



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 23 of 2001

N.N.S**PLAINTIFF**

VERSUS

S.A.M **DEFENDANT**

JUDGMENT

N.N.S, the Plaintiff in this suit got married to S.A.M, the Defendant in this suit at the Cutchchi Sunny Union Hall in Nairobi on 12th March, 1988 under the Mohammedan Law. Their marriage was blessed with three (3) issues namely:-

(a) Z.M.S born on 10th November, 1988

(b) A.K.S born on 27th June, October, 1990

(c) Y.W.S born on 28th June, 1995 which issues have since birth lived and attended school within Nairobi.

By 2001, the said marriage had been irretrievably broken down and Plaintiff filed a suit in the High Court Nairobi petitioning for a Divorce in High Court Divorce Cause No.175 of 2001. The marriage after determination of the said cause was dissolved by an order of the court on 21st December, 2005. The *decree nisi* was issued on 3rd February, 2006. The same is not as yet made absolute.

Before the dissolution of the Marriage the Plaintiff took out an Originating Summons, under section 17 of the Married Women's Property Act, 1882, of England (hereinafter referred to as 'The Act') which by dint of the provisions of Section 3(1) of the Judicature Act, Cap 8 Laws of Kenya, was a statute of general application in England as at the 12th August, 1897. Thus the said Act becomes a part of the Laws of Kenya. The Plaintiff seeks, amongst other orders, a declaration that a number of properties, (movable and immovable) acquired and/or developed by the joint funds and efforts of the Plaintiff and the Defendant during the subsistence of their marriage and some of which are registered in the names of the Defendant and are in possession of the Defendant, are owned jointly by the Plaintiff and the Defendant in equal shares. In particular the properties stated by her are as follows:

(a) Ruiru/Kiu Block [Particulars Witheld]

(b) Ruiru/Kiu Block [Particulars Witheld]

(c) Ruiru/Kiu Block [Particulars Witheld]

- (d) Unregistered Plot [Particulars withheld] Inner core Umoja Estate
- (e) [Particulars withheld] Township (Athi River)
- (f) Shares in Thika Muslim Housing Co-operative Society
- (g) Shares in Marorui Farmers Co-operative Society
- (h) Assorted household goods, items and appliances.

The Defendant filed a replying affidavit sworn on the 13th November, 2001 denying the Plaintiff's claim. The Defendant however, introduced other properties that had not been pleaded (movable and immovable) in his examination-in-chief whose introduction was objected to by Learned Counsel for the Plaintiff. The said objection was overruled by my brother late Justice Kamau on the ground that it was in the interest of both parties that all assets acquired during matrimony be disclosed so long as the said disclosure is not prejudicial in any manner. The Introduced properties were as follows:

- (a) Unsurveyed Commercial plot within Kisumu town being Plot [Particulars withheld]
- (b) Kakamega Plot next to the State Lodge
- (c) Kisumu Block [Particulars withheld]
- (d) Kakamega Plot next to [Particulars withheld]
- (e) South-B Mariguiru – 20 semi-permanent rooms
- (f) Mitubiri Thuthuwa Block 1 [Particulars withheld]
- (g) One House at Nairobi High-rise (2 bed-roomed)
- (h) Dandora phase IV [Particulars withheld]
- (i) Dandora Phase IV [Particulars withheld]
- (j) Motor Vehicle Registration No.[Particulars withheld]
- (k) Motor Vehicle Registration No. [Particulars withheld]
- (l) Motor Vehicle Registration No. [Particulars withheld]
- (m) Treasury Bills worth KShs.450,000
- (n) Household items of great value.

It must be stated that I did not have the benefit of hearing all the evidence and noting specifically the demeanour of the Plaintiff in her Examination-in-chief and cross-examination and the Defendant in his Examination-in-chief. The late Hon. Mr. Justice P. J. Kamau heard those. However the full evidence is on record before the court and the parties readily agreed to proceed in that manner, from where it was left.

It is not in dispute that both the Plaintiff and the Defendant were graduates and in gainful employment as Civil Servants. At the time of their marriage the Plaintiff was a Physical Planning Officer II with the Ministry of Environment and Natural Resources and the Defendant was a District Officer under the Provincial Administration.

