



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 25 OF 2006 (O.S)

**IN THE MATTER OF AN APPLICATION UNDER THE MARRIED WOMEN PROPERTIES
ACT 1882**

BETWEEN

L M N G.....PLAINTIFF/PLAINTIFF

AND

J G N.....DEFENDANT/DEFENDANT

RULING

1. The plaintiff, L M N G, moved the court by an Originating Summons dated 26th April 2006 and taken out under the provisions of Section 17 of the Married Women Property Act 1882 of England, seeking a determination that the parcel of land described as Nairobi/Block ***[particulars withheld]***, having been purchased, developed and or improved during the period of coverture, though registered in the name of the defendant, J G N, was matrimonial property in which the plaintiff had an interest, which interest ought to be ascertained, apportioned, excised and transferred to her name.
2. In her affidavit in support of the application sworn on 26th April 2006, the Plaintiff avers that she and the Defendant are husband and wife, estranged from each other though residing in the same house on Nairobi/Block ***[particulars withheld]*** in which they occupy different rooms. She avers to have filed a divorce cause against the Defendant as their marriage has now irretrievably broken down. She avers Further that the Defendant has on several occasions ordered her to vacate the suit premises so that he can bring in the woman he claims he is now married to, a move she has resisted as she has no other place to move to and also because she has an interest in the matrimonial house.
3. The Plaintiff contends that she immensely contributed to the purchase and development of the plot and the buildings erected on it. There is a main house on the property which they occupy as well as two other flats which are occupied by tenants.

4. The Defendant has opposed the application and swore a replying Affidavit on 28th July, 2006. In that affidavit he avers that he does not intend to dispose of, charge, part with possession, alienate or in any other way deal with the property in question. He contends that he is the legal owner of said property having bought the same through a loan taken from Home Savings and Mortgages Limited, which he paid off from his personal account with Savings and Loan Limited. It is his averment that whereas he was repaying the aforesaid loans, the entire Plaintiff's salary was used for her own benefit, to wit, buying shares in her own name. Further that he is not laying any claim of her shares and thus she should not be seen to benefit twice.
5. The Defendant contends that the Plaintiff did not contribute substantially to the purchase and development of the suit premises and the buildings being and erected on it. He also argues that the Plaintiff has not exhibited any proof of contribution towards the purchase of the suit premises. He further deposes that the Plaintiff's contribution, if any, was not material and thus she is not entitled to a substantial percentage of the suit premises. He suggests that if the Plaintiff is entitled to any percentage for her contribution, then the same cannot be more than 55 of the cost of the suit premises. He states that if the court finds that the Plaintiff contributed to the purchase and development of the suit premises, then the court should grant him the first option to purchase the Plaintiff's contribution. He contends that the Plaintiff has been working throughout the currency of their marriage and has acquired substantial properties using funds from her income and thus it is inconceivable that she should be following his property while on the other hand keeping what she has acquired while he was purchasing the suit property and or developing the same.
6. The Plaintiff filed a further affidavit on 18th February 2010 in which she avers, among others, that the suit property was bought in 1987 when the Defendant raised Kshs. 50,000.00, while she used her salary to buy food, and immediately after moving into the suit property the Defendant lost his job at Kenya Bus Services Ltd and she paid the monthly mortgage contributions from her own sources through the Defendant's loan account. She states that on 4th April 1989 she withdrew a sum of Kshs. 40,000.00 by banker's cheque which she gave to the Defendant and which he deposited in his account on the 5th April 1989 and which he applied to mortgage. She further avers that on 2nd October 1989 she again prepared a cheque for Kshs. 20,000.00 and gave the same to the Defendant who banked it in his account on the same date as shown by the relevant entries in the respective accounts. Further, on 22nd February, 1990, she prepared a cheque for Kshs. 24,000.00 and gave the same to the Defendant who banked it in his account on the 27th February, 1990 and that on 10th January, 1997 she withdrew a sum of Kshs. 200,000.00 from her account and gave to the Defendant which he put in the building of the extensions to the main house. She states that the extension cost about Kshs. 500,000. It is her statement that she has built the small house using her terminal benefits, and that she never built any house during coverture as she used to contribute to the acquisition and maintenance of the suit property. She contends that she and the Defendant have always shared the rent income from the extensions equally and still do to date. She adds that the suit property is their matrimonial home and it is the Defendant who abandoned her in the house by moving away with their former house help who is now his wife and it is only fair that she be given the option to buy of the Defendant from the said property. She avers that she has contributed to the acquisition and development of the suit property as much, even not more, as the Defendant and the just determination of this matter is that she should get slightly more than the Defendant as her share of the same.
7. The parties filed their respective written submissions. The position of the Plaintiff is that she is entitled to half of the said property by reason of firstly, being the Defendant's wife and secondly, by virtue of her own direct contribution to the acquisition, development or improvement of the said property. She relied on the decision of the Court of Appeal in the case of *Peter Mburu Echaria vs. Priscilla Echaria* CA No. 75 of 2001, where it was held that a wife must prove direct financial contribution towards the acquisition and or development of the property. She therefore submits she has proved in her affidavit evidence before the court.
8. She further submits that the Defendant moved away from the matrimonial home and went to put up with the Co-Defendant in the divorce petition, and has therefore no sentimental or emotional

value of the suit property. As a result, she submits that she should be allowed to buy off the Defendant and that the first option of buying the property should be given to her. She prays in the alternative, the property should be sold and proceeds therefrom be shared equally by the parties.

