



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIV CASE 20 OF 02

ELIZABETH NYAGUTHII MAGONDU.....APPLICANT

Versus

WASHINGTON MAGONDU MWAI.....RESPONDENT

JUDGMENT

In this Originating Summons, brought under Section 17 of the Married Women's Property Act 1882, the applicant seek for the following orders against her husband: 1) That it be declared that the property known as Nairobi/Block 82/1514 together with the building, and improvements thereon registered in the joint names of the applicant and respondent is held by the respondent upon trust for the applicant. 2) That it be declared that the applicant is the sole proprietor of the property known as Nairobi Block 82/1514. 3) That the respondent do pay the cost of these proceedings and all the incidentals thereto.

The application is supported by the affidavit of the applicant that details the circumstances under which the property was acquired and the basis for the prayers sought. The applicant also testified and produced documents marked in the list of exhibits. She produced 50 documents (exhibits) which show the transactions of how the suit premises was bought, loan application forms, Bank statements showing the repayments receipts for purchase of materials for construction and others.

The applicant is married to the respondent and they have been so married since March 1986. There is a Divorce Cause No. 32 of 1999 that is pending in this court for determination. There are two children between the applicant and respondent: a) Jane Nyawira Magondu born April 1986 b) Alex Mwai Magondu born 1993 The applicant testified how she single handedly purchased the suit premises as a plot in 1987. The plot costed Kshs.68,000/=. She purchased the plot in three instalments. She produced cheques and bank statements to show how she paid the three instalments.

She then obtained a loan for Kshs.300,000/= from the Barclays Bank of Kenya to commence the construction. The applicant was saving money to buy a house with the East African Building Society between 1988-1995 and the Kenya Commercial Bank between 1985 to 1988 where she had saved about Kshs.63,00/= which is the amount she used to purchase the plot. The conveyance was being undertaken by M/s Kihara Mattu Advocate, the applicant produced correspondence addressed to the said lawyer regarding the registration of transfer of the plot.

The plot was being purchased from Continental Developer who for unexplained reasons took inordinately too long to register the transfer despite the fact that the applicant had completed the purchase. This caused

the applicant to seek the intervention of the Criminal Investigation Department by a letter dated 9th January 1990. Eventually the documents which were meant for the processing of title were sent by the Advocate to the applicant, who duly signed and forwarded to the advocate.

The applicant testified that for reasons that this matter was taking too much of her time and she was working she opted to send the respondent with the documents between the advocates offices and the seller's the instructions must have changed despite a letter written by the applicant dated 27th February 1991 instructing the advocate to register the plot in her name, the Lease Title was registered in the joint names of the applicant and respondent. The applicant questioned why the respondent included his name and his answer was that it would be easy for both to use the Title to obtain the loans for development.

This was never to be, because the applicant single handedly applied for the 1st loan from Barclays Bank for Kshs.300,000/=. She paid all the loan application fees, legal fees and everything, she was the Borrower and the respondent and herself as the proprietors of the Title being charged were the charges. She commenced the construction she obtained the bill of quantities, booked and entered into contract with a labour contractor. She produced receipts for the building materials which she had to purchase, pay the workers, on the site and also pay the foreman. She produced a booklet called delivery note which detailed all the materials purchased and paid for by the applicant. By July 1994 the funds were exhausted and the house was not complete.

The applicant was forced to sell her shares with Barclays Bank of Kenya and she realized Kshs.68,000/= from the sale of shares. She also applied for another loan from the Housing finance Company of Kenya a loan of Kshs.600,000/=. She paid all the requisite charges, filed in all the applications as the Borrower, the loan offer was made to her. She redeemed the Title which was charged at the Barclays Bank, the loan proceeds were credited to her account. She continued with construction work as well as the repayment of the loans she also obtained a further loan of Kshs.355,500/= from her Co-operative Society Mhasibu Co-operative. She also maintained three credit cards in order to meet the obligation of purchasing building materials for finishing, and running of the household and mortgage repayments.

The loan from the Co-operative Society was applied towards the reduction of the H.F.C.K. loan and the balance was utilized to complete the work in the house and in January 1996 they moved into the house. The applicant testified that she carried out the work single handedly and did not receive any moral or financial support from the respondent. She supervised the work during lunch time and Saturdays. She was also paying the rent for the house the family was occupying in Buru Buru, Estate as well as the utility bills, such as water and electricity both at Buru Buru and at the suit premises.

