



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI**

Divorce Cause 6 of 1997

M.S.K.PETITIONER

VERSUS

S.N.K. RESPONDENT

JUDGMENT

A: PROCEDURE

1. By his ruling dated the 18th of November 2002, the then Chief Justice B.

Chunga gave the following direction concerning this case:-

“The matter involves children and obviously requires early disposition. We are in the middle of the third term and two judges in the family Division Aluoch J and Rawal J where the matter comes from are not available for hearing thereof.

I will be compelled in the circumstances, to find another judge outside the family division. Thus taking everything into account, I now order and direct that this matter be heard before Ang’awa J. The advocates will for this reason appear before her on Wednesday 20th November 2002 at 9.00 a.m. to take a suitable hearing dates”

2. This family division matter in a divorce cause 6/97. It was later consolidated with Hccc1606/97 a declaration claim for division of properties under the Married Women’s Property act (1882).

3. When the file was placed before me, the status of the matter was that the petitioner (wife) S.K. was represented A.N. Ngujiri & Co. Advocates who was instrumental in filing interlocutory applications before the family division court. The conduct of the case was taken over by H Sheth, of Harit Sheth & Co. Advocates, T. Thongori of T. Thongori Co. Advocates and D. Nyakundi of Harit Sheth & Co. Advocates.

4. The respondent (husband) S.N.K. was represented by K. Rawal & Co. Advocates who was later elevated to the bench as an Hon. Commissioner of Assizes and then Hon. Judge. The conduct of the case was taken over by R.K. Langat advocates. The respondent changed advocates to M/s Sobhag H. Shah & V. Goswani, then changed to L. Wahome & Co. Advocate, who obtained the services of Ms Jan Mohamed of M/s Archer and Willcock & Co. Advocates to lead. An assistant of L Wahome known as Sophie Mburu was in court to assist. The respondent changed advocates when Ms Jan Mohammed withdrew from representing the respondent. The respondent engaged Gatheru Gathemia & Co. Advocates, who then filed a notice of change of advocates but later withdrew from acting due to conflict of interest.

The respondents employed S. Mburu in his company whom he then later assisted set up her practice when objections was raised by the other party. She ceased from acting as instructed by respondent. The respondent then engaged M/s John Mburu & Co. Advocates who informed this court that he had no relationship with S. Mburu who earlier represented the respondent.

B DIRECTIONS

5. The parties narrowed down the issues to be determined in the two causes.

That concerning maintenance and the other division of properties, namely:

“i) Is the petitioner entitled to maintenance and if so how much?

ii) Is M K, the minor child entitled to maintenance and if so how much?

iii) Whether the applicant contributed to the property?

iv) What shares is the applicant entitled to?

v) Whether the applicant is entitled to properties owned by Kenwood trading Co. Ltd.?

vi) Whether the applicant is entitled to the properties owned by T[particulars withheld] Co. Ltd and to what shares. vii) Who pays the costs?”

C) BACKGROUND OF CASES

6. A brief background of this case is S.K. (wife) and S.N.K (husband) were formally married on the 16th March 1974 at the Shree Mombasa Lohana Mahajam temple.

Both were aged 23 years old. They moved to Nairobi and lived with the husband's parents in Red Hill Limuru. They later lived in River side drive, Chiromo flats, Westlands road then W estate in Nairobi.

7. They were blessed with three children of the marriage. K (now deceased) (at age 19 years) died in a road accident. Kenal son aged 24 years in 2005, M daughter aged 16 years in 2005.

8. S.N.K (husband) herein referred as the respondent put all his investments into limited liabilities companies. This included the home that they lived in at the Gigiri Whispers Estate with the applicant/Petitioner (wife herein referred to as the applicant).

9. The divorce proceeding was instigated when the respondent caused the eviction from the Gigiri home of the petitioner and her children. The petitioner rushed to court and sought orders of injunction restraining the defendants from such eviction.

Aluoch J gave orders on 15.1.97 and 29.1.97 reinstating the petitioner back to her home.

10. Two years later, Patel J (now deceased) heard the divorce petition and declared a decree Nisi on the 18.2.99. A decree absolute was given (notice by the principal deputy registrar on the 14.6.99). The respondent now lives with co-respondent and her 6 year old child by another man. 11. The Hon. Judge did not deal with the issues of maintenance/alimony pending suit, nor with the issue of custody. This ought to have been dealt with at that stage.

12.. Aluoch J requested for children's report and orders for access and visitation of minor child by the respondent (December 2001 and 28th November 2002).

