



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 144 of 2003

LILIAN MWERU THUITA.....APPLICANT

VERSUS

SAMUEL THUITA WANJAMA.....RESPONDENT

JUDGMENT

The applicant, Lilian Mweru Thuita (*hereinafter referred to as the applicant*) filed originating summons seeking a declaration to be made under **Section 17 of the Married Women's Property Act (1882)** that she is entitled to a half a share in parcel number LR. 12250/142 situate at Free Area Nakuru (*hereinafter referred to as the suit land*) together with all the buildings and improvements erected thereon. The applicant states that she is entitled to the said equal share with the respondent Samuel Thuita Wanjama (*hereinafter after to as the respondent*) because she had contributed to the construction of the said buildings which was their matrimonial home. The suit is supported by the annexed affidavit of Lilian Mweru Thuita. In the said affidavit, she depones that she was married to the respondent under the Kikuyu Customary Law in 1993 after which they cohabited together at Nakuru on the suit property as husband and wife until the year 2000 when the respondent forcefully removed her from the said premises. She deponed that she had contributed substantially to the construction of the premises which are now situate in the said parcel of land.

The respondent opposed the suit. He filed a replying affidavit whereby he deponed that he was not at the material time or any other time married to the applicant under any system of law. He denied that the applicant had contributed in any way to the purchase or the construction of the premises situate on the said property. He deponed that the buildings on the suit premises were constructed by his sole resources and not with any assistance from the applicant. He urged this court to dismiss the suit.

At the hearing of the suit, the applicant called two witnesses in her bid to establish her case. She testified that she is a teacher at St. Xavier's Primary School. In February 1993, she met with the respondent who was then working as the District Occupational Health Officer, Kericho. They became friends and by August 1993, they were engaged. The applicant visited the parents of the respondent soon thereafter. On the 4th of August 1993, the respondent and his relatives visited the parents of the applicant. Among the relatives of the respondent who was present during the visit was the respondent's mother. The respondent paid the sum of Kshs 6,000/= to the parents of the applicant as introduction fee. Thereafter the applicant testifies their parents blessed them and gave them a go- ahead to live together. She testified that she moved into the suit land soon thereafter and in March 1994 they commenced construction of permanent buildings on the suit land.

During this period, the respondent who was still working at Kericho, visited the applicant during most weekends. The applicant supervised the construction of the buildings on the suit land. She testified that they contributed jointly to the cost of construction of the said buildings. It was her further testimony that at the material time, she used to live with the brother of the respondent called Francis Gachunje Wanjama. Their marriage was however not blessed with any children and in 1995, the applicant testified that the respondent took her, first to see a gynaecologist and later to Tenwek Mission hospital where she was examined and recommended to undergo an operation. Because she did not have enough money, a *harambee* was organised by the respondent, among other people, to enable her to get sufficient funds so that the said operation could be performed. The *harambee* was successful. She was operated on and nothing was found to be wrong with her. She produced the medical documents as *applicant's exhibit No. 2*. The applicant further produced a bundle of pictures marked as *applicant's exhibit No. 1* to establish the close relationship she had with the respondent and his relatives during the material period.

She testified that she lived with the respondent as husband and wife until 1999 when the respondent informed her that he had married another wife. Although she was not happy, she accepted the respondent's decision because she was aware that the respondent desired to have children which the applicant could not provide as she could not conceive any child with the respondent. She however testified that the respondent, after marrying his second wife, cooled off in relating to her. She testified that his visits became infrequent, and by the early 2000, the visits had stopped completely. She was therefore shocked when she was served with a notice by Mbugua Advocate to start paying rent to him. She protested that she could not pay rent to the respondent because she was his wife. The applicant then realised that the respondent had abandoned her. She filed a suit in court in a bid to remain in the suit premises, but she withdrew the suit and decided to move out of the said premises on the 31st of August 2000.

