result, the Teachers' Service Commission started to pay the applicant owner occupier house allowance which she was otherwise not entitled to as she was not living in that house and she had not developed it.

The respondent further stated that he was not aware that the applicant had ever taken a loan of Kshs.133,000/- from Mwalimu Co-operative society SACCO.

The respondent denied that he was intending to sell any of his properties as claimed by the applicant.

It is not in dispute that the applicant and the respondent were married under Kikuyu Customary Law. The applicant testified in court that they got married in 1995 but dowry was paid in 1997. The dowry was paid in monetary form, Kshs.150,000/-. In a joint affidavit sworn by the parties on 17<sup>th</sup> December, 1997 they stated as follows:-

***“1. THAT, we are legal married (sic) husband and wife holders of I/D Cards Nos. [particulars withheld] and [particulars withheld] respectively.***

***2. THAT, we got married the year 1997 (sic) in may and the said marriage was solemnised and conducted under Kikuyu Customary Law where no written certificate was issued to us”.***

From the evidence given by both parties, it would appear that they started cohabiting in 1994 or 1995. The applicant said that it was in 1994 but the respondent said that he met her in 1995. Their first child was born on 27/2/97 and the second one on 1/10/98. Whether the cohabitation started in 1994 or 1995 is not important, the important fact is that the marriage was entered into in 1997 and not earlier. They separated sometimes in the year 2000 and on 8/5/2001 a separation order was made by the court and custody of the two children was given to the applicant and the respondent was ordered to pay a monthly sum of Kshs.7500/- for their maintenance. The originating summons filed by the applicant on 14<sup>th</sup> March, 2002 was brought under Section 17 of the Married Women's Property Act, 1882 (England), a statute of general application in Kenya. The pertinent part of that section reads as follows:-

*“In any question between husband and wife as to the title to or possession of property, either party or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply ... and the judge of the High Court of Justice ... may make such order with respect to the property in dispute, ... as he thinks fit ...”.*

It is common knowledge that under Kikuyu customary law, just as in many other African Customary Laws, payment of dowry, visits by parents and/or elders of the man to the lady's home among other things must take place before a valid customary marriage can be recognised. With respect to this matter, payment of dowry and the like was done in 1997 and that is when the marriage herein was contracted. If the parties were living together before then, that relationship was not of a husband and wife and therefore the provisions of Section 17 of the Married Women's Property Act, 1882 cannot apply thereto. The said law can only come into operation once parties have been legally married, either customarily or statutorily.

It is trite law that where property is acquired during the subsistence of a marriage and is registered in the name of the husband alone, if the wife proves that she made contribution

towards its acquisition, the wife will be entitled to a share of that property. Such share will be as determined by the court and the wife's contribution need not be in monetary terms only. It can take the form of domestic duties and or services provided by the wife to her husband and/or their children, see **KIVUITU VS KIVUITU (1982-1988) 2 KAR 241.**

But where a woman gets married to a man who already had property which he acquired before the marriage was contracted, the woman will not by fact of the marriage alone be entitled as of right to such property. If, however, she can show that she contributed towards development of a parcel of land which was registered in the man's name before their marriage, she may be entitled to a share thereof. Likewise, the act of marriage does not confer on a man any rights over property which the woman had acquired before a marriage between the two was contracted. It was so held by the Court of Appeal in **FATHIYA ESSA VS MOHAMED ALIBHAI ESSA** Civil Appeal No. 101 of 1995 at Nairobi (unreported).

I now turn to the applicants' prayers in the originating summons. I will consider the properties as listed therein in separate categories.

### **1. Parcels numbers Nakuru/Piave/[particulars withheld]**

There is no evidence to suggest that they were acquired during the subsistence of the marriage between the applicant and the respondent. The respondent acquired them between 1992 and 1994 through E U Housing Co-operative Society Ltd. They are all registered in the name of the respondent. The title deeds were issued on 2<sup>nd</sup> May, 1996 and that was before the parties herein got married. However, the applicant said that she had contributed Kshs.100,000/- towards the development of one of those plots. She did not know which one it was. She alleged that they constructed three rooms on one of the plots. Of the three rooms, one was permanent and had a bathroom and a toilet while the other two rooms were semi permanent. She said they also bought two grade cows. She had been given a loan of Kshs.133,000/- and that money was used in the above developments, she claimed. She produced a letter dated 9/6/99 from Mwalimu Co-operative Savings and Credit Society Ltd showing that she had been granted a loan of Kshs.133,000/- and the money had been remitted to her account at Co-operative Bank, Nakuru Branch. She also produced a bundle of receipts as evidence of purchase of various building materials issued on diverse dates between March 1998 and December 2000.

On the other hand, the respondent said that the above plots were not developed except that there was a temporary house built of timber off-cuts and a pit latrine which he put up in 1996. He was not aware that she had taken any loan as alleged.

I have carefully studied the bundle of receipts which the applicant produced as exhibit 5. Some of them are for purchase of iron sheets numbering about 110 pieces, 9 timber doors, 9 frames, 34 pieces of window glasses, several kilograms of nails, etc. Those materials could not have been used to put up just one permanent room and two semi-permanent ones and a bathroom as alleged by the applicant. It would appear that they were used in a much bigger construction. There was no sufficient evidence to prove that the applicant made any contribution towards the development of the structure that is standing on one of the said plots and I hold that the applicant is not entitled to any share of the plots.

