



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 21 OF 2003

STANLEY KITHIA MIRITI APPLICANT

VERSUS

HELLEN NKIROTE KITHIA..... RESPONDENT

JUDGMENT

By Originating summons filed in the High Court on 25.08.03 the applicant sought the following substantive orders:- 1. That it be declared that L.R. No. NBI/BLOCK/60/303 NGEI PHASE 1 NAIROBI and RUIRU/RUIRU EAST BLOCK/3/2500 are joint properties and this court be pleased to determine the applicant's share based on each party's contribution upon sale of the same. 2. That the respondent either by herself, servants and /or agents be restrained from alienating and/or in any other way encumbering L.R. No. NBI/BLOCK/60/303 herein until the determination of this suit. 3. That immediate possession of L.R. No. NBI/BLOCK 60/303 NGEI PHASE 1 NBI being the matrimonial home be given to the applicant and the respondent restrained from interfering with the applicant's peaceful enjoyment of the same property pending the determination of this suit. 4. That the respondent be forcefully evicted from the matrimonial property and the respondent refunds the previous tenant (Edgar Kalya) the deposit of Kshs.25,000/= for one month's rent. 5. That the respondent do pay the costs of this application and incidentals thereto together with a monthly rent of Kshs.25,000/= from April, 2003 to-date. The application is supported by the applicant's affidavit sworn on 11.08.03 and the following further ground, namely:-

That since May, 2003 todate the respondent has forcefully entered into the matrimonial property known as NAIROBI/BLOCK/60/303 NGEI PHASE 1 and thus denied the applicant income of about Kshs.25,000/= monthly from the same. There are numerous documents in the file including affidavits and their annexures containing accusations and counter-accusations between the parties. Salient points of the case may be summarised as under. The applicant and respondent got married on 10.04.71 at St. Paul's Methodist Church, Meru under the Marriage Act (Cap.150). They cohabited in Nairobi and there are 5 issues of the marriage:-

a) Kenneth Kirema Miriti – born on 22.08.69. b) Catherine kagwiria miriti – born on 30.07.71. c) Linnet Karwirwa Miriti – born on 29.12.74. d) Lisa Kathambi Miriti – born on 29.12.74. e) Kevin Muthoni Miriti – born on 22.12.77. All the children are now adults. In the course of time relationship between the parties went sour and the applicant filed petition for divorce, being chief Magistrate's Court in Nairobi (Milimani Commercial Courts) Divorce Cause No.23 of 1999, Stanley Kithia Miriti -vs- Hellen Nkirote Kithia. The applicant herein was the petitioner and he sought dissolution of the marriage on the ground of cruelty. He obtained a decree of divorce and a decree nisi was issued on 25.05.01. On 27.02.02 the decree nisi was made absolute. Documents in the file indicate that the respondent herein who was also the

respondent in the Magistrate's Court divorce proceedings eventually attempted to appeal out of time against the dissolution of the marriage but the outcome of her attempts does not appear in the file.

I take it that the respondent's attempts to appeal out of time did not succeed and that the parties remain divorced. The applicant averred that at the time the decree nisi was made absolute the respondent was no longer living with him, she having moved out of the matrimonial home, Nairobi/Block/60/303 Ngei Phase 1 House No.79 in 1996 to go and rent a house at Embakasi Estate, Nairobi. It is the applicant's case that he and the respondent disagreed in 1994; that the respondent is an S1 Teacher and that the Ngei Phase 1 House ("Ngei House") was acquired during the parties' marriage. There is a second property the applicant asked this court to declare as joint property, i.e. Ruiru/Ruiru East Block/3/2500. This is a 4 – acre shamba at Njiru (otherwise known as Mwalimu shamba at Kiambu being MICL/02/1775. This plot was allocated to the respondent by virtue of her being a teacher but the applicant averred that he is the one who paid for it and that he initiated the process of getting a title deed but when problems arose between him and the respondent, he stopped pursuing the title deed and he does not know its status. It is the applicant's case that this shamba is also jointly owned by him and the respondent.

With regard to the Ngei House, the applicant averred that he raised money to pay deposit, legal fees and mortgage for it by selling his house in Nairobi West, a house he had bought using a bank loan obtained using his father's title deed. A letter of 07.03.85 to the parties herein from Tyson Habenga Ltd offering the house to them for sale quotes the price as Kshs.400,000/=. I take this to be the piece of the Ngei House. The applicant is emphatic that the respondent played no contributory role to the purchase of the Nairobi West House but he consented to the Ngei House whose deposit came from the Nairobi West House being registered in the joint names of himself and his wife the respondent and it was so registered. He denies that the Nairobi West House was jointly owned by him and the respondent.

