



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NUMBER 161 OF 2006**

**LEAH WANGUI NGATA .....PLAINTIFF**

**VERSUS**

**FRANCIS NGATTA KING'ORI .....1<sup>ST</sup> DEFENDANT**

**RESMA COMMERCIAL GENCIES.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By an Amended Complaint dated the 29<sup>th</sup> August 2006, the Plaintiff who was the wife of the First Defendant Francis Ngatta King'ori sued him, together with Resma Commercial Agencies and sought the following reliefs:

**(1) A permanent injunction restraining the defendants by themselves, agents and/or servants from evicting, effecting transfer of Title, collecting rent or interfering in any manner whatsoever with the Title, ownership, quiet possession and enjoyment of the suit property.**

**(2) A declaration that NKU/MIN/BLOCK 3/325 is a matrimonial property and that the first Defendant held the title thereto in trust in equal shares for himself and the plaintiff and any transfer effected to the second defendant by the first defendant is declared null and void and the same be and is hereby cancelled or in the alternative an order directing the first defendant to pay the plaintiff half the market value of the suit property.**

**(3) Costs of the suit.**

2. Briefly, the Plaintiff, Leah Wangui Ngata was a lawfully wedded wife of the first Defendant with whom they had five grown up children, at the date of the suit. They cohabited at Nyahururu, Eldoret and finally at Nakuru, where by joint effort, bought the suit property **NKU/MIN/BLOCK 3/325** where they built their matrimonial home. Through various loans taken by the first defendant, who was first employed by Kenya Postal Corporation and later set up hotel businesses in Eldoret, Nyahururu and Nakuru and by assistance of the plaintiff who was doing chicken breeding business and farming and also the children who were operating the various hotels, they bought properties (plots) at Nyahururu, Laikipia and lastly at Nakuru where the family settled in the house constructed at the said plot. Evidence was produced that at all material times, the plaintiff assisted the first defendant in repayment of the various business loans from proceeds of her business of poultry breeding and keeping, and sale of the plots they had acquired, leaving the suit premises as the only plot where the family cohabited together for a period of seventeen years. By around 2002, the plaintiff became sick and could not run her business so she retired at the suit premises which had a mortgage but was discharged on 27<sup>th</sup> April 2005.

3. The first defendant continued with his hotel business and about May 2006 secretly and without consent of the plaintiff, and while both were cohabiting in the suit premises purported to sell the suit premises to the second defendant's company whose main shareholder, Samuel Kimani was the couples neighbour, by a sale agreement dated 17<sup>th</sup> May 2006 executed by the first defendant and the second defendant for a sum of Kshs.1,100,000/= which sum was paid in full to the first defendant. The plaintiff got the rude shock when the second defendant demanded by a letter dated 28<sup>th</sup> June 2006 for rent at the rate of Kshs.13,000/= per month and in default, gave her seven days notice to vacate the suit premises and house, claiming that the property had been sold to the 2<sup>nd</sup> defendant. This notice prompted the filing of this suit.

4. Upon application by the plaintiff at the commencement of the suit for restraining orders against the defendants, the court ordered *status quo* to be maintained on the 16<sup>th</sup> August 2006 thus stopped further interference with the Title and ownership of the suit property pending the hearing and determination of the suit.

At the time the court issued the *status quo* order, the property had not been transferred in favour of the second defendant but transfer process was ongoing.

5. The first defendant in his defence filed on the 29<sup>th</sup> August 2006, stated that he bought the said property alone and due to intimidation of one of his sons he could not access the same, that he had sought consent of the plaintiff – to sell to enable the couple rent a house elsewhere and create a matrimonial home on **LR Kiambogo/Kiambogo BLOCK 2/11600(MWARIKI)**. He further denied holding the suit property in trust for the plaintiff and stated that he needed money to take care of his ill-health.

6. The second defendant filed his defence on the 19<sup>th</sup> September 2006. It was its defence that all along the plaintiff was aware of the sale of the suit property and that it was the legal owner of the property and that an award of damages would be adequate compensation if an illegality was committed in the sale transaction.

The second defendant raised a COUNTER-CLAIM against the plaintiff and/or the first defendant and sought an order of vacant possession of the suit property in terms of the Sale Agreement and in the alternative a refund of the purchase price and mesne profits from 1<sup>st</sup> July 2006 at the rate of 450/= per day until payment in full plus 15% interest on the purchase price and a right of lien over the property pending full payment.

