REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 11 of 2002

IN THE MATTER OF AN APPLICATION FOR PROPERTY OF MARRIED WOMEN

IN THE MATTER OF AN APPLICATION FOR PROPERTY OF MARRIED WOMEN

FLORENCE WAIRIMU KANYORA…….....….PLAINTIFF/APPLICANT

VERSUS

NJOROGE KINYANJUI……..…DEFENDANT/RESPONDENT

JUDGEMENT

On 19th February, 2002, Florence Wairimu Kanyora (hereafter referred to as the applicant) moved this court by way of an Originating Summons filed under the provisions of the section 17 of the Married Women's Property Act against Njoroge Kinyanjui (hereafter referred to as the respondent) seeking for the determination of the following issues: -

1. Whether property known as LR NO.Gatamaiyu/kagwe/109 situated in Kiambu District together with the buildings and or improvement herein were acquired and or improved by the joint funds and efforts of the applicant and the respondent during their marriage and registered in the name of the respondent and is therefore owned jointly by the applicant and the respondent?

2. Either the said parcel of land be sold and the net proceeds there from shared equally between the Applicant and the Respondent or in such other just and equitable manner the court may deem fit and just to grant?

3. Whether the Respondent should be restrained from alienating, selling, disposing or, charging or in any other manner dealing with the said portion pending the hearing and determination of this Summons and finally who should bear the costs of this litigation

During the hearing, the following issues were raised inter-alia, which I consider pertinent in determining this matter

1) Whether the applicant was married to the Respondent under the Kikuyu customary law of marriage?

2) Was the property in dispute a matrimonial property acquired and or developed during the cohabitation?

3) Is land that was acquired by the Respondent through inheritance subject of division between spouses?

4) What was the Applicant's contribution and what share of the property should she be entitled to?

5) Does the Applicant's failure to adopt the Respondent's name disentitle her or disqualify her to be considered a wife?

The Applicant relied on her Supporting Affidavit sworn on 8th February, 2002. In addition to the Affidavit, the Applicant gave oral evidence and called evidence from three other witnesses, PW2, Samuel Mbugua wa Mukono and the Applicant's father PW3 Kanyora wa Koigi and Samwel Kinyanjui Njoro.

According to the applicant, she is a businesswoman at Kamahindu Shopping Centre carrying on the business of a food restaurant since 1982. It is in the cause of her work at her hotel that she met the Respondent and they started living together in a rented house at the market. The Respondent comes from the same neighborhood and the suit premises is not far from the shopping centre. In November, 1984, the Respondent who was accompanied by two friends namely Mungai and Karanja visited the Applicant's father and deposited with him Kshs. 3,000/= being part of the dowry.

There was a subsequent visit in the same month whereby the Respondent deposited a further sum of Kshs.6, 000/= with the Applicant's father being towards the payment of dowry. In 1985, the Respondent together with the Applicant started constructing a residential house at the suit premises and completed in 1986 when they moved from the shopping centre and relocated their home to the Respondent's parcel of land. The Respondent is married to a first wife with whom he has several children whose homestead is separate and about 100 metres from the Applicant's home

The Applicant testified that she contributed to the construction of the main house; she bought the timber and later constructed a house for her son. The Applicant has two children who are not the biological children of the Respondent but whom she claimed, the Respondent accepted and allowed them to reside at the suit premises. So the Applicant's son resides with his wife in a separate house while the daughter would share with the Applicant the main house.

The Applicant participated in plucking the Respondent's tea and even in planting more tea and used to deliver the tea to the Respondent's account at the Kagwe Tea Factory. The portion that she was picking the tea was separate from the one that the Respondent's first wife was plucking. This went on up to 1997 when a matrimonial disharmony arose and the Applicant's father together with PW2 were called at the Applicant's house to resolve the dispute.

According to the Applicant, the dispute was resolved and the Respondent was advised to provide the Applicant with separate tea picking baskets. In 1999, the Respondent refused the Applicant her wishes to pick the tea and to cultivate the land and this prompted the Applicant to report the matter to the Chief of the area as the Respondent was threatening to evict her from the suit premises. The dispute was referred to the Lari Land Disputes Tribunal No. LND/10/20/194/2000.