Applicant says he completed paying for the Ngei House in 2003 whereupon he paid discharge fees and the property was discharged. He says he vacated the Ngei House in 2003 because of problems between him and the respondent and he leased the house to the Judiciary for 2 years. The applicant says a magistrate called Grace Nzioka occupied the house while it was on lease to the Judiciary but the respondent created problems for her and she vacated when the lease expired in March, 2003. The applicant added that he obtained a court order restraining the respondent from interfering with tenants in the Ngei House but she continued doing so and the house remained vacant for 2 months. The applicant went on to narrate that in May, 2003 one Edgar Kalya occupied the Ngei House but on 12.06.03 the respondent used Langata Police and threw him out at night and put her own luggage inside the house despite the existence of a court order restraining her from interfering with the said house. The applicant adds that the respondent still lives in the Ngei House and has sub-let the servant's quarters while he (applicant) lives in a rented house at Onyonka Estate, Nairobi. Another complaint levelled by the applicant against the respondent related to Midland Junior School in Athi River which the applicant said he started on leased premises and the respondent, as a trained teacher, was entrusted with its management. It proved profitable and the applicant says he borrowed Kshs.300,000/= from the Kenyan Commercial Bank to develop it further in 1997. However, applicant continued, in the same year the respondent who was a signatory to the school account used a counter cheque and withdrew Kshs.155,000/= from the school account and disappeared with the money.

The applicant says he took the respondent to court over the matter and she was ordered to pay it back but she never did. The applicant adds that he obtained a decree with regard to the amount but somehow he did not deem it fit to execute it. Applicant also says that the children of the marriage pleaded with him to let the respondent go back to the school and he allowed her to do so but she ran the school down by chasing away teachers and workers, alleging that they were loyal to him instead of her. The school closed down in December, 2002 but the applicant had to repay the bank loan still. It is the applicant's case that other than buying food for the children, the respondent never contributed anything towards the home. Applicant adds that after the respondent deserted the matrimonial home in 1996, it is the applicant who maintained the children and paid the mortgage for the Ngei House. Applicant denied ill-treating the respondent as alleged by her. He also denied holding any title to the Mwalimu Shamba and averred that he is not aware of the existence of any title for it.

One of the respondent's counter – accusations was that she maintained the family while the applicant was away in Canada. The applicant denied this and said he was in Canada for only 3 months and he made arrangements to pay the mortgage for the Ngei House and also to maintain the family. On account of his aforesaid averments, the applicant prayed:- a) That the Ngei House be sold and the respondent be given 10 % of the proceeds of sale. b) That the rest of the proceeds be awarded to him to use in building another home for the family in Nairobi. c) That the Mwalimu Shamba measuring approximately 4 acres be divided equally between himself, the respondent and the children of the marriage. The applicant attended court for the hearing of this case before me on 04.11.04 accompanied by his counsel, Mrs. A.W. Keya. The respondent did not appear, neither was she represented by counsel. Applicant's counsel informed this court that the Federation of Women Lawyers of Kenya (FIDA) were on record for the respondent and that they were duly served on 07.07.04 with that day's hearing notice but they did not turn up, neither did their client the respondent.

There is in the file an affidavit of service sworn on 13.09.04 by one Stephen Makau Mwanza, Litigation Clerk in the firm of Cheloti & Etole Advocates that on 07.07.04 the said clerk served hearing notice of this case for 04.11.04 on FIDA. On the basis of the foregoing, hearing of this case proceeded as scheduled on 04.11.04 in the absence of the respondent and her lawyers. The applicant gave evidence on oath and called one witness on his behalf, i.e. Stephen Muthaura Miriti. The applicant basically reiterated his written averments summarised above. He confirmed that all children of the marriage are now adults and not living with him. He also confirmed that both the Ngei House and the Mwalimu Shamba were acquired by the parties during the subsistence of their marriage. Applicant said in his oral evidence that he vacated the Ngei House in 2002 when he and the respondent had problems. This contrasts with his earlier written statement that he vacated the Ngei House in May, 2003. There appears to be a mix up of dates in the applicant's mind here.