7. The plaintiffs claim is as stated in **Paragraph 2** of this judgment, that the suit property was the family's matrimonial home, that she had immensely contributed financially towards its purchase and construction by selling off her Nyahururu plot and putting in her income from her poultry business, paying off the first defendants loans with various financial institutions, that the family had no where else to call home, all other properties having been sold by the first defendant, and that her consent was not obtained for the sale of the property, that would leave her and her children destitute without a home.

Unfortunately, the plaintiff died before the case was completed and was substituted by her son, Joel Karumba Ngatta as the legal representative of her estate. A further Amended Plaintiff was filed on the 5<sup>th</sup> November 2011 to incorporate the substitution.

8. In his evidence the first defendant departed from his pleadings in his defence filed on the 29<sup>th</sup> August 2006, a complete about turn. He admitted that the plaintiff was his wife and that he left the matrimonial home and lives at Thika. He had filed an affidavit on the 27<sup>th</sup> June 2013 and urged the court to adopt the averments therein as his defence statement. In summary, and on cross examination on the affidavit, he stated that he became sick with diabetes from 2002, the same ailment that killed his wife the plaintiff and that he needed money for treatment. So without consent and/or knowledge of his wife, he sold the matrimonial home and was paid in full by the purchaser, the second defendant. He regretted selling the property and stated that the purchaser had promised to give him five Acres of land to relocate to at Kiambogo which never happened. He stated that he met with his children and explained to them that he

wanted to refund the purchase price to the purchaser so that he could give them back the family house.

9. On cross-examination, the 1<sup>st</sup> Defendant stated that the matrimonial home belonged to his family and that the wife (plaintiff) had contributed to its purchase from income from her shop and business. He stated that this case contributed to the death of his wife, the plaintiff. He stated that he wanted to refund the money and get back the property, the only place his children could call home.

10. On his part, the second defendant through its managing director, Samuel Kimani testified that he knew that the plaintiff and the first defendant lived in the suit property but was approached by the first defendant to buy the property as he needed money for treatment, as he paid him Kshs.1,100,000/= being the negotiated price for the property. He testified that the property was transferred to the 2<sup>nd</sup> Defendant on the 19<sup>th</sup> May 2006 and certificate of Title issued in its favour, but had not taken possession when this case was filed. In line with his counter-claim, he demanded refund of the purchase price and Kshs.450/= per day as mesne profits and interest at 15% Per Annum.

On cross examination, the second defendant stated that the plaintiff's consent, as wife of the seller was not a requirement under the law then. He denied having colluded with the first defendant in the sale of the suit property.

11. The issues that arise from the above evidence, pleadings, and the parties written submissions, in the courts view are as follows:

1. ***Whether the suit property is a matrimonial propriety, and if so, what constitutes such property.***
2. ***whether the plaintiffs consent was required before it could be sold.***
3. ***whether the plaintiff had a beneficial interest in the property.***
4. ***whether the sale of the property was valid and whether a valid title could be transferred to the second defendant.***
5. ***whether the second defendant is entitled to the prayers sought in his counter-claim.***

## 12. **Evaluation of evidence and determination**

What comes out of the evidence by the plaintiff, her witnesses and the first defendant is straight forward.

That the plaintiff was the lawful wife of the first defendant and during the marriage period, both the plaintiff and the first defendant through their individual businesses acquired some properties, by joint effort and financial contribution, culminating into the purchase of the Nakuru property **NKU/MIN/BLOCK 3/325** where the couples matrimonial home was built.

The couple and their children lived thereon for seventeen years upto the year 2006 when the first defendant, without the knowledge and consent of the plaintiff, purportedly sold the same to the second defendant, a neighbour, who also admitted that the plaintiff's consent to sell the property was not sought. Before the property could be transferred in favour of the second defendant, the court through an order of *status quo* issued on the 16<sup>th</sup> August 20106 stopped all further dealing with the suit property. Despite the court order, the second defendant in defiance, failed to stop the process of transfer of the suit property in its favour. Before the suit was concluded, the plaintiff died but her son, stood in and was substituted in her place.

13. The issues are intertwined, the court will address them together.

From the evidence, it has come out evidently that the plaintiff contributed financially to the purchase of the suit property where the couple built there matrimonial home. Indeed, the first defendant was

apologetic that he secretly sold the same and acknowledged his wife's financial contribution to not only the matrimonial home but in other properties acquired during the subsistence of the marriage. The marriage was dissolved by death of the plaintiff during the pendency of this suit.

