



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 97 OF 2004 (O.S.)

P O.....PLAINTIFF

VERSUS

J N K.....DEFENDANT

JUDGMENT

1. The parties divorced on 3rd June 2003. On 2nd August 2004, the plaintiff filed an originating summons claiming a share of the properties known as Kaplamai/Sirende Block 4 Koitogos/ **[particulars withheld]**; Plot E **[particulars withheld]** Dandora, Nairobi; Umoja Estate Nairobi Plot (under receipt No. 57071); and, some odd household items valued at Kshs 90,660. The plaintiff also prayed that the loan balance of Kshs 1,040,450.15 owed to the Industrial and Commercial Development Corporation (hereafter *the ICDC*) be shared equally between the two parties.

2. The originating summons is predicated upon section 17 of the Married Women's Property Act (1882) as applied in Kenya (now repealed). The summons is supported by a deposition of the plaintiff sworn on 19th July 2004.

3. The defendant denied the claim *in toto*. She filed a replying affidavit sworn on 17th January 2005. She averred that she purchased the property known as Kaplamai/Sirende Block 4/ Koitogos/ **[particulars withheld]**. In the alternative, she relies on the doctrine of advancement. She denied owning the Dandora property. She pleaded that the parties had acquired two other properties in Eldoret, Eldoret Municipality Block **[particulars withheld]** (hereafter the *Ndalat Estate property*); and, Eldoret, Eldoret Municipality Block **[particulars withheld]** (a half acre plot in *Langas*). However, the plaintiff sold the two properties without her consent. She claimed that all the household items claimed in the summons were left in the custody of the plaintiff. Regarding the loan from ICDC, she averred it was obtained by the plaintiff when they had separated.

4. On 19th January 2005, the court directed that the summons be determined by way of *viva voce* evidence; and, that documents be filed and exchanged by the parties. The originating summons was deemed to be a *plaint*; the applicant was to be the *plaintiff*; and, the respondent designated as the *defendant*.

5. The plaintiff is a pastor. He testified that he married the defendant in 1956 under *Gusii* custom. They were blessed with eight children. The marriage was dissolved by decree on 3rd June 2003. He clarified that he is *only* interested in *half* of the land known as Kaplamai/Sirende Block 4/Koitogos/ **[particulars withheld]**; and, that the liability for the ICDC loan be shared equally.

6. The property is in the name of the defendant. He produced the green card and certificate of official search. He said he bought the property from Benjamin Kiptel Sang in 1976 for the consideration of Kshs 28,000. The land measures 30 acres or thereabouts. He said it was originally 40 acres but the defendant disposed of about 10 acres. He produced the sale agreement (exhibit 3) in the names of the defendant and the vendor. He testified that he issued a cheque drawn on the account of his business, *Motari Commission Agents*. He produced a copy of the certificate issued under the Registration of Business Names Act (exhibit 4). A copy of the cheque number 223489 was also tendered in evidence as exhibit 5. The account was held at Kenya Commercial Bank (hereafter *KCB*).

7. The plaintiff contended that the land is a matrimonial property. He said the defendant was supposed to represent his interests but she turned against him: the defendant registered the property and the business in her name. The plaintiff was aggrieved and filed a suit in the Resident Magistrates Court in Civil Suit 231 of 1984. He sought a decree of divorce; and, a declaration that he owned Kaplamai/Sirende Block 4/Koitogos/ **[particulars withheld]**. The plaint was produced as exhibit 7. The lower court only determined the matter of the divorce. The plaintiff said he has three wives; and, that they should all get a share of the properties.

8. The plaintiff is thus claiming 20 acres of Kaplamai/Sirende Block 4/Koitogos/ **[particulars withheld]**. Regarding the loan, the plaintiff said he borrowed Kshs 110,000 from ICDC in 1975. He charged another property Kisii/Mugirango/Bomanono/ **[particulars withheld]**. The charge debt stood at Kshs 1,140,450.15 as at 9th January 1996. He said he utilized the loan proceeds in the business styled **[particulars withheld]** *Commission Agents*. He later relocated the business to Eldoret. Thereafter, he immigrated to Zaire where he continued preaching the word.

9. Upon cross examination, the plaintiff conceded that at the time he took the loan, he had two wives; and, that the defendant did not execute the loan agreement or charge. He however asserted that the loan was used to purchase Kaplamai/Sirende/Block 4/Koitogos/ **[particulars withheld]**. He conceded that he was not a party to the sale agreement. When shown a letter from Mr. Sang (the vendor) dated 20th May 2000, he said the letter was misleading as he had sent the defendant to Mr. Sang to buy the land on his behalf.

