



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

**AT NAIROBI
MILIMANI LAW COURTS**

CIVIL CASE NO. 2629 OF 1998 (O.S)

CLEMENTINE OKELLO.....PLAINTIFF

VERSUS

JOSEPHAT OKELLO ANGUTE.....DEFENDANT

JUDGMENT

This originating summons is brought under the Married Women's property Act 1882. Plaintiff seeks the following orders.

1. It be declared that L.R. No. Nairobi Block 97/77 is owned jointly and in equal shares by plaintiff and defendant and that defendant holds the same as trustee for benefit of himself and plaintiff
2. The said house be sold and proceeds be apportioned equally between plaintiff and defendant.
3. It be declared that Motor vehicle registration No. KQF169 registered in the name in possession of the defendant is owned personally by plaintiff and that defendant hold the same as trustee for the benefit of the plaintiff
4. The said motor vehicle be sold and proceeds of sale be apportioned to plaintiff.

Plaintiff and Respondent got married at Registrars office Nairobi 16.2.78. Plaintiff had one child outside marriage. They later begot one Valarie Okello born on 29.12.83. they lived in Zambia in 1978. They returned to Kenya in 1979 and lived in California Estate Nairobi from 1980 to 1985 The couple then bought a house in Golden Gate L.R. No. Nairobi Block 93/77 on Mortgage. Plaintiff and defendant lived in that house until 12.8.96 when plaintiff left with the child of the marriage.

Plaintiff filed Divorce cause No. 40 of 1997 at Senior Principal magistrates court Milimani Nairobi for the dissolution of the marriage. A Decree Absolute dissolving the marriage was given on 30.8.99. The present suit was filed on 25.11.98. This suit was filed when the marriage between the parties was subsisting. It is therefore competent and court has jurisdiction to determine the dispute notwithstanding that the Marriage has been dissolved.

The house in dispute LR No. Nairobi/Block 93/77 was bought through mortgage from Housing Finance Company of Kenya (HFCK) Plaintiff testified that she paid shs 84,000 as deposit out of the required deposit of shs 115,000 and that defendant paid the balance.

The application for a loan of shs 378,000 to HFCK is dated 21.5.85 It is signed by the defendant alone

but the applicants are shown as the plaintiff and the defendant.

Plaintiff testified that she paid shs 84,000 to M/S Kimani Kairu Advocates who were acting for the vendor. According to her she was remitting a quarter of her salary when she was working in Zambia to her bank account in Kenya. She was also employed by Block Hotels from 4.1.80 to May 1983. She testified that she had enough money in her account. She testified in her evidence in cross examination that she paid shs 84,000 in Cash to M/S Kimani & Kairu Advocates. On further cross examination, she testified that she gave shs 84,000 to defendant in lump sum but defendant paid M/S Kimani & Kairu Advocates in several cheques as defendant used to pay in bits. She admitted that her salary was about shs 3000 in July 1985.

Defendant denied that plaintiff gave him any money to pay M/s Kimani Kairu Advocates. Defendant testified that he obtained a loan from Wanandege Co-operative Society through which he paid the deposit and that the balance was financed through a loan from HFCK.

I have scrutinized the documents produced by both parties. The house L.R No. Nairobi/Block 93/77 was registered in the name of plaintiff and defendant as joint proprietors on 13.11.85 and a charge in favour of HFCK to secure a loan of shs 344,540 was registered against the property on the same day. Defendants letter dated 27.8.85 (document was No 8 of EX DI) shows that the purchase price of the property was shs 420,000; that shs 42,000 was required as deposit and that HFCK had agreed to advance shs 337,5000. By that letter, plaintiff applied for a loan of shs 124,000 to raise the shortfall of shs 82,500 and the 10% deposit of shs 42,000. The letter dated 29.7.85 from Wanandege (Document 11 of EX DI) shows that the defendants application for a loan was approved. The two letters dated 8.7.85 (Ex 29, and 2(b) and the letter dated 12.7.85 (Ex 2(C) produced by Plaintiff clearly show that the deposit required was sh 42,000. By the letter dated 12.7.85 the parties forwarded shs 20,000 to M/s Kimani Kairu Advocates and promised to pay the balance of shs 20,000 before end of July 1985. A receipt for shs 22,000 was given on 15.7.85 (Document 14 of Ex DI). A further shs 46,500 was paid to M/s Kimani Kairu Advocates on 11.9.85 (Document 15 of EX D1) On 3.10.85, shs 18,100 was paid to M/S Kimani Kairu Advocates (Doc 16 of Ex DI). The shs 18,100 was paid through a bank cheque purchased by defendant (Doc 18 of EX DI)

The evidence shows that contrary to the evidence of the plaintiff that the deposit required was shs 115,000 and that she paid shs 84,000 to M/S Kimani Kairu & Co Advocates, the deposit required was shs 42,000 and the plaintiff did not in fact pay shs 84,000 to M/S Kimani Kairu & Co Advocates. Plaintiff has not shown by documents that she had savings of shs 84,000 in her bank account or that she withdrew shs 84,000 from her bank account. She has not specified the date when she gave defendant shs 84,000/= If she had given defendant shs 84,000 in lump sum before 12.7.85, then she and defendant could not have had difficulties in raising the deposit of shs 42,000 demanded and they could not have written the letter dated 12.7.85 (Ex 2C) pleading to pay the balance of shs 20,000 by end of July 1985. I find the defendants evidence more credible which is supported by documents, that he applied for a loan from Wanandege Co-operative Society through which he paid the deposit and part of the purchase price which was not financed by a loan by several installments. Plaintiff admits that she did not pay any other money towards the purchase price or any mortgage installment. Indeed, defendants evidence and the relevant documents show that he has solely been paying the mortgage installments albeit with difficulties. The original mortgage debt was shs 344,540. Although defendant has paid the mortgage installments over the years, arrears has been accumulating and the outstanding mortgage loan balance as at January 2001 stood at shs 385,091/13.