It is worth noting that for the Plaintiff to succeed she has to show that she was married to the

Defendant at the time of filing this cause which she has successfully done and the Defendant has not raised any issue thereon. The properties in question also have to be proved to have been acquired during the subsistence of the marriage by both or either party to the suit. This issue does not seem to be very contentious but I shall deal with it in this judgment. Finally she also has to prove that she contributed directly or indirectly to the acquisition of those assets/properties. This is a burden the Plaintiff must discharge on a balance of probabilities. I must say the same thing for the Defendant in respect of the assets he brought in during his evidence.

The issues therefore to be determined by this court are:

- i. Whether the properties disclosed in this suit are the matrimonial properties acquired during the subsistence of the marriage as envisaged under Section 17 of the Act.**
- ii. Whether the Plaintiff directly or indirectly contributed to the acquisition and/or development of the properties so as to claim her contributions therefrom.**
- iii. Whether the Defendant also contributed as aforesaid as regards the properties disclosed by him.**

At this juncture I shall proceed to deal with evidence lead as regards each property in question so as to determine the aforesaid issues.

1. Ruiru/Kiu [Particulars withheld] (Formerly Plot No.[Particulars withheld] This property initially was known as Plot No.[Particulars withheld] at the time of acquisition and evidence from a copy of a receipt marked “NNS2” shows that the same was purchased for KShs.100,000 in the year 1990. It is the evidence of both parties to the suit that the said property is fully developed with a bungalow and all amenities and was constructed between the years 1990 and 1993. The family moved in to the property making it as their matrimonial home. The receipt from Kahawa Sukari Limited marked “NNS 2” and annexed to the Originating Summons is in the joint names of the parties. The Plaintiff testified that she and the Defendant contributed equally i.e. KShs.50,000 each in the purchase of the said property. The Plaintiff further testified that she did pay for the water metre and survey fees, however I find that these averments were not substantiated by any document on evidence. On cross-examination, the Plaintiff reaffirmed her contribution to the acquisition and development of this property but could not substantiate her direct contribution averred in her Examination-in-chief. The Defendant on the other hand testified that the Plaintiff never contributed to the acquisition. He however conceded that she supervised the progress of construction of the home financed by him. Kahawa Sukari Limited, however, according to him was withholding the issuance of the title in respect of the property under instructions from the Plaintiff. From the evidence led I am satisfied that the said property was acquired during subsistence of the marriage.

2. Ruiru/Kiu Block [Particulars withheld] (Formerly Plot No.[Particulars withheld] . This property borders the Plot bearing No. Ruiru/Kiu Block [Particulars withheld], the first property herein before. It is partially developed with an incomplete maisonette. This property was acquired around 1999 from a person named Harman Gichira who bought it from Kahawa Sukari Limited. The Plaintiff testified that this property was purchased for KShs.700,000 through joint efforts by the parties herein. However, from receipts produced by the Plaintiff and marked Exhibit 1 it transpires that the property was purchased for KShs,45,000/- by Mr. Herman Gichira from Kahawa Sukari Ltd. in 1989 and subsequently transferred to Yusuf Wainaina Salim at KShs.10,000 in 1999 and later to Neema Nungari Salim after payment of KShs.45,000/- on 11th September, 2000. There has been no proof that the same was purchased for KShs.700,000. It is not disputed that the Plaintiff supervised the development of this property and that the same is registered in the name of Yusuf Wainaina Salim who is a minor, a son of the parties herein. A minor is not entitled by legislation to enter into contract and acquire a legal estate in land. What this transfer gives him is an equitable interest in the property voidable at his option. The property was to be a gift to minor and having also been registered in the minor’s name as per the evidence before me by both parties the same cannot be said to be subject to an order under section 17 of the Act. I also note that as per the law the registration of the title in the name of the minor son is voidable at his option. But I would

refrain from commenting further on this issue.

3. **Ruiru/Kiu Block [Particulars withheld]** (Formerly Plot [Particulars withheld]). This property was purchased by the parties for KShs.100,000 from Kahawa Sukari Ltd. between 1990 to 1997 by installments as evidenced in a receipt marked “NNS 3” annexed to the Plaintiff’s Originating Summons. This property is undeveloped and parties claim to have both purchased the same during subsistence of the marriage. It thus is a property to be considered under Section 17 of the Act.