A letter of 20.03.03 from the Chief Court Administrator to the applicant, however, shoes that the Judiciary leased the Ngei House from the applicant on 06.04.01 for two years and had the lease was renewed for a further two years on 29.01.03. The letter from the Judiciary proceeded to complain to the applicant as follows: "On 28th February, 2003, one Hellen Nkirote Kithia who claimed to be your lawful wedded wife visited the above premises and breached clause 2 (d) of the executed Lease Agreement by threatening to throw out our Senior Resident Magistrate, Mrs. Grace Nzioka. She has also written a complaint letter over the house occupancy by a tenant other than herself and her family. In the circumstance, we demand from you three (3) months' rent in lieu of notice payable to the Judiciary forthwith." It appears the respondent caused premature termination of the second lease of the Ngei House by the Judiciary, which is one of the applicant's complaints against the respondent.

Stephen Muthaura Miriti testified before this court that he is a younger brother of the applicant. Responding to a claim in the respondent's replying affidavit of 27.10.03, Muthaura denied the respondent's claim that the Nairobi West House was a matrimonial home jointly owned between the petitioner and respondent. Muthaura said it was within his personal knowledge that the applicant approached their father for the latter's title deed which the applicant used as security for a bank loan to purchase the Nairobi West House. Muthaura was emphatic that the respondent did not contribute anything towards the purchase of the Nairobi West House. No date is specified by either party for the purchase of the Nairobi West House. There was also reference in the respondent's replying affidavit of 27.10.03 to the rural home situated on Ntima/Igoki/1492 having been jointly purchased by the applicant and the respondent.

In this regard, Muthaura told the court that he is the one who got the seller of that land and took him to the applicant who made part-payment of Kshs.250,000/= to the lady seller and that the balance of the purchase price was to be paid by installments. Muthaura pointed out that by that time the petitioner and respondent were not together. Muthaura added that after the petitioner and respondent disagreed, they were called to a family meeting in Meru in 1996. Both sets of parents were present and that the respondent said she would think of coming back to the petitioner after 3 years, which she has not done. Muthaura completely denied the respondent's claim that the rural home Ntima/Igoki/1492 was jointly owned by the petitioner and the respondent. The respondent's rejoinder to the applicant's case is basically contained in her replying affidavit sworn on 27.10.03 and filed on 30.10.03. The gist of her case is that

the properties alluded to at the first paragraph of this Judgment were jointly acquired by the applicant and herself and that she duly contributed to their acquisition.

She insists that the Nairobi West House was also jointly owned by the petitioner and herself. The respondent adds that the rural home Ntima/Igoki/1492 was also bought jointly by the petitioner and herself. With regard to Midland Junior School, Athi River the respondent says she utilized her retirement benefits, her teaching and management skills for the schools development. She denies deserting the matrimonial home and also denies abandoning the management of the school which she says was her only means of livelihood. The respondent accuses the applicant of having taken advantage of her sickness and absence from the school to arbitrarily use the school's proceeds to buy himself a share at the private Medical laboratory in Kenyatta National Hospital where he now works. Respondent ascribes her sickness to the applicant's constant harassment of her, which she says led to her becoming sick, suffering depression and having to undergo psychiatric treatment for a period "ranging from 1996 hitherto."

In this regard there is in the file a letter dated 10.07.2000 addressed by Dr. S.G. Gatere, Consultant Psychiatrist to the respondent's lawyers (FIDA) to the effect that the respondent was under Dr. Gatere's medical care from March, 1996 to 05.01.2000 for endogenous depression which required maintenance medication after adequate improvement had been achieved. Dr. Gatere said the respondent was last reviewed on 05.10.99 and had not attended medical clinic for 6 months, so the doctor could not comment on her mental state. This report seems to have been called for by FIDA in the context that the respondent may not have been in a position to defend the applicant's divorce petition. The records in the file are, however, not clear if this issue was pursued during the divorce proceedings. The respondent further complained that during the period she says she was sick, the applicant distanced himself from her and refused to offer her any assistance but instead he filed divorce proceedings against her which she says were heard ex-parte. On the question of the divorce proceedings being heard ex-parte, the applicant responded vide paragraph 12 of his further supporting affidavit of 11.05.04 as follows: "That further the divorce case was not heard ex-parte because the Respondent had engaged lawyers from FIDA inter alia Judith who was always in court and cross-examined me besides my lawyers Mr. Kithinji cross-examining the Respondent, therefore her allegations ought to be treated with the utmost contempt that they deserve."