From the foregoing I conclude that plaintiff has not shown by concrete and credible evidence that it is the defendant who paid the initial deposit and purchase price not covered by the loan and who continues to pay the mortgage installments.

Plaintiff testified that she agreed with defendant that she would take care of the children while defendant took care of the mortgage. She testified further that he was paying the school fees for the two children; buying books and buying groceries every month from 1985 to 1996 when the couple separated. Thus, she claims to have indirectly contributed towards the purchase of the house. Defendant denies this but he agrees that the couple was running a clothes business. He accuses plaintiff of carrying away nearly all the household goods when she left the matrimonial home in his absence.

I do not find it necessary to determine that dispute because it is my view that the dispute on the ownership of the property was prematurely brought to court. I say that the dispute was prematurely brought to court because the house is still on mortgage. The outstanding mortgage loan is today higher than the original mortgage loan although defendant has been paying the mortgage installments. The house is still heavily encumbered and it is speculative to say that defendant may sometime in the future be able to pay the mortgage loan outstanding. He may be unable to pay in which event HFCK will sell the house in exercise of its statutory power of sale. Plaintiff prays that the house be sold and proceeds be shared equally. A part from the high authority of James Kamore Njomo Phoebe Wangui Kamore & Another - CA No. 63 of 1999 that, the court has no jurisdiction to change title to the property, the house in dispute can only be sold subject to the charge. And although the plaintiff ask for a declaration of rights regarding that property, she has not offered to pay half of the outstanding mortgage debt or shown that she has the financial means to pay. It follows that if the declaration of rights is made now, defendant will still continue paying the whole of the outstanding mortgage debt.

The declaration of rights should have been sought after the whole of the mortgage debt has been fully paid and the charge discharged. That would be the appropriate moment to assess the contribution each party has made towards the purchase of the property. Until defendant completes the payment of the outstanding mortgages which varies from time to time because of the interest it is difficult to assess the contribution each party has made towards the purchase of the property.

Lastly, the court would be interfering with and prejudicing the charges rights to the property if it were to make a declaration of shares at this stage. Failure to make declaration of rights of cash at this stage will not prejudice the plaintiffs right section 17 of the married Women Property Act 1882 is a procedure section and plaintiff can still file a suit in the normal manner for declaration of rights.

Regarding Motor vehicle registration no KQF 169, plaintiff has produced an agreement of sale (Ex 4(a) which shows that she entered into agreement for the sale of the motor vehicle with Dorothy Kamene Syamda. She has also produced a receipt to show that he paid shs 39,200 for the car (Ex 4(d)). She has shown the source of funds – a loan from Block Hotels (Ex 4(e)). Defendants case is that he contributed shs 16,500 which was the difference between the purchase price and the loan of shs 22,500 which plaintiff obtained from Block Hotels. Defendant also claims to have paid for the car, insurance and transfer fees making a total contribution of shs 21,800 Defendant further testified that she gave plaintiff money to purchase another car reg. No. KAC 217V which she sold and bought motor vehicle reg No. KAK 336 W Motor vehicle reg No. KQD 169 is now registered in the name of the defendant. Although plaintiff claimed in the originating summons that the motor vehicle solely belongs to her she testified that she is claiming half share of the motor vehicle. The sale agreement and the receipt from the public Trustee show that it is the plaintiff who purchased the motor vehicle and paid for it. There is no concrete evidence from the defendant that he contributed in cash towards the purchase of the motor vehicle. I am satisfied that plaintiff has proved that she purchased the motor vehicle without any contribution from the defendant. I conclude that defendants is registered owner of the motor vehicle in trust for the plaintiff.

Plaintiff did not ask for an order for delivery of the Motor vehicle to her. She has another motor vehicle. It appears that defendant is using the motor vehicle. Court should order the defendant to pay the market price of the motor vehicle after valuation to the plaintiff. But an order for valuation may generate other disputes. It is appropriate to order the defendant to pay the estimated market price of the motor vehicle to the plaintiff.

I have taken into account the purchase price of the motor vehicle and the fact that it has been used for over 115 years since date of purchase. I have also taken into account that puegeot vehicles normally have a good resale value. I estimate the current market price of motor vehicle as shs 30,000.

On the issue of the costs of the suit, plaintiff has partially succeeded but has lost the claim to the house which is a valuable asset. It is just that each party should meet his/her own costs.

For the above reasons

1. I dismiss the plaintiff's claim in prayer 1 and 2 of the originating summons

2. I allow the plaintiffs claim in prayer 3 and 4 of the originating summons to the extent I order defendant to pay shs 30,000 to the plaintiff being the estimated market price of Motor vehicle reg. KQF 169 within 30 days and i/d execution to issue

3. Each party to meet her/his own costs of the suit.

E. M. Githinji

Judge

20.12.2001

Mr. Nyaga holding brief for Miss Guserwa for plaintiff present

Mr. Wachira holding brief for Mr. Kowade present