



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

**CIVIL SUIT NO. 26 OF 2010(O.S)**

**M W K.....PLAINTIFF**

**VERSUS**

**C W N.....DEFENDANT**

**JUDGMENT**

1. By an Originating Summons dated 28<sup>th</sup> July 2010 and taken out under Section 17 of the Married Women's Property Act and Section 3 of the Judicature Act Cap 8, the Plaintiff seeks the following main orders:- that LR. No. Nairobi/Block *[particulars withheld]* – House No. *[particulars withheld]* – Hazina Estate South “B” Nairobi was acquired through the joint efforts of the plaintiff and the defendant during their marriage and registered in the joint names of both the defendant and Plaintiff, that the Defendant to execute all documents and to do all such things as are necessary to transfer the said property to the to the plaintiff without interruption, alternatively that the property described above be valued, sold and the proceeds of the sale be shared by the Plaintiff and the Defendant in the ratio of fifty per cent to the Plaintiff and fifty per cent to the Defendant.
2. The application is supported by the annexed affidavit of M W K sworn on 28<sup>th</sup> July, 2010. In that affidavit, she deposes that she was lawfully married to the Defendant at St. