



**DNK v MKN (Civil Suit 9 of 2001)
[2005] KEHC 3008 (KLR) (Civ) (28 January 2005) (Judgment)**

Kamau v Ngugi [2005] eKLR

Neutral citation: [2005] KEHC 3008 (KLR)

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

**CIVIL
CIVIL SUIT 9 OF 2001**

**MK KOOME, J
JANUARY 28, 2005**

BETWEEN

DNK APPLICANT

AND

MKN RESPONDENT

JUDGMENT

1. On 26th March 2001, DNK (hereinafter referred to as the applicant) moved this court by way of an Originating Summons filed under the provisions of Sections 17 of the Married Women's Property Act, against MKN (hereinafter referred to as the respondent). The applicant is seeking for a determination and declaration that the following properties which were acquired by joint funds and efforts should be divided between the parties.
 - a) plot No. Olchoro-Onyore/XXXX
 - b) Plot No. Kiambu Municipality X(Kiamumbi) XXX
 - c) Kiamumbi Farmers Co-operative Society Ltd. plots numbers XXXX, XXX and shares held in certificate No. XXX.
 - d) Witeithie Gwaka Investment Ltd plot No. XXXX 'A'
 - e) Mwana Kukia Housing Co-operative Society Ltd. Plot No. XXXX
2. The applicant relied on her affidavit sworn on 26th March 2001, in addition, the applicant gave evidence and relied on the evidence of her two children, Joseph Kimemia and Racheal Wanjiru who gave evidence to support the applicants prayers.



3. According to the applicant, she married the respondent in 1975 under the Kikuyu Customary Law of Marriage and in 1992, their marriage was formalized under the African Christian and Divorce Act before the P.C.E.A. Church Kariobangi.

The marriage is blessed with four issues namely:

- a) JK aged 23
 - b) IN aged 22
 - c) RW aged 19
 - d) MN aged 11 years.
4. Upon the solemnization of the said marriage the parties cohabited together as husband and wife at first at Kahawa (Maziwa) Estate, Uthiru and Kasarani until on or about the year 2001 when the respondent said was forced to separate due to frequent beatings and harassment by the respondent. She was forced to move from the matrimonial home and was chased away with all the children. She moved with the children to Kiganjo village in Thika where she lives to date.
 5. The applicant claims that all the properties listed above were acquired during the subsistence of the marriage while she carried out a business of selling groceries in a shop at Kahawa and Uthiru.
 6. In addition to the groceries business, the applicant used to augment the family's income by selling porridge to the workers within the coffee estates. Moreover, the applicant also contributed to the welfare of the family by cooking, washing clothes for the entire family and looking after the children. The applicant continued to render these services until they moved to Uthiru. It was while they were living at Uthiru when they acquired the plot at Kasarani within a company known as Mwana Mukia housing Cooperative Society Ltd. plot No. XXXX. The applicant said that she helped to supervise the construction of a dwelling house, (their matrimonial home) while the respondent was all along working as a technician at the Kabete Technical School.
 7. The applicant used to fetch water with her children which was used for the construction. When the family eventually re located to this house, the applicant started rearing pigs and poultry to support the family. According to the applicant, the respondent was bequeathed the shares at Kiamumbi by his late father in consideration of the fact that the respondent and the applicant slaughtered for the respondent's father a goat while the respondent's other siblings neglected their father. The applicant therefore claims that she should be entitled to a share of plots Numbers XXXX and 2027 at Kiamumbi and whatever property that may be allotted to the respondent by virtue of share certificate number XXXX at Kiamumbi Farmers Co-operative Society Ltd.
 8. The applicant also seeks for a share of plot No. XXXX 'A' within [name withheld] Investments Ltd and parcel No. Olchoro-Onyore/XXXX which were all acquired during the subsistence of the marriage.
 9. The applicant stated that she contributed to the acquisition and developments of the properties directly and also indirectly. The applicant's evidence was supported by PW 2, and PW 3. They both confirmed that they have in the course of their growing up, witnessed their mother (applicant) work in the shop, sell porridge and clothes and was also rearing pigs and poultry in support of the family. The applicant also had to pay school fees and accessories for the witnesses and other children. The applicant has continued to provide for the children even after the separation.
 10. On the other hand, the applicant's case was opposed by the respondent. The respondent relied on his replying affidavit, his evidence and that of DW 2 James Mungai Wainaina the vice chairman of Kiamumbi Farmers Co-operative Society Ltd.