She also produced receipts for purchases for groceries, hospital bills for the children school uniforms and books. The applicant completed the construction of the house at the total of Kshs.1,222,072/=. The applicant has incurred a total of Kshs.1,971,637/= being the total sum used and loan repayments. The applicant is for this reason seeking that she be declared the sole owner of the suit premises. The respondent opposed this application. He has sworn a replying affidavit and also testified during the hearing. The gist of his replying affidavit and his testimony is that he is entitled to half share of the matrimonial home. He claimed that he supported his family to the best of his ability.

He was employed by Utalii College where he says he housed the family between 1986 – 1990 where he was housed by his employer. He however lost that employment in 1990 and in 1992 he was employed by the Teachers Service Commission up to 1997. To date the respondent has been unemployed. He however claims to have paid Kshs.14,000/= towards the purchase of the plot the suit premises herein. This payment was acknowledged by the applicant in a letter addressed to him. The respondent claims that the loan from Barclays Bank of Kenya and Housing Finance Company of Kenya were obtained by both parties and it was by agreement that the applicant was generally making mortgage repayments while the respondent was making contributions in other areas of family welfare.

He contends that he was paying school fees and buying groceries. He produced a bundle of receipts he used to pay school fees for one child Jane Magondu from 1997 to 2001. The respondent did not produce any other receipts to support his claim that he was buying food and other expenses but apart from

Kshs.14,000/= he does not claim to have made any other cash contribution for the suit premises. I have evaluated the evidence tendered herein by both parties and the applicants witnesses who supervised and worked on the construction of the suit premises. I have formulated the following issues that will guide me in analyzing the evidence and formulating the final findings as follows:

a) What was the intention of the parties when they acquired the property and developed it. b) What is the contribution of each party to the suit premises. c) What is the effect of each party's contribution, does the Title in Joint names mean that the parties own equal shares. d) What is the mandate of this court. Does it have jurisdiction to determine the matter and to what extent. When both parties go out to work and contribute to the acquisition of a matrimonial home, it has been almost settled principal that when both parties make a substantial contribution either directly or indirectly there is a prima facie inference that the property is a family asset whereby each spouse would be entitled to equal shares.

The full facts of this matter disclose that the applicant is the one who initiated the process of purchasing the plot, letters addressed to the vendors of the plot, clearly show that the plot was purchased through the initiative of the applicant. The plot was however registered in the joint names, a matter that the applicant questioned from the beginning. The respondent's response was it would make it possible for both of them to obtain loans to develop the property. He contributed Kshs.14,000/= the applicant contributed the rest of the purchase price as well as the conveyance, fees and other disbursements, apart from the purchase of the plot, the applicant is the one who applied for the loans from Barclays Bank, H.F.C.K. and her own Co-operative Savings Account.

The total sum spent by the applicant towards the suit premises is Kshs.1,971,637/= hence the sum spent by the respondent towards the acquisition and development of the plot is not even one percent of what the applicant has spent. The respondent also admitted that he did not offer any other support. According to the applicant the respondent did not even visit the construction site when the building was taking place. This evidence was collaborated by Joseph Muraguri who was the supervisor during the construction of the suit premises. The supervisor was on the site from or about 1994 and throughout the construction he never saw the respondent upto January 1996.

Even the respondent did not claim to have given any moral support in terms of visiting the construction site. He claimed to have been busy teaching in Machakos and overseeing other family matters involving his own family. The applicant who kept very good records of all the transactions also produced agreements entered into with various labour contractors. It would appear from the letter dated 7th December 1994, the applicant bore the brunt of bringing up and providing for her family's entire needs. The respondent used to make little money from salary and inheritance from his father but it would appear it was not spent on his family. This can be deduced on this letter that the applicant addressed to the respondent where even the content torches on the intention of the parties in having the Title registered in the joint names.

It would seem quite clear from the said letter that the applicant intended to be the sole proprietor but since the processing of documents was entrusted to the respondent he caused a joint registration and his intention was so that they could use the title to borrow. Hence the joint proprietorship was entrusted to the respondent. Many authorities were quoted by the applicant's counsel in her written submissions, in considering the said authorities I have of course cautioned myself that each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principals of Equality and Fairness. What is clear from the authorities is the fact that when a matrimonial property is in dispute as to whether a spouse made a contribution, direct or otherwise, to the acquisition of the suit premises it is a question of fact.