9. On his part, the Defendant submits that the Plaintiff only made a minimal contribution, which he contends has been paid back in full over the years. It is the Defendant's position, that it would be unjust and inequitable to declare the Plaintiff to be co-owner of fifty percent of the suit premises and that the court should take into account that the Defendant has another family and that he is the one who singlehandedly paid the mortgage and therefore it would be grossly unfair for the Plaintiff to take undue advantage of the situation and reap where she did not sow.
10. Having carefully considered the application, the affidavits as well as the written submissions by the respective parties and the authorities they have cited, I take the view that the main issue for determination is whether the Plaintiff herein is entitled to a share in the said property.
11. The instant application is grounded on the provisions of **Section 17** of the **Married Women's Property Act**. Under this section, a married woman is entitled to a declaration that she is a joint owner of matrimonial property if she can establish that she contributed for the purchase of the same.
12. The law on matters of this nature has been stated in a number of cases. In the case of *Njoroge vs. Ngari* (1985) KLR 481, where the plaintiff sought declaration that half of the property registered in the name of her husband was held in trust beneficially for her, the court therein held, *inter alia*, that:

"If property is held in the name of one person but another contributes towards acquisition of the property, then both persons have proprietary interests in that property. If legal ownership of such property is registered in the name of only one of them, that one is deemed to hold the land in trust beneficially for himself and the other person."

13. In *Florence Wairimu Kanyora vs. Njoroge Kinyanjui* [2005] eKLR Koome J stated thus:

*"A marriage institution is usually built on trust and it is very rare that parties would keep receipts or ledger books to show their contribution and that is why the court of Appeal in the celebrated case of *Kivuitu vs. Kivuitu* (1991) 2 KAR 241 expanded the principles in determining the wives contribution to include indirect contribution by the wife who is possibly a housewife and who devotes her time in keeping the home going while the husband pursues a career of paid employment or self-employment."*

14. In the case of *Falconer vs. Falconer* (1970) 3 All ER 449 at 452 (which followed *Gissing vs. Gissing* (1970) 2 All ER 780). Lord Denning MR stated thus:

"The law imputes to the husband and wife an intention to create a trust, the one for the other. It does so by way of inference from their conduct and surrounding circumstances, even though the parties themselves made no agreement on it. This inference of trust the one for the other, is readily drawn when each has made a financial contribution to the purchase price or to the mortgage instalments. The financial contributions may be direct, as where it is actually stated to be a contribution towards the price of instalments. It may be indirect, as where both go out to work, and one pays the house-keeping and the other the mortgage instalment. It does not matter which way round it is. It does not matter who pays what. So long as there is a substantial financial contribution to the family expenses, it raises the inference of trust. But where it is insubstantial no such inference can be drawn."

15. Further, in *Gissing vs. Gissing* (1970) 2 All ER 780, at page 792, it was stated that:-

“If there has been no discussion and agreement or understanding as to sharing in the ownership of the house and the husband has never evinced an intention that his wife should have a share, then the crucial question is whether the law will give a share to the wife who has made those contributions without which the house would not have been bought. I agree that this depends on the law of trust rather than on the law of contract, so the question is under what circumstances does the husband become a trustee for his wife in the absence of any declaration of trust or agreement on his part. It is not disputed that a man can become a trustee without making a declaration of trust or evincing any intention to become a trustee. The facts may impose on him an implied, constructive or resulting trust. Why does the fact that he has agreed to accept these contributions from his wife not impose such a trust on him?”

16. In *Burns vs. Burns* (Laser) 1 All ER. 244, it was held that:-

“Thus a payment could be said to be referable to the acquisition of the house, if for example, the payer either;

- a. *Pays part of purchase price or;*
- b. *Contributes regularly to the mortgage instalments or*
- c. *Pays off part of the mortgage, or*
- d. *Makes substantial financial contributions to the family expenses so as to enable the mortgage instalments to be paid.”*

17. The Plaintiff, in the very considered opinion of this court, at least from the evidence adduced, has established that she substantially contributed for the purchase of the suit property. It must be said clearly that this court is satisfied that the Plaintiff has indeed established that she made a contribution towards the acquisition of the suit property and must also be stated that the Defendant has failed to satisfy this court on his ability to acquire the suit property without any contribution from the Plaintiff. The acquisition of the suit property was done during the coverture. The Plaintiff was in full time employment, and she has shown how she contributed in the repayment of the loans, or development of the extension or even the maintenance of the whole property, she has demonstrated how she even supported the Defendant while he was in London.

18. In view of the foregoing, this court is not prepared to make an order that is adverse to her interests or that might impact on her ownership interest in the suit property. In the circumstances, it would only serve the interest of justice that this court makes an order that will preserve the Plaintiff's interest. Accordingly, the remedy must be one that recognizes the Plaintiff's entitlement to a half interest in the suit property.

19. Therefore, this court is inclined to make the following orders:

- a. That the Plaintiff is entitled to half share beneficial interest in the property known as Nairobi/Block ***[particulars withheld]***;
- b. That the said property be valued with the participation of both parties and be sold and the proceeds of sale be shared equally between the Plaintiff and the Defendant;
- c. In the alternative, the Defendant shall be at liberty to buy out the beneficial interest of the Plaintiff in the said property in monetary terms; and
- d. The plaintiff shall have costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 6th DAY OF June 2014.

W. MUSYOKA

JUDGE

In the presence of Ms. Ndegwa for Mr. Makori advocate for the respondent.