4. **Unregistered Plot No.[Particulars withheld]**. This property unlike the other 3 properties I have dealt with, was acquired when the Defendant was in Nairobi as a District Officer and the same was allocated to him by the City Commission by virtue of his employment. The Plaintiff testified that she paid the survey fees, annual ground rent and stand premium for the property and produced receipt marked Exhibit 2 which is in the Defendant’s name. The Defendant denies that the Plaintiff made any direct or indirect contribution but acknowledges that the Plaintiff did supervise the development of the plot as he was outside Nairobi during that period. The property is fully developed with a 4 storied building comprising of 15 two self-contained bed-roomed flats and 4 small self contained 1 roomed flats. The Plaintiff used to collect rents derived therefrom up to the year 2000, after which the Defendant collected those rents. In her supervisory contribution the Plaintiff surveyed the plot, supervised marking of the same with beacons, and supervised the works therein from foundation to their completion. This was also proved by the testimony of Joseph Wainaina Gitau (PW.2) a building foreman who dealt with the Plaintiff during development of both Ruiru/Kiu Block 3/595 and this property. The evidence led shows that the Plaintiff visited the construction site on a daily basis depending on her University Schedule and the Defendant communicated with her and sent money for the construction whenever the money was needed. This property is subject to the orders sought. It is the Plaintiff’s testimony that proceeds of Umoja Inner core Plot was used to develop Plot No.Ruiru/Kiu Block 3/588 the second property and the Defendant now uses the proceeds to pay the children’s school fees and their maintenance. The Plaintiff was collecting rent between KShs.95,000 to KShs.110,000 per month but the same has not been substantiated. I however, note that the property remain unregistered as per the parties’ evidence. In my opinion, this property is also subject to the prayers sought.

5. **[Particulars withheld] Mavoko Township (Athi River)** This property was acquired by the Defendant while he was still at the University in 1979/80 having paid shares through student allowances known as “boom”. However, I do note that final payments were done when the marriage between the parties existed, the property is not developed. The Plaintiff also agreed that she did not make any contribution. With this consensus this property cannot be subject to the issue of contribution, and hence the subject of orders sought.

6. **Shares in Thika Muslim Housing Co-operative Society**. Thika Muslim Project (near Castle Premium) was acquired by purchase of shares in the society amounting to KShs.45,000/- paid by the Defendant. The property is not developed. This was acquired during the subsistence of the marriage and the same should be considered as a matrimonial property.

7. **Shares in Marorui Farmers Co-operative Society** This property (known also as Marurui at Safari Park) was acquired during marriage at the purchase price of KShs.40,000 and it is not developed. This remains a matrimonial property and is subject to the orders sought herein. I also notice, from Plaintiff’s Exhibit 5, that shares to this property were jointly owned by the parties herein.

8. **Unsurveyed Commercial Plot within Kisumu town being plot No.[Particulars withheld]** This property was purchased by the Defendant when he was District Officer I in Kisumu. It was allocated to the Defendant by the District Plot Allocation Committee of the Kisumu Municipality by virtue of his employment. The allocation is in the name of the Plaintiff although the title has not yet been issued. It is worth noting that this property was introduced by the Defendant after the Plaintiff failed to disclose it in her pleadings and evidence. The property was acquired in the course of the parties’ marriage and the share held by the Plaintiff remains a share in matrimonial property.

9. **Kisumu Block [Particulars withheld]** This property was also acquired during subsistence of

marriage by the Defendant while he was a District Officer in Kisumu and the government allocated the same to him. It is still undeveloped. This property is registered in the Plaintiff's name and hence forms part of the matrimonial property.

10. Kakamega Plot next to State Lodge and another Kakamega Plot next to Kakamega Institute of Technology These plots were allocated to the Defendant by virtue of his employment as a Personal Assistant to the Provincial Commissioner by Plot Allocation Committee. The Defendant made all payments. One of the property is registered in the Plaintiff's name and forms part of the matrimonial property and the other is registered under the parties daughter's name Zena, who was a minor at that time. The property should be treated as gifted to the daughter hence the same does not form part of the matrimonial property. However, I do not have any evidence as to which property out of the two is in the name of the Plaintiff. I shall obviously expect the parties to clear this issue at the time of submission which I have directed hereafter.

11. South B Mariguiri This property is developed with semi permanent shanties constructed in the course of the marriage. There are 20 rooms currently fetching rent of about KShs.2,000 each per month and the Plaintiff has been collecting rent for over 10 years now. The Plaintiff applies the rent to family subsistence as per her evidence. The Defendant used his own money to develop this property. The same forms part of the matrimonial property.