Turning to the issue of Midland Junior School, the respondent accused the applicant of running the school down thereby depriving her of her means of livelihood. With regard to the children of the marriage, the respondent says in her replying affidavit of 27.10.03 that Catherine Miriti is an employee of Coca Cola South Africa, Lisa Miriti is an employee of Uniliver, Kenneth Miriti is an employee of Fina Bank, Kenyatta Avenue while Kevin Muthomi Miriti who is the last born and was so attached to and staying with her (respondent) in the Ngei House is suffering from drug abuse which the respondent ascribes to frustration caused by the applicant. The respondent makes no mention of what the third child, Linnet Karwirwa Miriti is doing for a living. However, in her further replying affidavit of 15.06.04 she says all children except Kevin are gainfully employed and staying on their own. On the issue of the lease of the Ngei House to the Judiciary, the respondent says the lease gave the applicant an opportunity to know some magistrates at Milimani Commercial Courts, Nairobi and that the applicant used that knowledge to obtain divorce from her ex-parte, which is denied by the applicant as noted earlier, and concludes her case as follows:

"That I have already written to the Minister for Justice, Constitutional and Human Rights (sic) to complain about high degree of corruption in Divorce Case No.23 of 1999 instituted by my husband. This is copied to the Chief Justice, and advised that no case of any type brought up by my husband as a result of this illegal divorce should be dealt with as this divorce is already in dispute." This essence of the respondent's case is that she should not be evicted from the matrimonial Ngei House and that the said property should not be transferred to the applicant as it is jointly owned by the applicant and herself. With regard to the Mwalimu Shamba, the respondent says it is solely hers and the applicant is not entitled to any share in it. Respondent also wants the rural home, Ntima/Igoki/1492 declared jointly owned between the applicant and herself.

The foregoing are in essence the vital claims made before this court by the parties to the present proceedings. These proceedings are for division of matrimonial property between former spouses –

former, because divorce was granted to the applicant herein by the lower court on the ground that the respondent was cruel to him. There is no evidence before me that the said divorce has been set aside through due process of law. Instead the respondent seems to have written to the Minister for Justice and Constitutional Affairs accusing the magistrate who granted divorce against her of corruption without supportive evidence. I must hold that the parties stand lawfully divorced. The parties to the present proceedings before me have traded ugly accusations against each other, each blaming the other as the cause of the breakdown of their marriage. As the lower court found the matrimonial offence of cruelty levelled by the applicant against the respondent duly proved and the court's decision stands, the issue of who is to blame for the breakdown of the marriage must be taken as duly settled.

Additionally, in Court of Appeal Civil Appeal No.203 of 1997, Tabitha Wangechi Nderitu –Vs- Simon Nderitu Kariuki (unreported) which was about division of matrimonial property, the following passage was cited by Pall, J.A (as he then was) from Cracknell –vs- Cracknell [1971] 3 All E.R 552: “In determining the shares in the matrimonial home of spouses who had separated, the court looked to their respective contribution and took no account of rights and wrongs of the separation.” I think this is a good general guide in approaching the issue of division of matrimonial property between former spouses. Both parties were in salaried employment for quite sometime before their marriage went sour leading to their divorce in 2002. There is evidence, which I accept, that the respondent moved out of the matrimonial home in 1996 while the Ngei House appears to have been purchased around 1985 and registered in the parties' joint names. It is common ground between the parties that the Ngei House was the parties' matrimonial home before the breakdown of their marriage. Indeed the applicant asks this court to declare the said house joint property and the only issue he raises relates to each party's share if the house were to be sold.

The applicant says he sold his Nairobi West House to raise deposit for the Ngei House and that the respondent had nothing to do with ownership of the Nairobi West House. On the other hand the respondent claims that the Nairobi West House was jointly owned between the applicant and herself. She, however, adduced no independent evidence to support her claim. Additionally, her claim has been refuted by Stephen Muthaura Miriti who gave testimony before me to the effect that the applicant used their father's title deed as security to get a bank loan to buy the Nairobi West House and that the respondent made no contribution to the purchase of the Nairobi West House. The record is, however, not clear as to when the Nairobi West House was purchased by the applicant. It was the respondent's duty to prove that this house was jointly owned by the applicant and herself but she did not.

