



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

**Civil Cause 53 of 2003**

**YCE KAMENE KINYUA ..... PETITIONER**

**VERSUS**

**JOSEPH KINYUA GICHINGA .....RESPONDENT**

**JUDGMENT**

This is an Originating Summons under Section 17 of the Married Women's Property act (1882), filed on behalf of JOYCE KAMENE KINYUA against JOSEPH KINYUA GICHANGA. It seeks for four substantive orders as follows:-

1. THAT, it be declared that the properties, moveable and immovable acquired by the joint efforts of the applicant and the respondent during their marriage and registered in the name of the respondent as more particularly set out hereunder belong to the applicant and respondent.

(i) Plot No. MAKUYU/KIMORORI/BLOCK 111/2921

(ii) Plot No. MAKUYU/KIMORORI/BLOCK 111/116

(iii) Plot No. GAKAWA/GITHIMA/BLOCK 1/BURUGET/1108

(iv) Volkswagen Kombi Registration Number KRN 021.

(v) Electronic Goods (Television set, video, speakers, radio and radio cassettes)

(vi) Kitchen appliances (multi-purpose grill)

(vii) NAIROBI/BLOCK/115/192

(viii) NAIROBI/BLOCK 62/452

2. THAT, this honourable court do order that the said properties be shared equally between the applicant and the respondent.

3. THAT, the net proceeds of such properties already sold by the respondent be shared equally between the applicant and the respondent.

4. THAT, the respondent be restrained from alienating, encumbering or in any other manner disposing of the said properties.

The respondent JOSEPH KINYUA GICHANGA filed a replying affidavit to the originating summons, which was sworn on 1<sup>st</sup> December 2004. He averred in his affidavit that he acquired all the assets listed by the applicant on his own, except NAIROBI/BLOCK 62/452 which was acquired through joint efforts of the applicant and the respondent, but that he alone expended over Kshs.300,000/= in renovation and development of same and therefore that property should not be shared equally between the applicant and the respondent.

The applicant filed a further affidavit sworn on 25.4.2005. She *inter alia*, averred that she did not aver at any time that she was interested in the items listed in (iii), (iv) and (v) of the respondent's replying affidavit. She however challenged other averments of the respondent regarding her entitlement to share in the other assets.

On the 21.7.2005 a consent order was recorded in court as follows:-

“By consent –

(1) The Petitioner herein JOYCE KAMENE KINYUA has today abandoned her claim in all the matrimonial properties listed in her Originating Summons dated 31.1.2003 (should be 2002) except for the claim of the property listed as NAIROBI/BLOCK/62/452, situated in Kibera Ayany Estate. This is the property the applicant wife, claims to have made substantial contribution to, and for which she receives monthly rent from the tenant, who is her son with the respondent”.

The Originating Summons came up for hearing on 25.05.2006. The petitioner testified in support of her case. The respondent also testified alone, without calling any witness.

The testimony of the petitioner, who testified as PW1 was that she acquired the subject property at Kibera when she used to work at Industrial Area. She initially paid Kshs.800/= for the subject property. She raised the money through assistance from relatives such as Bernard Mwololo who was now deceased, and Stephen Mbalu, both of whom were her brothers. Thereafter she was allocated the plot by the National Housing Corporation, but she could not raise the money required. Therefore she took her payslip as well as the payslip of her husband to the National Housing Corporation to justify her ability to pay. Then she took a loan of Kshs.20,000/= for the purchase. They were allocated a house which was a bed seater and they used to pay for it slightly over Kshs.660/= per month. They agreed with her husband to rent the house. She paid for the house, but towards the end it was her husband who finished paying for the house.

When they cleared the purchase price for the house, they put up a house with two rooms. The house was now occupied by one of her sons Albert Kinyua as a tenant who pays her Kshs.5,000/= per month. He had paid her that rent for about one year now.

In cross examination she maintained that she paid the initial Kshs 800/= in 1978. Later she took a loan of Kshs.20,000/= and paid the same to National Housing Corporation. They ceased to be husband and wife in 1997 November. Her husband left her in the house and went away. When they got married the husband was working for Nairobi City Council. He later worked for Abercrombie & Kent, BAT, Advaak Construction and also Othnological. He had informed her that he took a loan form City Council of Nairobi to finish payments for the house. She stated that her husband was the one who paid for the construction of the extra two bedrooms as she was not working then.