To that extent, and by virtue of her financial contribution, the plaintiff acquired a beneficial interest. In **Kimani -vs- Kimani 1997** it was held that a party has to prove that she directly or indirectly contributed towards acquisition of the properties to which she claims beneficial interest.

Likewise in **P. Mburu Echaria -vs- Pricilla Njeri Echaria C.A. NO. 75 of 2001**, the Judges of Appeal held that a spouse is only entitled to that part of matrimonial property which she can prove that she contributed to the acquisition thereof, where the property is registered in either of the spouses names. This was held in 1997, when Kenya did not have its own homegrown law on Women Property Rights.

14. The **Matrimonial Property Act 2013** was enacted to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes.

**Section 12 (4) (32) of the Act** provides that a spouse shall not be evicted from the matrimonial home by any person except:

- “(a) On the sale of any estate or interest in the matrimonial home in execution of a decree.*
- (b) by a trustee in bankruptcy or*
- (c) by a mortgagee or chargee in exercise of a power of sale or other remedy given under the law.”*

**Section 12(5)** states that the matrimonial home shall not be mortgaged or leased without written and informed consent of both spouses.

Under **Section 14**, there is a presumption that where a property is acquired during the marriage,

- (a) In the name of one spouse there shall be a rebuttable presumption that their beneficial interests in the matrimonial property are equal.*
- (b) In the names of the spouses jointly, there shall be a rebuttable presumption that their beneficial interests in the matrimonial property are equal.*

15. The old order under the **Married Women Property Act of 1882** ceased to apply in the Kenyan context at the commencement of the **Matrimonial Property Act, 2013**, on the 16<sup>th</sup> January 2014.

Though this case was filed in 2006 under the **Married Women Property Act**, provisions on both acts agree on the manner of disposal of the matrimonial home. **Section 17 of the Married Women Property Act**, the court was obligated to consider the wife's contribution, directly or indirectly to the acquisition of Section 17 Matrimonial Property. Cases like **Kivuitu -vs- Kivuitu (1991) LLR 1411**, **Nderitu -vs- Kariuki (1977) LLR 2731** and **Echaria -vs- Echaria**, the above principle was applied.

16. In applying the provisions of the **Section 17 of the Married Women Property Act** under which this case was filed, the court finds that the plaintiff contributed financially to the purchase, and construction of the matrimonial home standing on the suit property. The first defendant agreed that he sold the property secretly without the knowledge of the plaintiff, and did not share the proceeds with her.

The second defendant in my view was not an innocent purchaser for value. He knew that the plaintiff and the first defendant resided in the suit property as he was a neighbour. The plaintiff's children knew him too. He did not inform the plaintiff that he was about to dispossess the family of the property. All he did was to send a rent demand letter or face an eviction. He bought the property for investment purposes according to his evidence. The court reads some collusion between the first and second Defendants. Before the property was transferred in favour of the second Defendant, the court had issued an order of

*status quo* to be maintained - to restrain it or any body else from further interference or transactions touching on the suit property. In blatant disobedience to a lawful court order, the second Defendant went ahead and caused the transfer of the suit land into its name and a certificate of title issued in its favour.

For the courts dignity to be upheld, it behoves everyone to obey court orders however unpalatable they may be.

17. The second defendant in its evidence urged the court to dismiss the plaintiff's claim and in the alternative to make an order of refund of the purchase price plus Kshs.450/= per day and interest at 15% until payment in full. He however did not lay a basis or call evidence on his claim of Kshs.450/= per day nor the interest rates of 15% per annum. He did not produce a valuation report that would have informed the court of possible rental income per month. The claim was not substantiated or strictly proved. It can not stand as the court cannot act in a vacuum or give orders that are not supported either in law or in fact.

18. Upon analysis of the evidence the pleadings and the applicable law, the court is satisfied that the plaintiff's claim is merited and that the plaintiff has proved her case on a balance of probability. The first defendant supported the plaintiff's claim in all aspects. He informed the court that he was willing to refund the purchase price to have the matrimonial home returned to his children. The court finds that the plaintiff had a beneficial interest in the property as the spouse of the registered owner through her financial contributions to its acquisition. The court also makes a finding that the sale of the property was shrouded in secrecy, collusion, fraud and illegality. Spousal consent is an overriding interest and necessary for any matrimonial property under the old order, though not expressly required, equity demanded that before selling a matrimonial home, spousal consent had to be obtained, and the spouses share had to be ascertained. The registered spouse was holding the unregistered spouses share in trust. See **Kimani -vs- Kimani (Supra) and Nderitu -vs- Kariuki**.