She reiterated that she had contributed for the construction of the buildings in the said premises. She produced a bundle of receipts as *plaintiff's exhibit No. 3*. She testified that she took a loan of Kshs 197,000/= to fund the construction of the said buildings. She also sold her Barclays bank shares to fund the said construction. She denied that she was just a supervisor of the said construction. She testified that she had invested her time and money in the construction of the said buildings because she knew she was married to the respondent. She conceded that all the ceremonies pertaining to the Kikuyu Customary marriage were not completed but she insisted that she was properly married to the respondent. She testified that she performed all the wifely duties including cooking and feeding the respondent and washing his clothes. She denied any knowledge of the respondent having made a report to the police to the effect that the receipts which she had produced in evidence had been stolen from the possession of the respondent.

PW2 Celestine Mwaniki Muna, a brother to the applicant, testified that he knew the applicant and the respondent to be husband and wife. He recalled that the respondent and his relatives had visited their rural home where the respondent told them that he was interested in marrying the applicant. He sought permission to be allowed to live with the applicant pending the conclusion of the customary marriage negotiations. PW2 recalled that the respondent paid the sum of Kshs 6,000/= as introduction fee. He also testified that the women who had accompanied the respondent brought with them gifts which they gave to their mother. He testified that he visited the applicant in the house that she was living at in Free Area Nakuru and saw her supervising the construction of the houses. He recalled that in the year 2001, the applicant and the respondent separated. Efforts to reconcile them by the elders were in vain because of the respondent's reluctance to be reconciled with the applicant. He testified that although dowry was not paid in accordance with the Kikuyu Customary Law, the applicant and the respondent were considered to be husband and wife.

The respondent called three witnesses. DW1 Joyce Wachuka, the mother of the respondent, recalled that the respondent took home the applicant and introduced the applicant

to her. He later took DW1 with other members of her family who included two of her daughters, Regina Muthoni and Mary Wangoi and her other son Thuita to visit the parents of the applicant. She could not recall the year that they visited the parents of the applicant. She testified that they were welcome and properly fed. After the visit the respondent gave the parents of the applicant some money. She however testified that she did not know the reason why the money was paid.

She further testified that she did not know if their visit was a prelude to an engagement or not. She however recalled that no dowry was discussed during the visit. She testified that she did not know if the applicant and the respondent lived together after the visit or that they were subsequently married. She however conceded that, at the time of their visit, the respondent was not married and could have married the applicant if he had wanted. She testified that she did not know if the applicant was at the material time a girlfriend to the respondent. She testified that she did not know the reason why the respondent at the age of 46 years had his first born who was now aged 4 years. She denied any knowledge of the applicant being unable to conceive.

DW2 Francis Gachunji Wanjama, a brother of the respondent testified that after he graduated from Moi University in 1992 he stayed in Nairobi for a while before deciding in 1994 to come to Nakuru and reside in the plot owned by his brother. He made a decision to operate a retail shop business in the said premises. He testified that he stayed in the said premises for a period of 2¹/₂ years before he moved to Langa Langa estate Nakuru. He recalled that when he entered the suit property he found the applicant residing there. When he started living on the suit land there were two permanent houses and four semi permanent houses (*photographs produced as defence exhibit No. 3*). Thereafter new buildings were constructed.

He testified that he was in charge of the construction of the said buildings. He denied that the applicant had anything to do with the supervision of the said buildings. He recalled that at the time the respondent and the applicant were friends but not husband and wife. He testified that the respondent used to visit him at the suit premises and not the applicant. He testified that the applicant used to pay rent for the rooms that she was occupying just like any other tenant. He however conceded that he could not be certain of the relationship between the applicant and the respondent but he insisted they were friends. He recalled that the respondent participated in the *harambee* where money was raised to enable the applicant to be operated at the Tenwek Mission hospital. He did not recall any meeting being called to promote reconciliation between the applicant and the respondent. He also confirmed that during the material period the respondent was not married to any other woman. He however insisted that the applicant and the respondent were not married at the time.