A judgement was delivered on 20th March, 2001 and on 30th May 2002, the Applicant filed a Notice of Motion seeking the award/decision of the lands Disputes Tribunal be adopted by the Resident Magistrate Kiambu vide Misc. Civil Application No. 36 of 2002. However those proceedings were stayed by an order of this court and the court file was brought and consolidated with this file. The Tribunal had awarded the Applicant a portion of 2 acres. The Applicant would wish to get an equal share of the suit premises she claims that 2 acres is not equitable as the suit premises is more than 26 acres in total.

The evidence by PW2 basically corroborates the Applicant's evidence in that he is a neighbor, and a cousin of the Respondent. They belong to the same clan and in that capacity in 1997, the Respondent invited him to be present when there was a disagreement with the Applicant. They met in the house of the Applicant in the presence of the Applicant's father PW3 and resolved the dispute, which was to do with the picking of tea and the allocation of tea picking baskets.

According to PW2, he knew the Applicant as the 2nd wife of the Respondent. She resides at the Respondent's parcel of land where she has her own compound and houses. He was also a witness at the Land Dispute Tribunal regarding the dispute over whether the Respondent should evict the Applicant from the suit premises.

PW3, the father of the Applicant had a similar story of how the Respondent made two formal visits to him and paid a total sum of Kshs. 9,000/= being part of dowry for the Applicant. This witness keeps a year diary and recorded the events as they occurred. He produced the diary for 1984 November, where he recorded receipts of Kshs. 3,000/= and 6,000/= respectively from the Respondent. He also recorded at the meeting the Applicant's house in 1997 to resolve the matrimonial disharmony between the parties. He also testified at the Land Dispute Tribunal. According to this witness, the money he received from the Respondent was in respect of the dowry for the marriage of the Applicant, as he had no other dealings with the Respondent. He has been waiting for the Respondent to conclude the dowry payment and other ceremonies but according to him, his daughter was married and remains so married to the Respondent.

The evidence of PW4 supported the fact that he has always known the parties as husband and wife. What is more relevant from his testimony is that when the Applicant's grand-daughter passed away, the Respondent instructed him to take charge of the burial of the child and showed him where the child was to be buried. This witness participated in the burial ceremony and the child was buried in this suit premises in 1998. The Respondent had a dental problem and therefore excused himself from the burial ceremony.

That was the summary of the Applicant's case, which was opposed by the Respondent. The Respondent relied on his Replying Affidavit, his evidence and that of DW2 Kamuyu Kuria.

According to the Respondent, the suit premises known as Gatamaiyu/Kagwe/109 belonged to his late father Kinyanjui Kuria who died in 1980. It is his father who planted the tea. He filed Succession cause No. 1692/1998 and was issued with the Certificate of Confirmation on 25/2/2000 vesting the suit premises upon him as the sole beneficiary. The applicant did not at all contribute to the purchase or improvements, which were done with joint efforts of the Respondent and his 1st wife together with their eight children. Some of the children are married and they have built their houses on the suit premises.

The Respondent denied that the Applicant is a wife, according to him she was a friend and this is demonstrated by the fact that she uses her maiden name to-date. Between 1986, they agreed to move to his home but disagreement arose after only one year and he went back to his first wife due to the Applicant's habits of visiting the bars and drinking.

The Respondent admitted that in 1998, he had problems with the Applicant and registered his frustrations with the Applicant's father. A meeting was held at his home with the Applicant's father to resolve the dispute, which was to do with the Applicant's habits of drinking and coming home late. He denied that the dispute had anything to do with the tea plucking baskets. According to the Respondent, the Applicant is not entitled to any share of the suit premises as the Applicant has her own properties, being a plot at the shopping centre, another one at Lari, in Naivasha 5 acres as well as the business of a restaurant at the shopping centre.

The Respondent relied on the evidence of Kamuyu Kuria, a carpenter from the local shopping centre. The gist of his evidence was that he was given a contract by the Respondent to build a house at the suit premises. He identified the Applicant's house as the one he built for the Respondent. He used to be paid Kshs. 35/= per day for labour and the Respondent used to provide all the building materials. He denies that the Applicant paid any money although he knew the home was being constructed for her; he has been

seeing the Applicant at the shopping centre. He also denied any knowledge that the Applicant was married to the Respondent.