12. Mitubiri Thuthuwa Block 1 [Particulars withheld] The property is from a settlement scheme and was gifted to the Defendant as a wedding gift by the mother-in-law. However, it is registered in the name of the Plaintiff. This property is not developed. I have to determine whether this property thus acquired as a wedding gift can be considered as a matrimonial property. In Muthembwa – vs- Muthembwa (2002) 1KLR 91 at page 92 the court observed and I quote:

“In certain circumstances ... property inherited or gifted to one spouse before or during covertures is pooled with the other property which the couple may have and is developed by joint effort. The property then ceases to be in the original form and increases in value”.

It is agreed herein that the property has not been developed and no efforts have been put therein. It remains in its original form. I do however note that the property is registered in the Plaintiff's name although gifted to the Defendant as per evidence. Considering the evidence as a whole, I would consider the same as a matrimonial property subject to the orders sought.

13. One house at Nairobi High-rise This property was introduced by the Plaintiff in her cross-examination. She admitted and testified that she developed that property. The property fetches KShs.9,000 per month that pays the mortgage of KShs.6,800 per month. This property was acquired during marriage on her own admission, and she has not denied her ownership of the same. I do not think that it can at all be unsafe to find this property as matrimonial property as contended by the learned Defence Counsel. I only wish to state that the Plaintiff with full knowledge of its existence chose not to disclose as a matrimonial property till confronted.

14. Dandora Phase IV [Particulars withheld] This property was introduced by the Defendant in his evidence and is registered in the Plaintiff's name. I adopt my observations as to its non-disclosure, by the Plaintiff made earlier. Property was allocated to the Defendant by virtue of his employment as a District Officer in Makadara/Embakasi in 1989/99 as Chairman of settlement committee for resettling Muoroto people. It is developed with permanent store structure with 18 rooms fetching rent of KShs.2,000 per month per room. Plaintiff collects the rent through her agent. I thus find that this property forms part of the matrimonial properties.

15. Dandora Phase IV L.R. No[particulars withheld] This property was acquired in the same manner as property bearing no Dandora Phase IV L.R. No.[Particulars withheld] and is registered under Charles Nganya Wainaina a brother to the Plaintiff. It is also developed and again the Plaintiff collects the rent. I do not harbour any doubts that this property was acquired by the Defendant but as the same is registered in the name of a 3rd party, I would hesitate to declare the same as a matrimonial property when

the registered owner is not a party before me and thus I have no option but to find regrettably that it is not a matrimonial property.

16. Motor Vehicle Registration Number [Particulars withheld] This property was purchased while the Defendant was outside Nairobi by the Plaintiff who bought it for KShs.500,000 using her duty free facilities as a Lecturer. The property is obviously a matrimonial property having been acquired during subsistence of the marriage.

17. Motor Vehicle Registration No. [Particulars withheld] The Defendant testified that the Plaintiff bought it early 2005 after selling Treasury Bills valued at KShs.450,000. But in cross-examination he stated that the Plaintiff could not have paid the full purchase price with her source of income. However, I have evidence that not only the vehicle was purchased long after their cohabitation had ceased, but is also registered in the name of a third party. This property cannot unfortunately be a matrimonial property.

18. Motor Vehicle Registration No. [Particulars withheld] This is also registered under the Plaintiff's name. It is not disputed by the Plaintiff that it was acquired jointly although the Defendant states that he paid Shs.650,000 himself. I can thus find that this is a matrimonial property.

19. Treasury Bills worth KShs.450,000 Treasury Bills were purchased in 2004 in the name of the Plaintiff. The Defendant paid KShs.450,000/- as family money to the Plaintiff to purchase the treasury bills for the children's investment. The fact is evidenced from a handwritten letter (Ex. A), written by the Plaintiff addressed to the Defendant (see page 13 paragraph 23 thereof). I however note that despite the said letter being undated and unsigned its production as Defendants Exhibit A was not objected to. This property therefore forms part of the matrimonial property. The Plaintiff did not deny that it was not written by her.

20. Assorted Household items of great value These properties were purchased during the existence of marriage and the same are matrimonial property.

Having considered the evidence adduced as regards aforesaid properties in issue and having determined that some of those properties do form part of the matrimonial properties, it now remains for me to determine what contribution the Plaintiff made to acquire and/or to develop those matrimonial properties.