19. The plaintiff had sought for an order of permanent injunction to restrain the defendants from evicting her, collecting rent or interference with her peaceful occupation and enjoyment of the suit property in any manner. This is a matter where it is fit to grant a permanent order of injunction as prayed for in the plaint.

The plaintiff has satisfied all the principles formulated in the **Giella -vs- Cassman Brown & Co Ltd (1973) EA 358**. A *prima facie* case was established that unless the order of injunction is granted, the plaintiff would suffer irreparable loss resulting from the sale of her home that would not be adequately compensated in damages. Her children reside in the suit premises with no alternative home. Granting of the permanent order or injunction is appropriate.

20. Having made the above findings, what then would be the appropriate, equitable and just remedy?

The plaintiff in her Plaint prays that the sale of the property be declared null and void and the registration of the suit property in favour of the second Defendant be cancelled, and in the alternative direct that the first defendant to pay half share of the market value to the plaintiff.

**Section 80 of the Land Registration Act, 2012** provides for cancellation or amendment of the Register if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. The claim was brought under **Section 17 of the Married Women's Property Act of 1882**. The Act does not authorise substitution of title from one spouse to the other spouse. The **Land Registration Act, 2012** and the **Matrimonial Property Act, 2013**, cannot have retrospective application as this case that was filed before the enactment of the said Acts. **Section 17 of the 1882 Act** provided remedies in terms of declarations only. A court has no jurisdiction to make an order of transfer of proprietary rights from one spouse to the other (See **Kamore -vs- Kamore (2000) 1 EA 80**).

However, in the **Echaria case (Supra)** and citing **Muthembwa -vs- Muthembwa** decided two years later after the **Kamore** case, the Court of Appeal held that its jurisdiction was not limited to merely making declaratory orders, but could make any appropriate orders in the circumstances of each case, and pronounced itself that:

***“So if courts powers were limited to only making declaratory orders, we doubt whether the dispute between the parties would ever come to an end soon enough as envisaged by provisions of Section 17.”***

21. The court continued to state that it had jurisdiction to order adjudication of the dispute and to allocate shares of disputed property as it may deem just, and order transfer of the share to the rightful beneficial owner to give effect to the decision. This court is bound by the Judges of Appeal decision in the **Echaria** case.

The plaintiff in this case has proved beneficial ownership of the suit property and matrimonial home. As stated earlier, the first defendant is ready and willing to refund the purchase price he fraudulently and deceitfully received from the second defendant. Following the Court of Appeal decision in the **Echaria - vs- Echaria** case, I proceed to pronounce judgment in favour of the plaintiff against the first and second defendants in the following terms:

***1. That an order of permanent injunction is issued, and directed to the defendants jointly and severally, by themselves, their agents or servants from evicting the plaintiff or her family or demanding rent, or interfering with the plaintiff's family quiet occupation and enjoyment of the suit property.***

***2. That a declaration is issued that NKU/MIN/Block/3/325 is a matrimonial property and that the first defendant held the title in trust and in equal shares for himself and the plaintiff and that the transfer of the said property to the second defendant is declared null and void and is hereby cancelled.***

***3. That the Land Registrar, Nakuru County is directed to forthwith rectify the register in respect of property known as NKU /MIN/BLOCK 3/325 by cancelling the name of RESMA COMMERCIAL AGENCIES LIMITED as the proprietor and substituting it with the names of FRANCIS NGATTA KING'ORI and JOEL KARUMBA NGATTA, as the Legal Representative of the Estate of LEAH WANGUI NGATA, to hold the same in equal shares.***

***4. That the first Defendant shall refund to the second defendant the full purchase price of the property received, being Kshs.1,100,000/= plus interest at court rates from the 16<sup>th</sup> May 2006 when the first defendant received the said money.***

***5. The Second Defendant's claim for mesne profits having not been proved is disallowed.***

***6. The first Defendant shall pay 50% of the taxed or agreed costs of the suit to the Second Defendant, and 50% of the costs to the plaintiff.***

**Dated, signed and delivered in open court this 7<sup>th</sup> day of April 2016.**

**JANET MULWA**

**JUDGE**