I have carefully considered the evidence that was tendered herein. The pleadings and the submissions by both counsels. I will analyse some of the issues raised herein in further detail. Firstly by determining what constitutes a Kikuyu Customary Marriage.

According to the **Restatement of African Law of Marriage and Divorce Volume II by Eugene Cotron**, there are four standard procedures regarding the Kikuyu Customary Law of Marriage as follows: -

1) Proposal by the boy

2) If proposal is accepted there is the drinking of beer to signify asking the girls hand

3) Payment of dowry (ruracio)

4) Slaughtering of the ram (wedding ceremony) Ngurario

This Restatement was published in 1968, it has been noted in several decisions both of this court and the Court of Appeal that customary law is not static, it is dynamic and the exigencies of modern living should also be taken into account, especially where parties have taken certain steps to formalize the marriage and continued to cohabit as man and wife and disputes have occurred before all the steps have been completed. What inference should the court draw from such relationships? In the present case, the respondent did not deny that he visited the Applicant's father on two occasions and in the company of other people. He however denied that the sum of Kshs. 9.000/= that he paid in 1984 was dowry but just a gift.

I am persuaded by the evidence of the Applicant's father that the said sum was in respect of dowry, as he had no other dealings with the Respondent except the relationship with his daughter. Moreover, the Respondent confirmed to have lived with the Respondent and even constructed for her a house at his parcel of land. Even when there was a disagreement, the Respondent reported this to the Applicant's father. He even lodged a complaint at the Lands Disputes Tribunal against the Respondent. Considering all the circumstances and the evidence herein, I am satisfied that the Applicant was married to the Respondent despite the fact that all the dowry was not paid and that all the ceremonies were not performed. If the disagreement did not occur, perhaps there would have been further ceremonies to formalize the marriage, as there is no time limit set under the customary law within when the ceremonies should be completed especially where parties began with cohabitations in place of other procedure. I say so because, from the evidence, the Respondent was happy to do the following: -

1) Cohabit with the Applicant at the Local shopping centre.

2) Visit the Applicant's father and pay money.

3) Construct a house for the Applicant in a separate compound on the suit premises, which he inherited from his father.

4) Invite Applicant's father in the presence of his own cousin to register his frustrations with the Applicant.

5) Allow Applicant to participate in picking his tea and cultivate his land and even burying her grandchild in the suit premises.

When all the above was happening the Respondent did not mind to be associated with the Applicant as her husband but when the relationship went sour he would want to disassociate himself with the Applicant.

Parties should always be prepared to bear the consequences of their decisions and actions and in this regard the Respondent should bear the consequences of his decision to marry the Applicant and of taking her in his home as a wife.

I am of the humble view that the change of name of failure to change a name cannot affect one's marital status. There is no law that requires a person to adopt the husband's name. Same way the change of name above cannot confer one with status.

This now leads me to the second issue of whether the Applicant should be entitled to a share of the suit premises. This action is brought under section 17 of the Married Women's Property Act of England of 1882 which is deemed as a statute of general application vide the provisions of the Judicature Act. An issue was raised on whether this present application is valid in view of the fact that there has been no divorce proceedings or separation cause. A plain reading of the provisions of section 17 of the M.W.P.A of 1882 clearly states that when a question arises between a husband and wife regarding title to properties or share acquired during the marriage. This is a clear indication that the parties must be married, and with tremendous respect, I have to disagree with the decision of my learned brother Hon. Justice Khamoni in the case of **JEMIMAH MUIRURI VS. SAMUEL MUIRURI IN HCCC NO. 3019/1997** where he held as follows: -

''Having heard the case as stated from plaintiff's evidence in support of her claims and notwithstanding the provisions of section 17 of the Married Women's Property Act of 1882 of England, I am still not seeing the propriety of gravity the claims being made by the plaintiff were when the marriage of the plaintiff to her dependant husband still persists and there is even no order of Judicial Separation''

In my humble view, there is a question regarding the parties herein which lead the Respondent to return to his first wife and an attempt to evict the Applicant from the suit premise and this is the position envisaged by the provisions of Section 17 of the M.W.P.A. Consequently is the Applicant entitled to a share and what proportion?