11. According to the respondent, the property known as Kiamumbi/XXXX, 2027 and share certificate No. XXXX belonged to his late father, Ngugi Gathua who was the original share allottee. The shares were transferred to him in 1985, he did not purchase the plots and the applicant did not contribute at all either in their acquisition or development. This evidence was supported by DW 2 who produced the original records of the Kiamumbi Farmers Co-operative Society. The respondent argued that, when the titles were issued, he was issued with the title in respect of plot No. Kiambu/Municipality Block 5 Kiambu XXXX while he caused the applicant to be issued with the title Number Kiambu/Municipality plot No. XXXX.
12. As regards plot Number 2027, the respondent claimed that he had sold it during the subsistence of the marriage. He subsequently sold one half of plot Number XXXX and plot No. XXXX does not exist having been revoked by the company.
13. The respondent claims also to have sold the plot at Mwana Mukia when the applicant deserted him with the children, the area became very insecure and he decided to relocate to Kiamumbi. He stated that the plot at Witeithie Gwaka is still in existence but claimed that at the time when he purchased the share for himself he also bought one plot for the applicant. As regards the plot at Olchoro-Onyore/XXXX the respondent claimed that he obtained a loan of Kshs.30,000/= from his employer and used the proceeds towards the purchase. He claimed that the applicant cannot be entitled to 50% but perhaps less than 25% of the share of this property.
14. I have given careful consideration to all the evidence that was adduced, by both parties, the pleading, filed herein and submissions by both counsels. In this case, there is no dispute that the parties are married, hence they are husband and wife and that the properties in issue were all acquired during the subsistence of the marriage.
15. In my humble view the issue for determination is whether the applicant should be entitled to the properties sought under prayers (b) and (c) which plots were inherited by the respondent from his late father.
16. The other issue is what share should be allotted to the applicant in view of the fact that the property under prayer (e) of the application together with the developments were sold by the respondent without involving the applicant.
17. The principals that guide matters of this nature were long settled in various decisions of the Court of Appeal which have expounded on the unique circumstances affecting women who have sought their property rights under Section 17 of the Married Women's Property Act 1882 of England.
18. For instance in the decision of *Tabitha Wangechi Nderitu v Simon Nderitu Kariuki C.A. No. 203 of 1997*.

All that a wife has to show is that she is married to the husband and at the time of launching her application, that the property in question was acquired during the subsistence of the marriage:

and thirdly, that she contributed directly or indirectly to the acquisition of the assets. It is not enough for her to simply show that during the period under review she was sitting on the husband's back with her hands in his pockets. She has to bring evidence to show that she made a contribution towards the acquisition of the properties. That is a burden she has to discharge."
19. My task is to satisfy myself that the applicant made a direct or indirect contribution. The respondent admitted that the applicant used to run a grocery shop at Kamiti and Uthiru but the shop was ran down by her sister when they moved to Kasarani. He also admitted that the applicant was keeping pigs and poultry but on a very small scale. It should be noted that whatever the scale of business, the proceeds



were used for the welfare of the family even if the children ate the eggs and chicken, that in my humble view is a contribution.

20. The respondent did not deny that the applicant contributed to the construction of their matrimonial home at Kasarani by supervising the construction, even if he denied that she used to fetch water that was used for construction, I am satisfied on a balance of probabilities that the applicant has been able to prove her case to the required standard. Moreover a marriage institution is usually built on trust and it is very difficult for wives to keep details of receipts and ledger books to prove their contribution. This is why the Court of Appeal in the celebrated case of *Kivuitu vs Kivuitu* [1991] 2 KAR expanded the principals in determining the wives contribution to include indirect contribution by the wife who is probably a house wife and who devotes her time in keeping the house going while the husband pursues a career of paid employment or self employment.
21. In this regard, the applicant would be entitled to a share of plot No. Olchoro- Onyore/XXXX, Witeithie Gwaka Investments and Mwana Mukia Housing Co-operative Society Limited in equal shares with the respondent.
22. This now leads me to the second issue of whether the applicant should be entitled to the properties that were inherited by the respondent. In determining this issue I am bound by the decision by the Court of Appeal in the case of *Cosmas K. Muthembwa v Eunice Kyalo Muthembwa C.A. No. 74 of 2001*.
23. The Court of Appeal while adopting the holding in the case of *White v White 2001 All ELR* held:

“Hitherto the courts approaches has been that only those properties acquired during the subsistence of the marriage through the joint contribution, directly or otherwise, if the spouses would be subject to an order to an order under the said section. But in certain instances as in present case..... such property is pooled with other property the couple may have and is developed by joint efforts. The property then ceases to be in its original form and increases in value. Where the property exists in the same condition as at the time it was gifted or inherited no problems arise. The spouse to whom it was gifted should be allowed to retain it”.
24. I find the above reasoning very appropriate and relevant to this matter.
25. Although the applicant gave evidence that they slaughtered a goat for the respondent’s father and in consideration they were given the shares, I am not satisfied that, this was the only reason the shares were gifted to the respondent but more because he was a son.
26. There is no evidence that the applicant has expended any money or made any contribution to the development of these plots. In any event the respondent has already sold one half of plot No. XXXX and also plot Number 2027. Although he says he used the money from the sale of the Kasarani plot to develop the plot at Kiamumbi, the plot he actually developed belongs to the applicant in her singular name.
27. In this regard I would treat the applicant’s share of [name withheld] Housing (Kasarani) being the proceeds of the sale to have been the ones that were utilized to develop her own plot at Kiamumbi by the respondent.
28. The respondent’s counsel persuaded this court to consider that the applicant also owns a plot at Kiamumbi being Title Number XXXX and a plot at [name withheld] Investment Ltd. The respondent did not file a counter claim in this matter and therefore the issues of his contribution to the wives acquisition of these properties were not ventilated. In the circumstances I would not wish to make any orders in that regard.



29. Taking all the circumstances into consideration I would declare that in view of the contribution either directly or indirectly by the applicant in the acquisition of the assets listed in the application, I make a finding that she is entitled to one half share of plot No. Olchoro-Onyore/XXXX and Witeithie Gwaka Investment Ltd. – Plot No. XXXX “A”.
30. The jurisdiction of this court under Section 17 of the Married Women Property Act is limited to making a declaration. The issues of valuation, partition and transfer of title are subject of separate execution proceeding. Pending the partition, the respondent is hereby restrained by an order of injunction from dealing with the said property in a manner that is detrimental to the applicant.

Each party should bear their own costs of this application.

It is so ordered.

JUDGMENT READ AND SIGNED ON 28TH JANUARY 2005.

MARTHA KOOME

JUDGE