10. The plaintiff testified that he had omitted the Langas plot in his claim before the court. He lives on that plot with another wife. He conceded that it is the defendant who was a party to the sale agreement. The Ndalat Estate property was also in the name of the defendant. Due to financial problems he defaulted in repayment; and, the municipality repossessed it. He said he trusted the defendant. That is why she was executing sale agreement on his behalf. That marked the close of the plaintiff's case.

11. The defendant testified that she lived with the plaintiff in Nairobi for two years. They then relocated to Molo for another two years. The plaintiff was initially working for the Ministry of Works. She said the plaintiff left employment to become a pastor in Kampala, Uganda. The defendant at first relocated to her rural home in Kisii. She later joined the plaintiff in Kampala. They stayed there for about 14 years. She claimed she was doing business: running a shop and exporting bananas to Kenya.

12. The defendant testified that the plaintiff left her in Kampala and returned to Kenya. She said she was not in the picture when the plaintiff borrowed money from ICDC; and, that the security was ancestral land in Kisii belonging to the plaintiff's father. She said she bought the Trans Nzoia land (Kaplamai/Sirende Block 4/Koitogos/ **[particulars withheld]**) during her stay in Kampala. She testified that the property is worth Kshs 200,000 per acre. The agreement had three parties: her; Mr. Sang; and, Mr. David Onguso, who introduced her to Mr. Sang. She claimed the purchase price was financed by her banana export business. She asked the plaintiff to process the payment cheque. She said she gave him the cash.

13. The defendant said the sale agreement was executed before Gadher Advocate. She also said she bought the Langas property. She produced the agreement (exhibit D2). She said the value of the plot is now Kshs 9,000,000. As there is a house on it, she opined it is worth about Kshs 20,000,000. She also bought the house in Ndalat Estate. She estimated its value at Kshs 16,000,000. She said that she paid the loan through a tenant purchase scheme. She said the plaintiff sold both the Ndalat house and ½ acre property in Langas.

14. The defendant referred to letters from the Eldoret Municipal Council (exhibits D3 and D5) insinuating that she had repaid the loan under the tenant purchase scheme. Under cross-examination, she conceded that she was a housewife. However, in Nairobi she engaged in small businesses. She said the plaintiff left her in Kampala. She did not have documents to show she was selling or exporting bananas to Kenya. She said she solely educated her children. She claimed she flew back in 1976 to transact over the Trans Nzoia land. Two of her children are buried on the land. She conceded that the cheque was drawn on KCB on the account of the plaintiff's firm. As the Langas and Ndalat properties have a higher value than the Trans Nzoia land, she opined that it is the plaintiff who should compensate her.

15. On 18th January 2016, and by *consent*, the defendant introduced a valuation report dated 23rd October 2015 by *Prime Valuers* over the Ndalat and Langas properties. The report shows that the open market value for the Langas property is Kshs 2,880,000; while that of Ndalat is Kshs 4,000,000. That marked the close of the defendant's case.

16. The plaintiff filed detailed submissions with authorities annexed on 4th March 2016. The defendant's submissions and precedents were also filed on 4th March 2016. I have considered the originating summons, depositions, oral testimony, the documents and rival submissions.

17. The originating summons did *not* frame *questions* for answer by the court. But seeing that the court directed that the summons be deemed to be a *plaint*, the following four broad issues arise for determination-

(i) *Is the property known as Kaplamai/Sirende Block 4/Koitogos/ [particulars withheld] and registered in the name of the defendant a matrimonial property? Paraphrased, is the plaintiff entitled to half a share?*

(ii) *Should the defendant and plaintiff share the liability of the charge debt owed to ICDC?*

(iii) *Is the plaintiff entitled to other reliefs pleaded in the summons?*

(iv) *Who should bear the costs of this suit?*

18. The current law governing matrimonial property is the Matrimonial Property Act, 2013. It came into effect on 16th January 2014. Section 19 expressly repealed The Married Women's Property Act (1882) of England as applied to Kenya. The properties in contest in this suit were purchased well before the coming into force of the new Act. The Act cannot apply *retrospectively*. See *Esther Wanjiru Kiarie v Mary Wanjiru Githaka*, High Court, Eldoret, P&A Cause 244 of 2002 [2016] eKLR.

19. It follows that certain rights and privileges of the parties had crystallized before the new Act came into force. Section 23 (3) (c) of the Interpretation and General Provisions Act Cap 2 states-

"Where the law repeals in whole or in part another written law, unless a contrary intention appears; the repeal shall not; affect a right, privilege, obligation or liability acquired, occurred, or incurred under a written so repealed."