DW3 Samuel Thuita Wanjama (*the respondent*) testified that he knew the applicant in 1993. He denied that he had ever had sex with the applicant. He testified that the applicant used to be his friend. He recalled that he visited the home of the applicant twice; once to attend the funeral of the applicant's brother and secondly when he visited her parents with his close relatives, according to him, to verify if he could marry the applicant. Although he gave the sum of Kshs 6,000/= to the applicant's mother, he testified that the money signified nothing and was only given in appreciation of the welcome that they had received. He denied that any marriage relationship was ever contemplated in the said visit since no dowry was discussed nor was it paid.

He testified that the applicant moved into the suit land after making a request to him to allow her to occupy a room in the suit land because at the time the applicant was facing financial problems. He conceded that the applicant did not pay any rent to him. He however denied that he lived in the same house with her as husband and wife. This is because he had a room next to the one occupied by the applicant. He admitted that he took pictures with the applicant when they visited his parents and further during the graduation of his brother DW2. He denied that he had organised the *harambee* to pay for the operation of the applicant at Tenwek Mission

hospital. He however admitted that he participated in the *harambee*. He further denied that he had organised for the applicant to be admitted at Tenwek Mission hospital. He testified that the applicant was referred to the said hospital by the doctors at Kijabe Mission hospital.

He testified that he used his resources to construct the buildings in the said premises. He borrowed money from his SACCO, Harambee Co-operative to fund some of the construction in the suit premises. He also got money from his insurance (*documents produced as defence exhibit No. 4*). He vehemently denied that the applicant used any of her personal money to fund the said project. He denied the allegation by the applicant that she had supervised the construction of the buildings in the said premises. He testified that the receipts which were produced in evidence by the applicant were stolen from his house. He produced the police abstract of the report he made to the police after the theft as *defence exhibit No. 5*. He testified that he purchased the said parcel of land and was issued with a title in 1997. The certificate of title and a copy of transfer were produced as *defence exhibit No. 6 & 2* respectively.

He denied the claims by the applicant that he had married her. He testified that he only got married in 1999 and since the year 2000 had not met with the applicant. He reiterated that the applicant had no claim whatsoever over the said parcel of land or the buildings constructed thereon. He conceded that at the time he took the applicant to see his parents and also at the time he visited the applicant's parents, he was an eligible bachelor and could therefore have married the applicant. He conceded that he allowed the applicant to live in two rooms in the suit land after he had visited her at the place where she used to live. He however reiterated that he allowed the applicant to live in his parcel of land because of the financial difficulties that she was facing at the time. He also conceded that the applicant sometimes use to collect rent from the other tenants in the said premises on his behalf.

He reiterated that the receipts which were produced by the applicant were stolen from his premises. He testified that he helped the applicant to be treated at Tenwek Mission hospital because she had informed him that she had a problem with her fallopian tubes. He testified that it was the applicant who made the decision to call herself Lilian Thuita – his surname when she was admitted at Tenwek Mission hospital. He had nothing to do with the change of name. He denied that he had allowed the applicant to occupy the two rooms in his suit premises because he wanted her to take care of his construction materials. He testified that the applicant had nothing to do with the construction of the buildings in the premises. He testified that although it was unusual for him to get married at the age of 45 years (*in 1999*) prior thereto he was not married to any woman neither did he have a girlfriend. He reiterated that he was not telling lies in court.

I have considered the evidence adduced by the parties to this suit. I have also considered the written submissions which were presented to me by learned counsel for the applicant and learned counsel for the respondent. The issues for determination by this court are two fold; firstly, whether the applicant has established that she was married to the respondent under a system recognised by the law. Secondly, if the first issue will be determined in favour of the applicant, then, should the suit property be subdivided between the applicant and the respondent? And if so, in what portions.

The applicant testified that the respondent took her to his parents and introduced her as his prospective wife. Later the respondent and his parents visited the parents of the applicant whereby the respondent introduced himself to the respondent's parents and indicated his intention to marry the applicant. The applicant testified that the respondent paid the sum of Kshs 6,000/- to her mother as introductory fees in accordance with the Kikuyu Customary Law. The respondent concedes that he took the applicant to his rural home and later visited the applicant's parents with his close relatives. He however denies that the visit had anything to do with his having intended to marry the applicant. He testified that the sum of Kshs 6,000/= paid to the parents of the respondent was in appreciation of the welcome that they had received.