### **2. Plot No. [particulars withheld]**

This property was purchased by the respondent in 1994 and that was not denied by the applicant. Her only claim was that she assisted in development of the same. She said that it was developed in the year 2000. There was no evidence that the same was developed and if so, whether she made any contribution thereto. She sought to rely on a bundle of receipts marked as P. Exhibit 6 which are on account of purchase of some building materials but the same are inconclusive and cannot sustain her claim.

**3. Plot No. [particulars withheld]:**

The applicant admitted during cross examination that the said plot belonged to the respondent's father. The parties herein have nothing to do with it.

**4. Plot No. [particulars withheld]:**

The applicant stated that she had been the allottee of the plot but she sold it during the subsistence of the marriage. I cannot therefore make any declaration on the same.

**5. Rongai Gicheha Block [particulars withheld]**

From the evidence on record, that is the matrimonial home of the respondent's first wife. The property initially belonged to the respondent's father but in 1980 he gave it to the respondent and his first wife. The title deed for the same was issued in 1989, long before the applicant met the respondent. The applicant's claim regarding the same is based on a letter dated 30<sup>th</sup> October, 1997 which the respondent wrote to the secretary, Teachers' Service Commission and stated as follows:-

**"RE: MY WIFE'S HOUSE ALLOWANCE.**

*I am grateful to inform you that C W K (M) TSC No. [particulars withheld] my wife and we have been lucky to build our own house on my shamba (Rongai/Gicheha Block [particulars withheld]).*

***I am a small scale farmer and businessman, therefore my wife has the freedom to use the house and the title deed to claim for owner occupier. I will be grateful for the assistance you will accord her towards this end.***

*Yours faithfully*

*(signed)*

**Z K**

**Cc**

***Headmistress – [particulars withheld]. School***

***Inspector of Schools – Njoro Zone***

***District Education Officer – Nakuru District***

***Provincial Director of Education – Rift Valley Province."***

The said letter was sent through the Chief, Njoro Location and on 13<sup>th</sup> July 1998 the said chief sent a letter to the Secretary, Teachers' Service Commission which read as follows:-

**"RE: HOUSE ALLOWANCE**

**C W K**

**TSC NO. [particulars withheld]**

***The above who is a teacher at [particulars withheld] is the wife of Z Kof P. O. Box 439, Njoro. They own a plot (shamba) – Rongai/Gicheha Block [particulars withheld] and have put up a permanent house. I therefore confirm that she is entitled to a house***

**allowance. Please assist her where necessary.**

**(signed)**

**S. K. N.”**

The said house was allegedly inspected and valued at Kshs.686,000/-. In her examination in chief, the applicant said that they constructed the house in 1995 and in her cross examination she alleged that she had contributed about one third of the cost towards its construction. However, both parties agreed that there was conspiracy between them and the chief of Njoro location which was aimed at securing owner occupier house allowance for the applicant. The three of them actually engaged in real corruption, as I believe the Teacher's Service Commission began to pay to the applicant owner occupier house allowance. The truth of the matter is that the applicant never lived on the said property and neither could she have assisted in developing the same when the respondent's first wife was living there with her children. I reject the applicant's claim over the property. I direct that copies of this judgment be forwarded to the Teachers' Service Commission and to the District Criminal Investigations Officer so that they can carry out proper investigations into the issue and possibly prefer appropriate charges against the relevant persons.

**6. Nakuru/Piave/[particulars withheld]:**

There is on record a sale agreement for this plot dated 17/4/2001 and the same is between Stephen K M as the vendor and the respondent as the purchaser. The purchase price was Kshs.65,000/-. The applicant alleged that she contributed Kshs.20,000/- towards its purchase.

According to the proceedings in the Senior Principal Magistrate's Court at Naivasha which were produced as Exhibit No. 12, the applicant filed the separation suit sometimes in January, 2001, having moved out of their house and gone to live with her parents on 27/11/2000. It is therefore inconceivable how she could have agreed to give to the respondent Kshs.20,000/- in April 2001 as her contribution towards purchase of the said property. The applicant's allegation is baseless and I reject the same.

**7. Kiamunyi B Plot No. [particulars withheld]**

The applicant testified that she used to provide for the family when the respondent was acquiring the said plot. He acquired it through E U H C S Ltd. Balloting for the plots was done on 1/12/2001. By that time the parties had already separated. The purchase of the property took place between 1998 and 2001. I find that the applicant contributed towards the acquisition of this property between 1998 and the time they were separated as she was helping in financing their house upkeep and provision of necessities like food and clothing. Balloting for the plots must have come at the tail end of the acquisition process. I hold that the applicant is entitled to fifty percent of the value of this property. The same should be valued by a reputable registered valuer so that the respondent pays to the applicant half of its value and pending so doing, the respondent is hereby restrained by himself, his servants and/or agents from disposing of the same or dealing with it in a manner detrimental to the applicant's interest.

**8. Motor Vehicle Registration Number [particulars withheld]**

As both parties testified that there is a civil suit in court regarding the sale of the above motor vehicle, I will not make any orders herein as that may be prejudicial to either of the parties' interests.

In conclusion, except for the orders which I have made in respect of **Kiamunyi B Plot [particulars withheld]** I dismiss the rest of the applicant's claims. Each party will bear its own costs.

DATED, SIGNED AND DELIVERED at Nakuru this 18<sup>th</sup> day of May, 2006.

**D. MUSINGA**

JUDGE

**18/5/2006**

Judgment delivered in open court in the presence of Mr. Machage for the applicant and Mr. Mugambi for the respondent.

**D. MUSINGA**

JUDGE

**18/5/2006**