I appreciate even if it is impracticable to take accounts of respective contributions of a married couple in the management of a home. I find in this case the project of acquiring the plot developing it and payment of the loans was largely done by the applicant. The respondent claims that he contributed to the acquisition, while the applicant claims that she single handedly contributed to the purchase. The property is held in joint and in my humble view the applicant has the onus of recounting the presumption and proving her case. I am persuaded by the Court of Appeal decision in Civil Appeal No. 74 of 2001 Cosmas

K. Muthembwa vs Eunice Kyalo Muthembwa, (unreported) Page 14 which I quote: “It was common ground that it is impracticable to take accounts of the respective contributions of husband and wife in the management of a home. That is why in the case of Kivuitu vs Kivuitu (Supra) a presumption of equal contribution was raised. It is a presumption which either party can rebut. On the face of the facts of the present case, it cannot be said that the presumption in this case was rebutted; if anything the evidence points to the wife as having made substantial contribution to the acquisition of all the assets in issue.”

The application deals with the issue of declaration of a trust and I have been persuaded by the decision of Bernard vs Josephs All E.L.R. (1982) 3 page 163 specially the holding that “Where there was no express declaration of trust there was no presumption that the parties would always take equal shares; instead, their respective shares were to be ascertained according to the circumstances and the parties respective contributions to the purchase and the joint finances of the home either adding up to the contributions in cash, in kind or in services to each party up to the time of separation and even, where necessary, having regard to post separation events or by determining the intention of the parties at the time of purchase regarding their respective beneficial interests as evidenced by their respective contributions both at the time of the purchase and subsequently”

The evidence before me does not at all show that the respondent was a very supportive husband to his wife, the wife even paid for her own maternity expenses for the second child. The respondent did not produce receipts or bank statements to show that he paid rent for the Buru Buru home for one year as claimed whereas the applicant did support her evidence with documents. The fact that the respondent provided accommodation to the family in Utalii College cannot be contribution to the purchase of the plot because this was done way before the construction started. The respondent confirmed that most of the construction work was done in 1995 and was supervised and paid for by the applicant indeed this is the verbatim evidence by the respondent “The applicant was supervising the construction. Most of the construction was done in 1995 when I was working at Machakos Teachers College. I was commuting daily and the same year my aged father was ailing and I undertook the responsibility of attending to my father in Nanyuki on a farm. I used to take him to hospital in Nyeri and eventually brought him to Nairobi in 1995 where he was hospitalized. He passed away in Nairobi in 1995. During the same year I lost a brother-in-law. I had the responsibility of consolidating the estate of my brother in law. I had very little opportunity to supervise the construction. It is the applicant who paid the fundis and supervised the building” End of the quote.

I find the evidence by the respondent about indirect contribution too tenuous to enable me make a finding of Equal ownership. He paid school fees for one child and kept the receipts, if indeed he contributed in other ways he could have kept the receipts. The only way I can deduce the intentions of these parties is through the evidence. With the evidence before this court I find it un equitable to allow the respondent to claim a share of the suit premises and in doing so I find nothing that disturbs the conscience of the court for the following other reasons.

1) Apart from lack of substantial contribution either directly or indirectly, the respondent inherited properties as follows during the conventure: (a) LR No. Nanyuki/Naibor/99 – 32 acres (b) Magutu/Gatei/342 – 3.3 acres (c) Cash of Kshs.253,000/=. The respondent also acquired LR NO. Nanyuki/Naibor/72 70 acres and sold another plot in Nairobi that was acquired by both parties. The applicant is not claiming any of these properties. In view of the above, I would grant the orders sought but before doing so, it is important to settle the issue of what orders this court is mandated to issue under section 17 of the M.W.P.A which is a statute of general application by dint of the provisions of the Judicature Act.

Previous authorities have settled that the court has power to ascertain the respective right of a husband and wife in a dispute involving a property but does not confer to this court jurisdiction to transfer any proprietary interest in the property James Kamere Njomo vs Phoebe Wangui Kamore Civil Appeal No. 63 of 1998 (unreported) In this regard therefore I grant prayer No. one of the Originating Summons. a) That it is hereby declared that property known as Nairobi/Block 82/1514 together with the buildings and improvements thereon registered in the joint names of the applicant and respondent is held by the respondent upon trust for the applicant.

Each party shall bear their own costs since this is a family dispute. Orders accordingly.

Judgment read and signed on 30th January 2004.

MARTHA KOOME

JUDGE