13. Respondent through Chief Magistrate's Court (Kanyangi (C.M.) as he then was and now retired) gave orders for distress of rent. All of petitioner's furnitures and goods removed from home. Aluoch J gave orders reinstating petitioner (7.1.02)) Kanyangi CM (revoked his own orders on 4.1.02. Petitioner's goods traced to Trasami Ltd.

14. Contempt proceedings taken out but not heard.

D) EXISTING SUITS

15. It transpired that the parties had filed multiplicity of suits:-

a) Divorce cause 6/97 MSK V S.N.K filed 15.1.97

b) Winding up cause 22/97 MSK V K[particulars withheld] Trading Co. 25.4.97

c) Married Women Property act Hccc 1606/97 (OS0 MSK V SNK 27.6.97

d) MSK V T[particulars withheld]LTD CA 638/97 filed 25.6.97 (respondents SNK AN. K, MAK)

e) Leonard Mutua v K[particulars withheld] Ttrading Co.1498/91

f) Hccc25/03 S.N.K v H Seth defamation 16. The cases were originally handled by M/s K.H Rawal & Co. assisted by Gatheru Gathemia & Co. Advocates (who later left the country for studies and closed his practice. Files being handled by Mbigi Njuguna & Co. Advocates, G. Gathema later returned and actual appeared again).

E: MAINTENANCE AND DISTRIBUTION OF PROPERTIES

17. The parties requested that the two suits dealing with maintenance (D.C. 6/97) and distribution of estate (Hccc1606/97) be consolidated and dealt with together. As a result directions was given by the court and at the request of the parties that “vivo vorce” evidence be taken. The applicant was given leave to amend the application for maintenance or alimony pending suit as the suit on divorce had been finalized.

18. The contentious issues herein is that the home the applicant petitioner is living in is a limited liability company under the name of T[particulars withheld] Ltd.

19. It is the case for the respondent that this house never was the matrimonial home. That the parties lived in the said house paying rent and further that the house had now been sold to one Henry Ruhiu. Rent was being paid to the K[particulars withheld] Trading Co. Ltd.

20. That the applicant petitioner had never worked in her life nor contributed to the purchase of the said properties.

21. When the petition applicant did work for the company she did nothing but abuse the staff.

22. He described her contribution to the home as follows:-

“Except for the birth of children that she [never] worked for me to make [the] company a success . . . ”

E (i) Companies

23. The petitioner/applicant stated that the respondent and her were involved in a family business of U[....]Builders Ltd. This business according to the respondent dealt with renovations and did not do so well. The respondent and his brother one ANK (who had never been part of these proceeding) began two companies. R[...] company Ltd and K[...]Trading Company ltd.

24. The K[particulars withheld] Trading Company later imported goods into the country. It did very well and was successful. The Rockwell Company did not do so well.

25. On 1989, A was leaving the country (1985) The shares of K[particulars withheld] Trading Co. Ltd that had been held at 50%:50% between the two brothers was then given to the petitioner/applicant. She took 100% of Ashare whilst the respondent took the rest of 90%.

26. The respondent aim was for the petitioner applicant to hold the shares in K[particulars withheld] Trading Company in trust for him.

27. The petitioner said she was a lawful share holder and participated in the day to day running of the business.

28. Both parties agreed that K[particulars withheld] Trading company paid their, salaries, utilities bills, school fees for the children and living expenses.

29. Both agree that a company was subsequently formed known as T[particulars withheld] Co. Ltd. The name being denied from the respondents’ mothers name and the minor daughters of the parties’ name. 30. The Gigiri Whispers Property was registered in the name of T[particulars withheld]. The funds it is believed came from K[particulars withheld] Trading company.

31. The petitioner/applicant informed the court tht she had loved and trusted the respondent. As a result she signed a power of attorney to him or he alleges he held a power of attorney (14.2.91) from the respondent which he used to transfer her shares to third parties in the K[particulars withheld] Trading Company and T[particulars withheld] Co. Ltd.

32. The properties of the companies are:-

a) LR Nbi Block [particulars withheld] LR Nbi Block [particulars withheld] Certificate of lease given on 1.6.78. Gigiri. Both in names of the respondent. A house under construction The property was acquired as a result of a cash gift given by the respondent father.

The respondent brought the two piece of land.

b) LR [particulars withheld] RTA

South C estate in name of the respondent

c) LR [particulars withheld]

Industrial area property owned by K[particulars withheld] Trading Co. Ltd

situated along Dar-es-Salaam road.