The applicant concedes that after the introduction there was no formal marriage or engagement ceremony as envisaged by the Kikuyu Customary Law. Whereas the applicant testified that after the introduction, their parents allowed them to live together as husband and wife, the respondent denies that he ever lived with the applicant as her husband. He however conceded that he allowed the applicant to live in the suit land rent free for a period of over seven years. He said he did this because the applicant had indicated to him that she was facing some financial difficulties. On the other hand, the applicant testified that she lived on the respondent's premises as his wife.

I have evaluated the said evidence adduced. What is clear to me is that the respondent was a friend to the applicant. Their friendship blossomed to the extent that they became lovers. The respondent desired to concretise the relationship into something permanent. He wanted to marry the applicant. He took the applicant to his rural home to visit his parents. He later visited the parents of the applicant together with his close relatives because he intended to marry the applicant under the Kikuyu Customary Law. He paid the introduction fee of Kshs 6,000/= with a promise that he was going to formally visit the family of the applicant to negotiate dowry with them. However this was not to be. This is because when the respondent saw the parents of the applicant he was granted permission to move in with the applicant so that they could start living together as husband and wife.

In this respect, I believed the evidence of the applicant and her witness to be truthful. On the other hand, I found the evidence of the respondent to be a fantastic piece of fiction and imagination. It was no coincidence that after the visit to the parents of the applicant, the applicant moved into the suit premises. Although the marriage procedures as envisaged by the Kikuyu Customary Law were not concluded, the fact that the applicant and the respondent started cohabiting together meant that theirs became a common law marriage.

Evidence was adduced how the applicant resided in the respondent's premises for a period of seven years. She was not residing in the said premises as a tenant because she was not paying any rent. Neither was she residing in the said premises as an employee because she was not being paid any salary. The truth of the matter is that she was residing in the said premises as the wife of the respondent. As was held in the case of **Hortensiah Wanjiku Yawe –vs- The Public Trustee CA Civil Appeal No. 13 of 1976 (unreported)** by Mustafa J. A.,

“I can find nothing in the Restatement of African Law to suggest that Kikuyu Customary Law is opposed to the concept of presumption of marriage arising from long cohabitation. In my view, all marriages in whatever form they take, civil or customary or religious, are basically similar, with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the appellant in this case should not apply just because she was married according to Kikuyu Customary Law. It is a concept which is beneficial to the institution of marriage, to the status of the parties involved and to the issue of their union, and in my view, is applicable to all marriages howsoever celebrated. The evidence concerning cohabitation was adduced at the hearing and formed part of the issue concerning the fact of marriage ...”.

In this case, I hold that the fact that the Kikuyu Customary Law Marriage ceremonies were not concluded does not preclude this court from finding from the evidence presented before it that there existed a common law marriage between the applicant and the respondent by virtue of the fact that they lived together as a husband and wife for a long period of time, in this case for a period of over seven years.

I therefore hold that the applicant is the wife of the respondent by virtue of the fact that they had lived together for the said period of time. The denial by the respondent that he was married to the applicant does not hold any water. In fact according to the evidence adduced before this court there was no reason why the respondent would be interested in the fallopian tubes of the applicant if he did not have an interest in the product of the said fallopian tubes. In this respect,

I hold that the respondent chased away the applicant after living with her for seven years because she was unable to conceive a child. I did not believe the evidence of the respondent that he had had no sexual intercourse with the applicant. All the evidence adduced before this court points to the fact that the relationship between the applicant and the respondent was a romantic one and not of a platonic nature.