I find that the Nairobi West House was not jointly owned between the applicant and the respondent. That notwithstanding, I take cognizance of the fact that the applicant deemed it fit to have the Ngei House, whose purchase deposit was derived from sale of the Nairobi West House, registered in the joint names of himself and the respondent without specifying either party's shareholding therein. A rebuttable presumption arises, and I so infer, from this treatment of the respondent by the applicant that he intended that the two of them should hold the Ngei House property in equal shares. The applicant must have recognized the respondent as part of him and that she had made a contribution, either in cash or kind, to his family welfare to warrant such treatment. I note that the applicant at least conceded that the respondent bought food for the children. It is of course common knowledge that in this society it is wives who ordinarily shoulder the bulk of the responsibilities for nursing of children, especially when they are young. In the circumstances of this case, I find on the basis of the Court of Appeal decision in Mary Anne Matanu Kivuitu – vs- Samuel Mutua Kivuitu [1991] 2 KAR 241 that the applicant and the respondent in the present case hold the Ngei House property on equal basis or in equal shares. With regard to the Mwalimu Shamba property, the parties are agreed that it is the respondent who applied for it and that she got it by virtue of her being a teacher, which the applicant is not. The applicant says he is the one who paid for the plot and there is evidence that he is in fact the one who went to ballot for it on behalf of the respondent. That was in the days when the parties were living and working in harmony. However, receipts in respect of payments for the plot plus legal fees and stamp duty are in the respondent's name as are also receipts in respect of payments for the Ngei House (supra) or at least the bulk of them. To me this scenario depicts a symbiotic relationship between the parties whereby they pooled their various resources for the singular purpose of building a home and family together. In the premise, this Mwalimu Shamba too must be treated as part and parcel of both parties' matrimonial property in equal shares. The

respondent asked this court to declare the rural property Ntima/Igoki/1492 jointly owned by the applicant and herself. She, however, tendered no independent evidence to support her claim. In view of the evidence of Stephen Muthaura Miriti who testified that this property was purchased by the applicant after he and the respondent separated, which evidence I accept, I find that the respondent's claim to own Ntima/Igoki/1492 jointly with the applicant has no legal basis and I reject the same.

The applicant asked this court, inter alia, to order the sale of the Ngei House and that he be awarded 90% of the proceeds of sale for him to use in building another home for the family in Nairobi. In this connection, I note that, by the applicant's own admission, all the children are grown up. And the respondent adds that all the children except the last born, Kevin are gainfully employed and that they live on their own. Furthermore, the respondent averred that Kevin has been attached to and was living with her until he went for treatment for drug abuse. Given the above scenario, I am not persuaded by the applicant's plea that building a home for the family in Nairobi out of proceeds of sale of the Ngei House is a pressing obligation of his in the circumstances of this case. I also note from Kivuitu's case (supra) that the learned Judges of Appeal held that Section 17 of the Married Women's Property Act, 1882 of England does not give the right of sale but a determination and declaration of the wife's share in the property. In the present case the respondent wife moved out of the matrimonial home in 1996 and declined to return despite family attempts for her to do so. However, when it apparently suited her, she is said to have forcibly evicted the resident tenant, Edgar Kalya at night on 12.06.03 using the police and went into occupation of the Ngei House herself and sublet its servant's quarters despite the existence of a court order restraining her from interfering with tenants of the house.

The applicant complains that in 1997, i.e. one year after the respondent moved out of the matrimonial home, the respondent used a counter cheque to withdraw Kshs.155,000/= from the account of Midland Junior School, which she once jointly owned with the applicant, without consulting the applicant and used the money for her own unspecified purposes. The applicant adds that he took the respondent to court over the matter and obtained a court order for the respondent to refund the money but she did not do so. The applicant says he obtained an execution order but somehow he did not deem it fit to execute the order against her. The respondent has not answered this complaint by the applicant. There is a further complaint by the applicant that Midland Junior School closed down in December, 2002 and he blames the respondent for the school's breakdown but he (applicant) nevertheless had to repay the bank loan of ksh.300,000/= he had earlier taken for purposes of developing the school further.

On the other hand the respondent says she utilized her retirement benefits, her teaching and management skills for the school's development. At the same time she denies deserting the matrimonial home and denies abandoning the management of the school, yet she blames the applicant as the cause of the school's breakdown, which is a contradiction. Taking the entire evidence in this case into consideration, the respondent comes through as someone of erratic behaviour. One example is the fact that on 28.02.03 she described herself as the applicant's lawful wedded wife and evicted the resident tenant, while she knew the applicant had divorced her effective from 27.02.02. The respondent also seems to be of the acquisitive type with tremendous zeal for property ownership. One manifestation of this is her claim to own Ntima/Igoki/1492 jointly with the applicant against clear evidence that the said property was acquired by the applicant after she and the applicant separated.