33. It is the claim by the petitioner applicant that she is entitled to maintenance from the respondent at 6 million shilling a year. She later sort for a lump sum payment.
34. The life style she led during her marriage life was to be maintained. This life style was of a high standard.
35. The respondents reaction was that the petitioner was a “pathological spend thrift and reknown gambler”
36. The petitioner claimed that the respondent removed funds form K[particulars withheld] Trading Co. Ltd and began a new company known as Jaribu Credit Company Ltd.
37. Jaribu Ceditt ran along side Panatech Co. Ltd. where funds were transferred from K[particulars withheld] Trading company
38. The Kenya revenue authorities found mishandling of Panatech Co. Ltd due to tax evasion and the company had some difficulties. The directors were the respondent and his two sons.

E (ii) Causes

39. From the proceeding the cause of all the problem that be fell the respondent was in 1992. The K[particulars withheld] company had given out a substantial amount of goods on credit. The year was the election year. The shilling lost strength and he experienced major losses. He was unable to complete his construction at LR Nbi Block [particulars withheld] and LR Nbi [particulars withheld]
40. His relationship with his wife began to go bad. He took to drink and gambling to get away. By 1994, he began having an affair with his secretary whom he later married and took in her 6 year old son as his. He is not the biological father of the child.
41. The applicant wound up K[particulars withheld] Trading Co. Ltd thus causing hardship on the respondent
42. The respondent is said not to have too much money. He stated in his affidavit of means and in evidence that he earns a gross Ksh.100,000/- per month. This being Jaribu Credit pays him Ksh.50,000/- and K[particulars withheld] pays him Ksh.50,000/-. His house allowance of Ksh.140,000/- a three bedroom apartment along Wayaiki way.

He therefore claims his earnings are:-

Salary	Ksh.50,000/-
Rent	Ksh.140,000/-
	Ksh. 7,000/-
	Ksh.31,500/-
	Ksh. 5,500/-
	Ksh. 5,000/-
	Ksh.16,000/-
	Ksh.255,500/-

He would not offer more than Ksh.50,000/- for maintenance to the respondent. He would not mind paying maintenance for the daughters school fees but on condition that she attends a cheaper school and stops her extra curricular activities.

43. The petitioner was able to show through her Advocate that infact the respondent has more than Ksh.500,000/- at his disposal. His credit card bills amount to this sum which he pays.
44. The respondent was also shown to have transferred over £4,000 to school fees in England which funds were later paid to the late son and banked into his account in England.

F: Maintenance

46. The courts finds that the petitioner/applicant was once married to the respondent. That this marriage having broken down irreparable and a divorce being duly granted the applicant is entitled to maintenance. She is, according to law, to be maintained in the same standard as she was living before.

From the proceeding I find that there was an attempt to evict her out of the house she is currently occupying and taken her to live in "South C". She had never lived in such areas before and from the list of places she lived in, she had always occupied suitable areas to live in.

47. I find that she is indeed entitled to maintenance. The real income apart from the company funds that the respondent obtain is shown to be salary Ksh.450,000/-

Credit cards Ksh 400,000/-

House rent Ksh.140,000/-

Medical costs Ksh. 50,000/-

Fee bills Ksh. 50,000/-

Approximately 1 million per month

48 . The respondent is under a duty to maintain his former wife and minor child.

49 . I find that the minor child is entitled to maintenance. The welfare of the child is paramount. It is therefore important to know hat she is to be maintained in the same standard and be offered the same type of education as her brothers were. I would state that the minor is entitled to maintenance by the respondent in respect of schooling, clothing, food, and the basic necessity of life.

F. DISTRIBUTION OF PROPERTIES

50 The property at Gigiri has been where the applicant has lived all along with her children. The property was in the name of the company with the respondent and petitioner/applicant as share holders.

51. It seems that from 1994 the respondent has deliberately gone out of his way to change directions using the power of attorney he had from the petitioner " who trusted him wholly and relied on him." To circumvent the p ossession of the said premises

52. He then enlisted the assistant of Hon. Henry Ruhiu, whom he said was the chairman of Jaribu Creditors. This friend also owned a company known as Neptune Investments Ltd. Thereafter he sold the premises to Hon. Henry Ruhiu for Ksh.12,000,000/- hereby causing the petitioner to be evicted.

53 . At the start of this trial, the said Hon. Henry Ruhiu attempted to be joined as party at this suit together with M/s Tamaeera Ltd. Out of his own violation he did not peruse the matter an stated in a further affidavit that the respondent had used him and he therefore had no interest in the matter nor did he wish to be party to the eviction of the petitioner from the suit premises.