From 1997 when her husband left her, she had lived at Uhuru estate in a house where her husband was the tenant. Albert started paying rent in May 2005 when he got married. She used the money (rent) top pay rent and also for her upkeep. She stated that the reason for the litigation was that she wanted the court to give her the house (at Ayany Kibera) as she was unemployed and required necessities for her upkeep. She stated that she did not know how much her husband spent for the extension of the house.

In re-examination she stated that they had not actually divorced with her husband. They were only staying separately because her husband wrote her a letter saying that he did not need her anymore, together with the children. She paid land rent for the Ayany house and was also paying rates and land rent for the Uhuru house.

The evidence of the respondent was that he had worked for City Council of Nairobi 1963 to 1974, University of Nairobi 1976 – 1977, BAT 1978 – 1980, then vocational part time jobs, then Panithological Safaries (Now Original Safaris) from 1990.

He testified that it was true that the applicant initiated the purchase of the Ayany house, but they contributed the Kshs.300/= together. It was also true that the applicant later paid Kshs.20,000/= for the house. The applicant was his wife. For the extension of the house, he paid Kshs.300,000/= but it was paid in bits. The applicant signed the vouchers for some of the expenditures when he was away on safaris. He got the money through loans from his sister Catherine Wanigur who lived in the UK who gave her Kshs.100,000/=. He also obtained loans from his employer. The documents for the house from National Housing Corporation showed that both himself and his wife were purchasers and that the loan had been repaid in full.

As for the Uhuru estate house, it was allocated to him as a member of staff of Nairobi City Council from June 1968, after getting married in February of the same year.

He had now divorced his wife customarily under Kikuyu customarily law. There were six children, two born before marriage. However, he brought up all the six children, who were now adults. He could not say whether the applicant was paying rent from the income of the Ayany house as the applicant and the children had kept things secret. He could not agree to share the Ayany house equally, unless he was paid his costs of extension and arrears of rent for 12 years, which was when he completed the construction. He wanted 50% of rent as well as the Kshs.300,000/=. He also wanted the court to consider the cost of the litigation, loss of his safari allowance of Kshs.40,000/= per trip and the fact that he was currently renting a house at monthly rent of Kshs.5,000/= while he would pay Kshs.900/= monthly for the house at Uhuru estate.

In cross examination he stated that he paid Kshs.25,000/= to National Housing Corporation by workers cheque and also Kshs.6,000/= to the lands office. He had not paid rates on land rent. He denied telling his children not to pay rent. He contended that he gave them only six months after the completion of the house start paying rent, but did not evict them in default as they were his children. He stopped paying rent for the City Council house at Uhuru in 1997.

In re-examination, he denied deserting his wife and claimed that he escaped for his safety because his wife had reported to the police that he had committed burglary. He contended that it was James his son who was paying rent for the Uhuru house.

After the close of the parties case, counsel requested to file written submissions. The court allowed them to do so. However, only counsel for the applicant Mrs. Muniafu filed written submissions. The submissions of Ms Muniafu for the applicant were in short that the applicant and the respondent were married under Kikuyu customary law and had four children. She had initially claimed, in this motion, an interest in all the assets acquired in the name of the respondent when they cohabited together between 1968 to 1997. She however abandoned her claim with respect to the rural properties and was now claiming an interest in the Ayany house Kibera Title Number NAIROBI/BLOCK/62/452. The petitioner was also residing in a house = Nairobi City Council house Number 443 Uhuru phase one and paying rent and other outgoings since 1997 and wanted to retain the status quo, though that house was in the name of the respondent.

The reasons why she was claiming an interest in the Ayany house was because she was the one who initiated the purchase and paid the initial Kshs.800/=. She also took a loan and paid Kshs.20,000/= towards the purchase of the house. However, she could not pay the full purchase price so the respondent had to chip in. The respondent also added two rooms, which he constructed at his own costs when she

was not working. Currently the house was occupied by a son of the applicant called Albert Mununa Kinyua who was paying her monthly rent of Kshs.5,000/=. The counsel sought to rely on the cases of COSMAS MUTHEMBWA vs EUNICE KYALO MUTHEMBWA – Civil Appeal No. 74 of 2001, the case of CHRISTOPHER MICHAEL STRONG vs. SABINA WAIRIMU STRONG Civil Appeal No. 221 of 2000 and KIVUITU vs KIVUITU. The respondent's counsel did not file or make any submissions.

