



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 236 of 2004 (OS)

S A AAPPLICANT

VERSUS

F MRESPONDENT

J U D G M E N T

The Applicant/Plaintiff Scovian Atieno Amimo filed originating Summons amended on 17/2/05.

She prays that a declaration be made that is entitled to one half share in property. Title CR 21774 subdivision 1584 and that she be entitled to one half of all moveable property once the inventory is made and costs of this suit. The Application is supported by her affidavit which shows that the marriage has irretrievably broken down and that the husband intends to leave the country alone and leave her behind. The application is opposed by the husband, Defendant, who says property was purchased with his own money before the marriage. Looking at the transfer document dated 26/3/2001 indicates that the purchase money was paid to vendor by the Defendant and the Plaintiff and were registered as transferees on 2nd April 2001 in the lands registry.

The rules of evidence prohibits oral allegations to explain a written document. The evidence of transfer therefore stands. The marriage of the parties was celebrated on 30.3.2001 in Switzerland and therefore the transfer was registered during the marriage. The defendant swears that he intends to sell house and invest in a restaurant in Switzerland so that he can maintain himself and the applicant's child he has fostered. He does not show any consideration for his wife. The legal relationship with the child is not clear.

Both parents have forwarded several authorities regarding this dispute. The law applicable on issues of property is Registration of Titles Act Cap 281 Laws of Kenya under which the land is registered. A person registered as a proprietor under that Act (Sec 23) acquires an indefeasible title to the land. The remedy of any claimant is in damages.

The other provisions is of Married Women Property Act 1882 of England. Let it be noted that the law of matrimonial property has been developed tremendously since 1882 and the protection available in England of Spouses claim to joint property is greatly expanded.

Looking at the decision of court of Appeal in the case of **Muthembwa vs. Mukembewa Case No. 74 of 2001(2002) I E A L R at page 186** the court said

“where parties to a limited liability company to hold shares in their shares in own rights no question arose as to the title to the shares at issue. However, where only one spouse was a shareholder section 17 M W P A allowed the court to deal with the parties respective interests.”

The court also said that there is wide and unfettered discretion under Section 17 to make such orders as the justice of the case demanded.

In the case of **Peter Ndungu vs. Sofia Ndungu** the court of appeal found that the marriage was sound and no divorce was contemplated and proceeded to say the High Court had no jurisdiction to make orders during lifetime and unbroken curvatures.

This case is distinguishable. The facts are different. The suit was seeking a declaration of trust. The judge did not make a finding under the provisions of Section 17 Married Women Property Act but proceeded to alienate the property as in a succession case. In the case of Michael Strong vs. Wairimu Strong evidence was offered on the contributions of each party and court found 50% contribution by parties.

In the case of Kamore vs. Kamore 2 properties were jointly registered. The court held that in such a case the court must find that the two properties were jointly owned. The case of Anne Wanjiru Kariuki vs. Gunter Goder is also relied upon by the defendant. Note that in that case the parties were not married. Nevertheless the court investigated the ownership of property claimed by the defendant who was not registered as proprietor. There was evidence of a relationship only. The court was of the view that there would be a rebuttable presumption of advancement to relations by blood or marriage. Between plaintiff and defendant, there can be no circumstances which give rise to a presumption of advancement.

In this present case the property was in fact acquired in contemplation of marriage which took place immediately before the registration of property.

In the case of **Chakupewa v Mpenzi and another**, a Tanzania case the court held that a Matrimonial property acquired with effort of both spouses is a matrimonial asset.

In case of Kivuitu v. Kivuitu court found that the wife was entitled to 50% of family property and proceeded to order husband to pay on proper valuation half share thereof.

As will be seen in all these cited cases evidence was offered in court of the facts of each case and the contribution of the parties. In the present case the parties relied on evidence in the affidavits. It is my considered view that sec. 17 Married Women Property Act was intended to protect a married woman's property before and during marriage. The court is required to inquire into the rights of a married woman in property which is seen to be hers. It does not matter that the property was acquired before or after the marriage. The History of women property before the enactment of this legislation in England was that the husband had dominion over it. Under Customary Law of Africans by that time women could deal with their property whatever it was without restrictions. See I v I EA 1971. Having said that I revert to land registration Cap 281 which guarantees title to the applicant. She has indefeasible title. The Act does not recognize trusts.

I find that the applicant is registered as co-owner of the said property with the defendant and I make declarations sought in the Originating summons as to immovable property. Regarding moveable property no evidence has been tendered as to the nature of these assets .

In the circumstances judgment is entered for plaintiff on immovable property. Costs shall be paid by the defendant.

Delivered and dated at Mombasa this 29th day of September 2005.

J. KHAMINWA

J U D G E