54. On the 6.2.02 the respondents advocate Gathuru Gathemia & Co. wrote a letter to:-

M/s Harit Seth advocate A.N. Ngunjiri & Co. Advocates On the divorce Cause

On as follows:-

D.C. Cause 6/97 MSK v SK

Kindly note that we are no longer acting for Mr. SNK in this matter on the grounds, inter alia.

i) He has not been able to produce to us any shred of evidence to establish that the house LR [particulars withheld] Whispers Gigiri is owned by his brother A K

ii) We have learned with utter dismay that the affidavit filed by M/s P.J. Kakad Advocate Misc. civil application [particulars withheld] in the matter of M.K V T[particulars withheld] Ltd (Court note dismissed by Mutugi J, Milimani court) and purported to have been sworn by his brother A K is forgery apparently made by S himself with the assistance of his General Manager one Abdul Mahid.

iii) That we have requested over and over against to be shown the consideration purportedly made by one Hon. Henry Ruhiu for the unreported purchase of the said property and none has been availed to sue.

iv) The said S N. K acting inconsistent with his brother-in-law VS have attempted to implicate many other people in the criminal act where they attempted to steal goods distained from the premises of Kenya Shield auctioneer to our knowledge, the said goods were supposed to remain in the hands and custody of the auctioneer if indeed the distress is proper [It] has such come to our knowledge tht all the household goods future and fittings were taken away and stored in Mr. S gin Dar-es-Salaam road and cartons of hair products whereby well over 2,500 were taken by S and hidden at SDV Transami. We have since fallen out with the said client for refusing to abet or aid his feeble attempt to cover up this glaring illegality.

v) After obtaining the court order for visitation the undersigned accompanied by children's . . .”

Signed Gatheru Gathemi Copied to John Mburu the current Advocate for respondent

55. I do not rely on the above letter but an affidavit by Gacheru Gatheru who deponed that he had been instructed by AKbrother of respondent.

56. That he investigated and found a document deponed to a solicitor in England was a complete forgery and was made by Abdul Naren an employee of SNK the respondent.

57. I illustrate the above incident to illustrate how the respondent by his action has attempted to deprive the petitioner access to what she known as her matrimonial home by what ever means possible. This action of changing the suit premises ownership through share holders during the persistence of this suit illustrates further the respondents effort to defeat justice.

58. A marriage institution is an institution of trust. The wife does not go about daily to record what she has done to contribute to the marriage.

59. This type of action is well shown in the case of:-

Jones and Another V Lipman & Another (1962) IWL R832

A couple entered into an agreement with the 1st defendant to purchase a free hold land. The 1st defendant instead and before the completion of the sale transaction sold the land to the 2nd defendants company. The 1st defendant declined to continue with the sale with the plaintiff 1 and 2. The 1st defendant was found to infact be a director of the 2nd defendnt together with the advocates clerk.

The court held that the 1st defendant had used :-

“A mask to avoid recognition by the eye of equity . . . he had control of the limited company in which the property was vested and [as such] was in a position to cause the contract in question to be completed.”

60. In this particular case all through out the proceeding the respondent has brought in persons such as Hon. Henry Ruhiu to purchase the matrimonial property knowingly that it was a false purchase in order to state that the properties had changed hands, when infact he had full control.

61. K[particulars withheld] Trading Company had its assets moved to Panatac Co. Ltd. in order to avoid the petitioner access to funds to support her which funds were available to the petitioner during her marriage from the same company K[particulars withheld] Trading company.

62. The law under Equity requires that Equity looks to the interest rather to the form. The intention of the respondent as not to sell the properties and transfer companies but to deprive the applicant what is rightfully hers by law. 63. He who seek Equity must do Equity. He must come to Equity with clean hands. The respondent as requied to at as a reasonable and prudent man would do.

64. The companies are Limited and different entity to the parties. The case of Muthebwa v Muthemba CA74/01 whereby the court recognized that properties that had been pooled together and developed by the joint effort of the parties that such property is contribution given by the spouse. The judges recognized the problems arising in tracing what is to be matrimonial property that has been intertwined with company property and the injustices that might arise under the matrimonial women's Property Act seciton 17.

65. The question that arise between husband and wife is to be decided in a summary was when it concerns property.

66. Most certainly both parties did not have any of their landed properties on the company assets in their respective names. There was trust between the couple.

“Trust”

“An equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who is called the beneficiaries or cestuis quetrus) of which he may himself be one, and any one of whom may enforce the obligations.”

67. The defendant as in the Jones v Lipman case (supra) created defendant companies that is:-

‘The creature of the 1st defendant, a device and a shan, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity’ (emphasis supplied).