Having found that the applicant is the wife to the respondent, the issue that is left for determination is whether the applicant is entitled to a portion of the suit property under **Section 17 of the Married Women Properties Act (1882)**. The Court of Appeal in the case of **Mereka –vs- Mereka CA Civil Appeal No. 236 of 2001 (unreported)** quoted with approval the decision of Lord Upjohn in **Pettitt –vs- Pettitt [1969]2All ER 385** at page 405 where he held that:

“In my view, Section 17 is purely a procedural section which confers on the judges in relation to the questions of title no greater discretion than he would have in proceedings began in any division of the high court or in any county court in relation to the property in dispute, for it must be remembered that apart from altogether from Section 17, a husband and wife could sue one another even before the Act of 1882 over questions of property; so that, in my opinion Section 17 now disappears from the scene and the rights of the parties must be judged on the general principles applicable in any court of law when considering questions of title to property and although the parties are husband and wife these questions of title must be decided by the principles of law applicable to the settlement of claims between those not related, while making full allowance for that relationship

But where both spouses contribute to the acquisition of a property, then my own view (of course in the absence of evidence) is that they intended to be joint beneficial owners and this is so whether the purchase be in the joint names or in the name of one. This is the result of the application of the presumption of resulting trust. Even if the property be put in the sole name of the wife, I would not myself treat that as a circumstance of the evidence enabling the wife to claim an advancement to her; for it is against all the probabilities of the case unless the husband’s contribution is very small. Whether the spouse contributed to the purchase should be considered to be equal owner or in some other proportion depends on the circumstances of each case.”

The Court of Appeal in the same case (**Mereka –vs- Mereka supra**) quoted with approval the decision of Simpson J. (as he was then) in **Karanja –vs- Karanja [1976] KLR 307** at page 311 where he held that:

“On the basis of these authorities, payments by the wife need not be direct payment towards the purchase of the property, but may be indirect such as meeting household and other expenses including expenditure on clothing for the wife and children and the education of the children which the husband would otherwise have had to pay; and even though the husband may never have evinced an intention that his wife should have a share in the property the wife may in the circumstances of the case be entitled to a declaration that the property registered in the husband’s name is held wholly or in part in trust for her by virtue of its acquisition as a joint venture. Although most authorities deal with disputes in relation to the matrimonial home, it is because of the majority of married couples in England have only one house. Section 17 is not limited in its application to the matrimonial home and its content.”

In the instant case, it is undisputed fact that the respondent purchased the suit parcel of land in 1987, five years before he met the applicant. The respondent had constructed some houses which were described in evidence as mud walled semi-permanent houses. It is clear that it is when the applicant moved into the said parcel of land that the construction of the permanent houses commenced in the earnest. I believe the testimony by the applicant that she supervised the construction of the said permanent rooms in the said plot. Although there is evidence that

the initial construction was financed by the respondent, the applicant adduced evidence that she borrowed money from her co-operative to the tune of Kshs 197,000/= to fund the said construction. She further sold her shares of Barclays bank to complete the said construction. This was in addition to the salary she received in her employment as a teacher.

Having evaluated the evidence, it is clear that once the respondent visited the applicant's parents and sought her hand in marriage, and was granted permission to live with the respondent, the applicant put her heart in the building project in the suit land which she considered to be her matrimonial home. In this regard, the receipts that she produced in evidence established on a balance of probabilities that she was a major contributor for the construction of the said premises. I found no merit with the evidence adduced by the respondent that the applicant played no part in the construction of the said premises, either by supervising it or by contributing to the purchase of the building materials.

In my opinion, if fate had not conspired to deny the applicant the ability to conceive a child, the respondent would still be living with her in the said premises as the applicant's husband. In the circumstances therefore, I hold that the applicant has established on a balance of probabilities that she is entitled to a half share of the suit property by virtue of the fact that the said property comprised her matrimonial home and further that she had substantially contributed to the developments thereon and the improvement of its value.

I will however immediately not make an order that the said property be split into two equal portions in view of the acrimonious relationship between the applicant and the respondent. I will give the respondent the following two options; The said suit property should be valued by two registered valuers each appointed by the applicant and the respondent after which the respondent shall pay the applicant half of the value of the said property within 30 days after the delivery of this judgment. The other option would be that the said property shall be subdivided into two equal portions, each portion to be owned by the applicant and the respondent respectively. The applicant shall have the costs of this suit.

DATED at NAKURU this 13th day of June 2006.

L. KIMARU

JUDGE