The Plaintiff has all along been in gainful employment since the inception of the marriage. The pay slips produced in court clearly show that the Plaintiff's income could not make major contributions to those matrimonial properties acquired. The Defendant has on the other hand openly acknowledged that the Plaintiff did contribute to the development of the properties by playing a supervisory role to the same while he was posted outside Nairobi. It is not disputable that he held and still holds senior posts in the Public Sector.

The presence of the Plaintiff in the construction site when matrimonial properties were being developed and the supervisory role in monitoring those works on its own amount to contribution by the Plaintiff. Her contribution placed the Defendant to secure income for the family.

The Defendant having served in capacity of District Officer, District Commissioner and Personal Assistant to the Provincial Commission in several areas within Kenya and thus he was more often than not outside Nairobi where his family had settled. It is evident that the Plaintiff gave birth to three children of the marriage and has lived with them in Nairobi all through their developing ages. She ensured that the children were taken care of and that they attended school properly in Nairobi. The Plaintiff also cared for the family and its development in the absence of the Defendant giving the Defendant comfort and freedom to seek resources from various sources which could then be invested in furtherance of family welfare. The Plaintiff has thus definitely contributed indirectly to the acquisition of these matrimonial properties. There is evidence also that the Plaintiff was earning from her consultation work and she has given evidence on financial contribution as well. In short she has given some direct contribution and lot of indirect contributions.

The law as regards the principles on contribution by a spouse is well established. I shall quote a few of observations made by our courts. In **Muthembwa –vs- Muthembwa (2002) 1 KLR 91** at page 93, it was held that:

“In cases such as this, where it is impractical to take account of respective contributions of spouses in the management of a home, a presumption of equal contribution was raised and it is a presumption which either party may rebut easily”.

In **Tabitha Wangechi Nderitu –vs.- Simon Nderitu Kariuki Civil Appeal No.203 of 1997** (*unreported*). The court of appeal stated the law on contribution thus:

“A married woman is entitled to 50% interest in the family property. A wife’s contribution to the acquisition of family property need not be financial. Indirect contribution by the wife to the family income by looking after the welfare of the family must form a basis just like the financial contribution”.

In view of the foregoing I do find, without any hesitation that, the Plaintiff has proved that she indeed made both direct and indirect contribution to acquisition and development of these properties. Justice and fairness demand that she be considered as having equally contributed to the acquisition and development of properties and thus is entitled to an equal share of the matrimonial properties which determination includes the application of share of any rental income accruing from the matrimonial property. In the present case, it is on record that the Plaintiff collected rents for several properties for some time.

I therefore find that the Plaintiff and the Defendant holds in equal share all the matrimonial properties including those she did not pray for such declaration in her Originating Summons and those whose existence she deliberately withheld from the court.

I shall for the sake of clarity specify them as under:

- 1 Ruiru/Kiu Block [Particulars withheld]
- 2 Ruiru/Kiu Block [Particulars withheld]
- 3 Unregistered Plot No.[Particulars withheld] Inner Core Umoja Estate
- 4 Shares in Thika Muslim Housing Co-operative Society
- 5 Shares in Marorui Farmers Co-operative Society
- 6 Unsurveyed Commercial plot within Kisumu town being Plot No.[Particulars withheld]
- 7 Kisumu Block [Particulars withheld]
- 8 Kakamega Plot which is registered in the name of the Plaintiff and which has to be ascertained.
9. South-B Mariguiru – 20 semi-permanent rooms
10. Mitubiri Thuthuwa Block 1 (Kajaa Kabuku) 505 - ¼ acre
11. One House at Nairobi High-rise (2 bed-roomed)
12. Dandora phase IV L.R. No.[Particulars withheld]
13. Motor Vehicle Registration No. [Particulars withheld]
14. Motor Vehicle Registration No. [Particulars withheld]

15. Treasury Bills worth KShs.450,000

16. Assorted Household items of unascertained

Regarding the actual division of the determined matrimonial properties the court allows the parties to make further submissions as to the modalities to be carried out in their equal division since none of the matrimonial properties declared to be matrimonial has been valued.

Lastly, it is evident that the Plaintiff did not declare some of the properties which are placed in her names although acquired during subsistence of the marriage, while seeking the declaration of equal shares in those properties only registered in the name of the Defendant. I therefore order that each party shall bear its own costs.

Dated and signed at Nairobi this 4th July, 2006.

K.H. RAWAL

JUDGE

4.7.06