68. In another case a couple were married in 1935. The husband ran a family business. He had problems with drinking. The wife was a house wife. She looked after the home. The couple separated some time in 1955. The wife went to live with a married man. The husband lives with another woman. The company he ran was wound up and he obtained substantial money of £10,000. He

paid his wife £5,000. He then paid his two sons from further funds £5,000 each and kept the rest of the funds. The wife claimed more and the court awarded £8,000. On appeal the court held that the wife was entitled to an equal share and increased the sum to £10,000 what was taken into consideration is the work the wife did in taking care of the home.

69. In the case of Chapman v Champan the court held the shares from a property jointly contributed should be shared equally. Whether the proceeds are under the Company Act Mbugua v Mbugua (2001) 2 E.A 445 requires that it should be divided according to the shares held. The case of Mbugua v Mbugua reflects the contribution by the wife as lacking. It also deals in depth the position of the Kenyan law as to the Married Women's Property Act.

70. In an earlier case relied on, the court recognized the contributions made by the wife in looking after the house, the children and the husband as entitled to part of the share to her settlement.

71. I would distinguish this current case on the grounds that there had been a deliberate move on the part of the respondent to deprive the petitioner applicant with the entitlement.

72. The respondent deliberately misled this court when he stated that he had no funds in his accounts. There indeed was over Ksh.4 million which the applicant on applying for the same to be frozen, the respondent removed from the account. 73. The respondent then removed caveats put against properties connected to this cause without a genuine court order.

74. As the relationship between parties is so acrimonious I make the following declarations and awards.

a) That the petitioner applicant is entitled to maintenance but that this be paid as a lump sum. For example, the case of:-

Joy Octavia Hunting V Kenneth Malcon Hunting (1963) E.A 616

This is where the husband paid a lump sum payment and the wife was not to claim any further for allowance and maintenance. The wife returned at a later stage to claim more money. After the court went into the subject it was noted that most of the money was misused. She was barred from claiming more.

75. The lump sum payment is sufficient and would stop the parties having to deal with each other in the future.

76. Under the matrimonial causes act I award to the applicant/ petitioner, a sum lump of Ksh.10,000,000/-.

77. Maintenance for minor daughter

The respondent has no difficulties in paying the school fees and maintenance for the minor daughter. I do not agree that M should have a less quality education as her brothers did.

78. I would award M Ksh.10,000,000/- to cater for her schooling and care.

This sum to be invested accordingly.

79. The distribution of property is under the Married Women's Property Act. I am aware that the Gigiri Property was originally under the Company Act. And shares held jointly by the applicant and respondent.

80. That the fact the respondent has attempted to cloak the real intention of the property and that Hon. Henry Ruhiu has completed deponed he is no longer interested in the property, I would declare that the Gigiri property be transferred out right to the applicant/petitioner begin held in trust by the respondent for the petitioner applicant and the children.

81. I am not inclined to declare the other properties of Nbi/Block [particulars withheld], Nbi/block [particulars withheld],LR [particulars withheld] (South C) all three in the name of the respondent to be given out right to the applicant but would declare that the respondent holds 50% in his shares in the properties in trust for the applicant.

82. I further declare that a sum of Ksh. 80 million be awarded to the petitioner in her forgoing her claims in Jaribu Credit Trading Company and any other company where she holds interest apart from the matrimonial home (T[particulars withheld] Ltd.).

83. In summary
Maintenance

i) Applicant/wife Ksh.10,000,000/-

ii) Applicant minor daughter Ksh.10,000,000/-

Subject to investment.

Division of properties: Declaration

i) Gigiri estate LR:

Nbi/[particulars withheld] out right to the Applicant/petitioner based on trust

ii) Nbi/Block [particulars withheld] 50%

iii) Nbi/Block [particulars withheld] 50%

iv) LR [particulars withheld] 50%

South C

Married Women Properties Act and Trust

vi) Share held in companies:- declaration

The petitioner to forgo interest in the companies Jaribu Credit Trading Co. & any other Company on condition she is paid Ksh.80,000,000/-

Exception of the company T[particulars withheld]Co. Ltd, the matrimonial home.

84. I award interest in the two cause to the Petitioner/applicant. I award costs

for three advocates to the applicant petitioner.

Dated this 10th day of May 2005 at Nairobi.

M.A. ANG'AWA

JUDGE

Harit Seth & Co. Advocates

Aassited by T. Thongori & Co. Advocates for Petitioner

J.M. Mburu & Co. Advocates for the respondent