In determining this issue, I am bound by the decision of the Court of Appeal in the case of **COSMAS K. MUTHEMBWA VS. EUNICE KYALO MUTHEMBWA C.A. NO. 74/2001** whereby the Court of Appeal while adopting the holding in the case of White vs. White 2001 Allel held:

''Hitherto the court's approach has been that only those properties acquired during the subsistence of the marriage through the joint contribution, direct or otherwise, of the spouses would be subject 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 effort. 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. Problems however, arise, where, as here, improvements have been made to the property using matrimonial resources, which increases the value thereof. If it is landed property, may be a house has been built on it, trees have been planted thereof, and possibly perennial cash crops have been planted, and they yield a regular income, English Courts consider such property as a contribution by the spouse to whom the gift or bequest is given to the welfare of the family and which courts should take into account if the marriage breaks down''.

I find the above reasoning very appropriate and relevant to the matter at hand, in that the Respondent as in the above decision inherited the property from his father. The Applicant states that she contributed to the constructions of the house and the development of the tea farm. She purchaser timber that was used to construct the house. It is a clear from the evidence that the house was constructed for the Applicant while the parties were already cohabiting and after the Respondent had visited the Applicant's father. The Applicant was running a business and according to her, she was also helping the Respondent in picking tea from the suit premises. The Respondent denied that the Respondent even picked tea.

A marriage institution is usually built on trust and it is very rare that parties would keep receipts or ledger books to show their contribution and that is why the court of Appeal in the celebrated case of

KIVUITU VS. KIVUITU(1991) 2 KAR 241 expanded the principals in determining the wives contribution to include indirect contribution by the wife who is possibly a housewife and who devotes her time in keeping the home going while the husband pursues a career of paid employment or self employment.

In this case I am satisfied by the Applicant's evidence that she made indirect and direct contribution by picking tea which she delivered to the Respondent's account at Kagwe Tea Factory from which the Respondent was paid and the proceeds was used to construct the house for the Applicant on the suit premises. I am persuaded that the Applicant made direct or indirect contribution and it is met and just that he share should be determined. The last issue for consideration is the question of her share. Counsel for the Applicant sought for declaration that the whole parcel of land be divided to be held jointly and in the alternative the court to determine what is just and equitable. I have taken into account that the Respondent has another wife and 8 children who have also contributed much longer than the Applicant. It would be glossily fair to declare the Applicant a co-owner of 50% of the suit premises.

I would adopt the reasoning by counsel for the Respondent in his written submission where he argues as follows: -

The applicant conveniently forgets that there is another elder wife Mary Nyagaki Njoroge with whom the Respondent has had 8 children so that even if the property were to be shared under the law of Succession Act under intestacy (assuming she was the wife of the Respondent) She would only get 1/10 of the land. So there is no way the applicant can get ½ of the LR No. Gatamaiyu/Kagwe/109 or have the entire land sold to the detriment of the Respondent and his wife and children.

I agree with the above reasoning and in any case the Applicant did not contribute to the acquisition of the property but only the development of her portion. Her contribution was in respect of the construction of her house and compound and the tea picking and planting which did not affect the entire parcel of land. It would also be glossily unfair for the Applicant to take undue advantage of the situation and leap where she did not plant. I believe this is the same reasoning the Land Dispute Tribunal employed in arriving at the decision whereby the Applicant was given two acres within where her house is constructed.

Taking all the circumstances into consideration, I would declare that in view of the contribution either directly or indirectly by the Applicant in the development of part of Gatamaiyu/Kagwe/109, she is beneficiary entitled to a portion of 2.5 acres (Two and one half acres) thereof where her house is constructed. This is about one tenth (1/10) of the Applicant's parcel of land. If I were to be guided by the Respondent's counsel's submission.

The Jurisdiction of this court under section 17 of the Married Women's Property Act is limited to making a declaration. The issues of valuation, partitions and transfer are subject of separate execution proceedings. Pending the partition, the Respondent is hereby restrained from dealing with this portion of 2.5 acre in a manner that is detrimental to the Applicant. This being a family matter, I order each party do bear their own cost.

It is so ordered

Delivered at Nairobi this 21st day of January 2005.

M. KOOME

JUDGE