



**REPUBLIC OF KENYA**

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

**H.C.C.C. NO. 4 OF 2003 (O.S.)**

**BONNIE SUE DUNBAR..... PLAINTIFF**

**Versus**

**WAYNE MICHAEL ERLANK.....RESPONDEAT**

**JUDGMENT**

This Is an Originating Summons brought under the provisions of Section 17 of the Married Women's Property Act of 1882 of England as well as under Section 3 (1) of the Judicature Act Cap 8 of the Laws of Kenya,

The applicant Dr. Bonnie Sue Dunbar has sought certain declarations against the respondent Wayne Michael Erlank,

The applicant has sought the following orders.

1. That this Honourable Court be pleased to declare that the immovable and movable properties numbered I-IX in the Schedule attached hereto are the sole and exclusive property of the plaintiff **BONNIE SUE DUMBAR**
2. That the Defendant **WAYNE MICHAEL ERLANK** be permanently restrained from asserting any claim, interest or title in the immovable and movable property set out in the Schedule, or from attaching, disposing, alienating, wasting or otherwise interfering with the said properties and the Plaintiff's quiet title, possession and enjoyment thereof.
3. That the Defendant **WAYNE MICHAEL ERLANK** be ordered to bear the costs of these proceedings in any event.
4. Such other relief or orders as this Honourable Court may deem fit and just in the circumstances of the case.

**SCHEDULE**

**LIST OF MOVABLE AND IMMOVABLE PROPERTY**

**COMPRISING THE PLAINTIFF'S ESTATE**

1. **Real Estate:** Parcels of Land known as Land Reference Numbers 10126/2, 10126/3, 10126/4 and 10126/5, together with the building and improvements thereon, situate in the Karen, Nairobi.

ii. **Shareholdings** One (1) share in Karen Blixen Coffee Garden and Cottages Ltd which runs a restaurant and hotel business at Karen Nairobi.

iii. **Furniture:** 2 King size bedroom sets, formal dining table and 6 Chippendale chairs; Chippendale antique glass cabinet, formal hand carved dining cabinet, 2 hide-a-bed couches, modern glass dining cabinet, wrought iron dining table, 5 book cases, antique writing desk

iv. **Appliances and electronics;** 4 TV sets, two DVD players, 1 VHS machine, Toshiba computer, DVD projector, Surround sound audio system, one electric four burner stove. v. **Art:** 6 Persian antique and Semi-antique rugs, Larsen Lion paintings, Antique gold Chinese museum mounted Cloth, Chinese ivory antiques, Jaguar print framed, Lion Print framed. Artificial flowers in vases and baskets, Japanese ivory inlaid two panel screen, 6 wildlife photos, set of four fine prints, 6 wood carving wall hangings, 20 brass and wood candle sticks, 8 glass flower vases. Miscellaneous knick-knack carvings of elephants and other animals

vi **Crockery and Kitchenware:** i full set gold rimmed Lennox china, 1 full set clear glass china, 1 set black onyx china, 1 set plain white china, 3 full sets of silver ware settings, one full set up antique red and green depression glass china, one overhead appliance hanger and 12 high quality cooking pots, skillets and pans. Electric Chinese wok, electric microwave, electric water heater, 4 large serving trays, 1 gas stove 2 electric food processors, electric can opener, electric crock pot, 4 wood storage boxes, 15 cooking glass bowls, 20 glass serving bowls, 6 wood serving bowls, 4 Pewter serving platters, 8 crystal pitchers, 6 sets of 8 crystal glasses (wine, water, champagne) and pitchers, electric tray warmer miscellaneous cooking and pitchers electric tray warmer, miscellaneous cooking utensils.

vii **Miscellaneous:** 2 Camping tents, camping gas barbecue unit, 2 sleeping bags, 2 camping chairs, 10 sets king-size sheets, 6 king size duvet covers, 6 blankets, 4 sets curtains, full set of scuba diving equipment, Nikon 35 mm camera and accessory lenses, Canon 35 mm camera. Books (over 400); video and DVD library (over 200) viii **Motor vehicle:** Toyota Rav 1996 model registration number KAN 058Q

ix. **Terminal benefits:** US\$ 100,000/= per annum which she will earn until the year 2004 The application is premised on the grounds that;

a) The properties set out in the Schedule were acquired by the Plaintiff before the marriage and/or utilizing her own resources obtained prior to the marriage, and are the exclusive and separate property of the Plaintiff and do not constitute matrimonial or joint property,

b) That the Defendant did not and has not contributed to the acquisition of the properties belonging to the Plaintiff as set out in the Schedule and has no right interest or title whatsoever in the same.

c) The defendant has deserted the plaintiff; committed adultery and has attempted to wrongfully and aggressively assert an interest and title in the said properties with a view to undermining the plaintiff's exclusive ownership and title thereof

d) There is a question and dispute regarding title and possession of the properties set out in the schedule.

The defendant did not enter an appearance nor did he file a defence despite having been served by way of substituted service. The application was therefore heard *ex parte* and the plaintiff adduced evidence in support of the prayers. In addition to her testimony the plaintiff relied on her sworn affidavit dated 1<sup>st</sup> April 2003 and produced several documents as exhibits.