I have considered this matter, the evidence tendered and submissions of counsel for the applicant. There is no dispute that the applicant and respondent were married. They claim to have been married in 1968 under Kikuyu customs. The applicant stated that they are only living separately with the respondent since 1997, while the respondent stated that they divorced under Kikuyu customs since 1997.

The Originating Summons was brought under Section 17 of the Married Women's Property Act (1882). That section provides that disputes between husband and wife as to the title or possession of property can be determined by the High Court of Justice in England or Ireland and the court may make such orders with respect to the subject property in dispute as it deems fit. The Married Women's Property Act (1882) is applicable to Kenya – see NJOROGE vs NGARI [1985] KLR 480.

It is not disputed that both the applicant and the respondent contributed towards the acquisition of the asset NAIROBI/BLOCK/62/452. The applicant in the Originating Summons paragraph I asked that the properties be shared equally between her and the respondent. She later dropped her claim on the other listed properties except NAIROBI/BLOCK/62/452. She now states in evidence and in submissions of her counsel that she wants to be granted sole ownership of the subject property. On the other hand, the respondent claims that he spent more money on development of the subject asset than the applicant. He therefore wants to be paid that expenditure of Kshs.300,000/= as well as arrears of rent and costs of his loss of travel allowances for coming to court, before the court orders that the subject asset be shared equally.

Indeed, the respondent appears to have spent more money on development of the asset than the applicant. It is not disputed that the respondent has not received any rent for the house. The house is occupied by one of his sons, who is paying rent to the applicant of Kshs.5,000/= per month, it is said from 2004. On the fact of it the respondent can appear to have a strong claim. However, one has to consider that the acquisition was initiated by the applicant in about 1978. The applicant also paid Kshs.20,000/= for the asset soon after acquisition. That must have been a lot of money at that time. The costs of Kshs.300,000/= incurred by the respondent for development of the house was much later, when the value of money must have gone down. On top of that the respondent has admitted that it is his own child or children who have actually occupied the said asset. I do find that if the son of the respondent has been paying Kshs.5,000/= to the applicant per month as rent, that is a family arrangement. In any case, if the respondent had a claim it should be against the occupier of the house, not against the applicant. On the moneys incurred for the assets I find that the contribution of the applicant and the respondent can be viewed as 50/50. As I have found earlier in this judgment, a contribution of Kshs.20,000/= soon after 1978 could be of same or even more value than a contribution of Kshs.300,000/= more than 10 years afterwards.

The purpose of the Married Women's Property Act (1882) – Section 17 is to provide a machinery for ascertaining and defining the rights of parties and once ascertained, if the court is registered then the register will have to be changed to take account of those rights. I have today ascertained the rights of the parties (spouses) and will make orders hereafter. The respondent cannot be reimbursed of alleged loss of past income.

The applicant has testified about a house in Uhuru estate, which she currently occupies. The respondent has also testified that that house was allocated to him by the City Council of Nairobi when he used to work there in 1968. The status of that house as at present is not clear to me. It is not clear as to who is the current tenant of the Nairobi City Council, though initially it was allocated to the respondent in 1968 when he was an employee of the Nairobi City Council. It has not been established or proved before me that it forms part of matrimonial property. I will therefore not make orders on it as this cause.

Consequently, I allow this Originating Summons to the extent that I make a declaration that the property in Ayany Kibera known as NAIROBI/BLOCK 62/452 with the buildings and developments erected thereon is jointly owned in equal shares by the applicant and the respondent herein.

Each of the parties will bear their own costs of the proceedings herein, as this is a family matter in which the parties have been living apart for sometime.

Dated and Delivered at Nairobi this 2<sup>nd</sup> day of November, 2006.

**George Dulu**

**Ag. Judge**

Ms Muniafu

I ask for a copy of the typed judgment.

DULU

AG. JUDGE

COURT

Applicant to be provided with certified copy of judgment on payment of copying charges.

DULU

AG. JUDGE

2.11.2006