20. I thus find that section 17 of the Married Women's Property Act (1882) as applied in Kenya (now repealed), to be the operative statute in this dispute. See *R M M v B A M* Nairobi, Court of Appeal, Civil Appeal 267 of 2011 [2015] eKLR, *Esther Wanjiru Kiarie v Mary Wanjiru Githaka*, High Court, Eldoret, P&A Cause 244 of 2002 [2016] eKLR. Sections 6, 10, and 14 of the Matrimonial Property Act 2013 cited by learned counsel for the plaintiff, Mr. Omboto, are thus *inapplicable*.

21. It is common ground that the parties were married under Gusii customary law. By a decree made on 3rd June 2003, the union was dissolved. The principles applicable in division of matrimonial property, where the properties are registered in the name of one spouse, were restated in *Peter Mburu Echaria v Priscilla Njeri Echaria*, Civil Appeal No. 75 of 2001 [2007] eKLR. See also *Burns v Burns* [1984] 1 All

22. I will first deal with the charge debt to ICDC. The debt stood at Kshs 1,140,450.15 as at 9th January 1996. The principal loan of Kshs 110,000 loan was applied for and *drawn down* by the *plaintiff*. Doubt is removed completely by plaintiff's exhibit 8. It is a letter of offer dated 1st July 1975 addressed to *Patroba Omwosa Motari*. The debt was charged to an ancestral property, Kisii/Mugirango/Bomanono/1139. The year was 1975. The plaintiff was in coverture with a *second* wife.

23. The defendant was *not* a party to the loan transaction. It *may* be true as alleged by the plaintiff that the proceeds benefited the defendant. But there was *no* cogent evidence led by the plaintiff to establish that the defendant *personally* benefitted from the loan. Even assuming she did, the plaintiff remained the *principal* debtor to the bank. That is why the lender in a letter dated 9th January 1996 (exhibit 9) demanded repayment from the plaintiff *personally*.

24. From a legal and contractual standpoint, there was no *privity of contract* between ICDC and the defendant. The plaintiff has to carry his *own* cross over the debt. It follows as a corollary that the answer to issue number (ii) above is in the *negative*.

25. The defendant claimed she was doing business in Kampala: running a shop and exporting bananas to Kenya. However, she had no documentary evidence. If it is true as claimed by the defendant that she had Kshs 28,000 to buy the land, it beats logic why she asked the plaintiff to process the cheque (exhibit 5). The cheque was drawn from the KCB account of the plaintiff's business, **[particulars withheld]** *Commission Agents*. From exhibit 4, there is no doubt it was a *sole proprietorship* as at 15th June 1973. The defendant may have flown back to Kenya to execute the sale agreement, but I have lingering doubts that it was *her* money.

26. I am fortified in that finding by two other reasons. First, the defendant in paragraph 4 of her replying affidavit sworn on 17th January 2005 made a *conflicting* proposition: She averred, in the alternative, that "*if the applicant owned the property aforesaid and caused the same to be registered in the name of the respondent then the doctrine of advancement applies in favour*" of the respondent. That pleading was *inconsistent* with her claim of outright *purchase* of the land.

27. Secondly, the sale agreement at clause 1 (a) stated that-

"The purchase price is agreed at Shs 28,000 and the purchaser has given a cheque No. 620720 drawn by [particulars withheld] Commission Agents signed by Mr. Omwanza.....and after the cheque is duly honoured, the vendor will be deemed to have received the payment in full and final settlement."

28. I am alive that the sale agreement was between the vendor and the defendant. I am also cognizant that the defendant was engaging in some business; never mind the lack of financial records. But the defendant has not given a rational explanation why the *entire* payment originated from the plaintiff's business. On a balance of probabilities, I find that the plaintiff paid for the purchase price.

29. The plaintiff had alleged that the loan of Kshs 110,000 from ICDC was utilized to purchase the land. I find *no* such connection. From the letter of offer I referred to, the loan was "*to purchase a business; and, for working capital*". The offer was made on 1st July 1975. The sale agreement for the Trans Nzoia land was made on 16th February 1976.