According to the plaintiff who is an American citizen domiciled in the Republic of Kenya, she

married the defendant on the 12th March, 2001,

There are no children to the marriage and the defendant is a South African National. The marriage was short lived, as soon thereafter the defendant 'was involved in an extra marital affair with another woman in South Africa according to explicate e-mail communications exchanged between the defendant and his lover. It would seem when the Plaintiff queried the extra marital affairs the defendant deserted her since August 2002 and he is currently residing in the Republic of South Africa. Prior to his desertion the defendant had filed a Separation cause in the High court *vide high* court judicial separation cause No.135 of 2002. He however did not serve the plaintiff with the pleadings which she became aware of later on after the respondent deserted. The defendant has also in October 2002 filed proceedings, in the Republic of South Africa Transvaal Provincial Division Case No. 26834 of 2002. The defendant has sought for an order of divorce and payment of a sum of R400,000/= and US\$ 100,000/= as he claim he married the plaintiff under a Community of Property Law.

This is what prompted these proceedings the plaintiff was genuinely apprehensive that her proprietary rights over the properties contained in the schedule here above which are situated in Kenya may be in jeopardy. interim orders to preserve the properties were made on 15<sup>th</sup> may 2003.

The plaintiff was a professor for 20 years at Baylor College of medicine in Houston Texas. SHE IS A MOLECULAR and cellular biologist by profession. Currently she is the Managing Director of Karen Blixen Coffee Garden and Cottages Ltd. which she purchased upon retirement from her position as a full time professor in the year 2001.

In 1999, the plaintiff purchased land in Karen area of Nairobi known as LR NOS.10126/2, 10126/3, 10126/4 and 10126/5 together with the building and improvements thereon at a price of two hundred and seventy thousand pounds sterling (£270,000), She made the entire purchase price from her own resources.- The sale agreement was between her and Frank Sutton and the property was transferred to her on 29th December 1999.

The defendant did not contribute to the purchase price, the property was charged to secure the repayment of the balance of the purchase price The plaintiff produced documents to show how she transferred funds from her terminal benefits from her previous employer, she also sold her house in the United States of America, her Mercedes motor vehicle in order to invest further in the business she undertook. The plaintiff also incorporated the company in January 2000 which runs the business. She produced copies of the memorandum and Articles of Association of Karen Blixen Coffee Garden and Cottages Limited.

The defendant is neither a shareholder nor a director of the company. When the plaintiff married the defendant they settled in Kenya but the plaintiff settled all the bills in respect of house, rent for the premises they occupied in Karen,

The plaintiff continued to transfer funds to the defendant's accounts as per the bundle of document. The defendant did not engage in any income generating income, he brought a sum of US \$23,000 which was advanced to the company. The plaintiff entrusted the signing of cheques of the company especially when the plaintiff traveled outside of the country.

According to the plaintiff the defendant made unauthorized withdrawals of money and other underhand activities that made the company lose colossal sums of money. This is in addition to using the restaurant extravagantly to entertain himself his friends and using other company facilities such as telephone and e-mails and running high bills.

Despite advancing this money the defendant did not acquire shares or any interest in the company he was not an employee of the company and therefore has no claim on the land or the business.

As for the sum of US\$ 23,000/= is concerned the defendant is a creditor whose claim should be set off from the money he embezzled from a company.

I have given very careful consideration to the pleadings filed herein, the testimony by the plaintiff and the entire file of papers as well as the documents which were produced as exhibits. I am satisfied that the plaintiff is the sole registered proprietor of the parcels of land stipulated in the schedule No.1 of the application.

These properties were acquired before the marriage. The plaintiff financed the purchase and there are documents to show the funds emanated from her accounts in the United States of America. The parties got married on 12th March 2001 and the defendant deserted in the month of August 2002 thus merely after 17 months. The plaintiff transferred her entire lifetime savings to Kenya. She bought the land and invited other partners in the company that runs the business. This is a separate entity from the plaintiff. It is clear from *the documents* that the defendant has no shareholdings in the *company* and he is not a director. This company was also incorporated in the year 2000 before the ill fated marriage took

place. Accordingly I am satisfied that the defendant is not entitled to one (1) share in Karen Blixen Coffee and Garden Cottages which runs a restaurant and hotel business in Karen,

The plaintiff is genuinely apprehensive that the defendant who has decided to take out proceedings, in South Africa claiming 50% shares in her land and business might deprive her of her life long savings,

If the defendant did not make a contribution to the acquisition or improvement of the properties on what basis would he be entitled to a 50% of the property. The properties were acquired before the marriage and the funds came from the plaintiff's accounts and investments in America,

Indirect contribution is usually recognized if a spouse has dedicated his/her life to offering indirect services that enables the other spouse put more efforts in acquisition of property. Such indirect services are child rearing, home making, looking after the elderly parents, relatives and generally supporting the working spouse who in turn is able to acquire properties within the marriage. This marriage was extremely short lived, there were no children and it was dogged by stress and misunderstandings due to defendant's unfaithfulness and underhand activities with the company accounts.

I am satisfied that the defendant did not make any direct or indirect contribution to the acquisition of the properties listed in the schedule here above nor did he contribute to their improvements.

Accordingly I find that the properties were acquired solely by the plaintiff whose proprietary rights are duly protected under the constitution of Kenya like all other civilized constitutions of other countries "which guarantee and offers protection from deprivation of property. By virtue of that right people are free to determine and pursue their economic development. The plaintiff who is a cherished investor has opportunities to conclude contracts acquire properties manage *her* business, and freely dispose of *her* property etc. the *Kenyan* law protects her fundamental rights.

In conclusion therefore I find that the plaintiff/applicant has proved her case within the set standards. I accordingly allow the Originating Summons dated 1<sup>st</sup> April 2003 and grant her prayers I, 23 and 4 as prayed.

It is so ordered.

Judgment read and signed on 14<sup>th</sup> July 2004

**MARTHA KOOME**

**JUDGE**