The respondent also appears to be no respecter of court orders, as witness the fact that she forcefully entered the matrimonial Ngei House property, after throwing out the tenant Edgar Kalya at night, despite the existence of a court order for her not to interfere with the property. The respondent is said to have moved out of the matrimonial home in 1996 to go and live in rented accommodation at Embakasi Estate, Nairobi and it is not clear what prompted her to return and forcefully enter and occupy the said matrimonial property on 12.06.03. Be that as it may, this court will be guided by her contribution, in cash or kind, towards acquisition of the matrimonial property in question in determining her share in such property. At this juncture I wish to refer to Court of Appeal Civil Appeal No.79 of 1997, Beatrice Wanjiru Kimani -vs- Evanson Kimani Njoroge (unreported) to which applicant's counsel drew this court's attention and which she (counsel) sought to rely on.

As I understand it, the main point of the Judgment of the Presiding Judge of Appeal (Gicheru, J.A) was

that contribution of whatever nature of the partners to the marriage which had gone sour must be proved on a balance of probabilities; that the appellant wife had not so proved the contribution she claimed to have made; and that in the Presiding Judge's view, her appeal for 50% of the matrimonial property in question should be dismissed. This was a minority Judgment. The other two learned Judges of Appeal (Omolo and Lakha, JJA) were of the view that the appellant's appeal be allowed on the basis that the learned trial Judge of the Superior Court (Kuloba, J – as he then was) appeared to have been biased against the appellant in the appeal in question and that the case should be re-tried by a different Judge. The other two Judges of Appeal did not address the substantive issues of the appeal as did the Presiding Judge of Appeal. For my part I have no quarrel with the position that respective contributions of whatever form made by marriage partners towards acquisition of matrimonial property must be proved on evidence on a balance of probabilities, unless admitted.

In Kimani's case (supra) the essential property was registered in the husband's name. In the present case the Ngei House property was registered in joint names of the applicant and respondent while the Mwalimi Shamba property was applied for by the respondent wife by virtue of being a teacher, which appears to have been the only way the property could land in the hands of the family. Otherwise it is the applicant husband who did the running around and attended balloting for the plot. Receipts in respect of payments for the plot appear of necessity to have been issued in the name of the respondent wife who was the official applicant for the plot. I hold that the present case is distinguishable on facts from the Kimani case (supra). The facts in the present case indicate that the parties' treatment of each other with regard to the two properties in question was such as to lead to the conclusion that they intended to treat each other as equal partners as far as their interests in the said properties were concerned. In this connection, the following excerpt from the observations of Lord Morris of Borth-y-Gest in *Gissing –vs- Gissing* [1971] A.C. 886 seems appropriate as a conclusion to the discourse in the present case:

“The court does not decide how the parties might have ordered their affairs; it only finds how they did. The court cannot devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had. Not can ownership of property be affected by the mere circumstances that harmony has been replaced by discord. Any power in the court to alter ownership must be found in statutory enactment”.

On the basis of all the foregoing, I make the following final orders:- 1. Properties L.R. NO.NBI/block 60/303 Ngei Phase 1 Nairobi (Ngei House) and Ruiru/Ruiru East Block 3/2500 Mwalimu Shamba are hereby declared joint properties owned jointly between the applicant and respondent in equal shares. 2. As the parties have not been able to agree on how the properties at 1 above should be shared between them, it is hereby ordered that each of the said properties be valued by a valuer to be mutually agreed between the parties and each party to have the option of purchasing the other party's 50% share of each property. In the event that the parties fail to agree on which of them should purchase the other's 50% share, the property in question to be sold and the proceeds of sale divided equally between the parties. 3. For avoidance of doubt, either party is hereby restrained by himself, by servants and/or agents from alienating and/or in any other way encumbering the properties at 1 above pending compliance with the orders at 1 and 2 above. 4. The respondent is hereby ordered to refund the deposit of Kshs.25,000/= to the previous tenant of the Ngei House at 1 above within 30 days of the date hereof. 5. The respondent is hereby ordered to refund to the applicant the kshs.155,000/= she withdrew from Midland Junior School Account in 1997 without consulting the applicant within 90 days of the date hereof. 6. The respondent's prayer that Ntima/Igoki/1492 be declared joint property jointly owned between the applicant and herself is hereby dismissed. 7. The respondent is hereby ordered to pay the applicant's costs of these proceedings.

Orders accordingly.

Delivered at Nairobi this 9th day of November 2004.

B.P. KUBO

JUDGE