30. But there is a point that should not be lost in all this: the evidential burden to prove the Trans Nzoia property was a matrimonial asset lay squarely upon the plaintiff's shoulders. See sections 107 and 109 of the Evidence Act. See also *Evans Nyakwana v Cleophas Ongaro*, High Court, Homa Bay, Civil Appeal 7 of 2014 [2015] eKLR, *Esther Wanjiru Kiarie v Mary Wanjiru Githaka*, High Court, Eldoret, P&A Cause 244 of 2002 [2016] eKLR. I have found on the evidence and on a balance of probabilities that the

plaintiff discharged the burden. I readily find there was a resulting trust; and, that the plaintiff *would* be entitled to half share of Kaplamai/Sirende/Block 4/Koitogos/ **[particulars withheld]**.

31. That is however not the end of the matter. The land was bought for Kshs 28,000 in 1976. From the *uncontroverted* evidence of the defendant, the current value of an acre of the land is Kshs 200,000. Even assuming the land is still 40 acres (which is *not* the case from the evidence); its total value would be approximately Kshs 8,000,000. The plaintiff would thus only be entitled to Kshs 4,000,000 of the value. The remainder of that land today, as per the plaintiff, is only 30 acres. The entitlement of the plaintiff is thus roughly Kshs 3,000,000 only.

32. However, the plaintiff retained or sold, without concurrence of the defendant, two other properties: Eldoret Municipality/Block **[particulars withheld]** in Langas; and, Eldoret Municipality/Block **[particulars withheld]** in Ndalat Estate. The two properties were in the *name* of the *defendant*. The value given by the plaintiff in her testimony for the two properties was exaggerated. According to the professional valuation report dated 23rd October 2015 from *Prime Valuers* (which was admitted into evidence by consent) the former property is valued at 2,880,000 and the latter property at Kshs 4,000,000. The combined value of the two properties is thus *Kshs 6,800,000*. Having sold the two properties, the plaintiff took the entire benefit. Being urban properties, the benefit far *exceeds* his claim for half share of the land known as Kaplamai/Sirende/Block 4/Koitogos/ **[particulars withheld]**. On the scales of justice, he is the one who owes the defendant.

33. I thus find that the *defendant* is entitled to keep the *entire* land known as Kaplamai/Sirende/Block 4/Koitogos/ **[particulars withheld]**. I am fortified there by Article 45 (3) of our Constitution. It speaks *strongly* to *equality* of parties to a marriage. I am alive that the Constitution is not *necessarily subject to the same principles against retroactivity as ordinary legislation*. I am also guided by the Supreme Court that in order to re-engineer the social order, a constitution must *look forward and backward, vertically and horizontally*. See *Samuel Kamau Macharia and another v Kenya Commercial Bank* Nairobi, Supreme Court, Application 2 of 2011 [2012] eKLR. In interpreting the Constitution, the court must pay due regard to the language of the Constitution.

34. My answer to issue number (i) above is that the property known as *Kaplamai/Sirende/Block 4/Koitogos/ [particulars withheld]* and registered in the name of the defendant is a matrimonial property. However, the plaintiff having appropriated two other properties belonging to the defendant of a *higher* value than the *half share* he now claims in the land, the *plaintiff is not* entitled to any share of the land. The title shall remain exclusively that of the *defendant*.

35. The plaintiff unequivocally *abandoned* all his other prayers in the originating summons. He was categorical that he was *only* pursuing *half* or 20 acres of the Trans Nzoia land, *Kaplamai/Sirende/Block 4/Koitogos/ [particulars withheld]*. When the trial opened, the plaintiff told the court he had *no* claims over Plot E **[particulars withheld]** Dandora; Umoja Estate Nairobi Plot (under receipt No. 57071); and the odd household items valued at Kshs 90,660.

36. It is instructive that the Umoja property is registered in the name of *Rebecca Onchonga Kebwaro* who is *not* a party to this suit. In any event, *no* concrete evidence was led by the plaintiff to support his claim over the Dandora or Umoja properties; or, the household items such as television set, radio, furniture or three cows. I have no hesitation in finding that the plaintiff is *not* entitled to any portion of those properties. My answer to issue number (iii) above is in the *negative*: the plaintiff *failed* to prove he was entitled to a share of those properties.

37. In the result, the originating summons is *dismissed*. That leaves the question of *costs*. Costs follow the event and are at the *discretion* of the court. This is a bitter contest stemming from a failed marriage. The circumstances of the plaintiff are *measly*. He succeeded partially in the summons but lost the gains in the end. He told the trial court he is *indigent* and unable to meet his debts. In the interests of justice; and, considering the plight of the plaintiff, I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 5th day of April 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr. Chokaa for Mr. Omboto for the plaintiff instructed by Rioba Omboto & Company Advocates.

Mr. Njuguna for the defendant instructed by Njuguna & Company Advocates.

Mr. J. Kemboi, Court clerk.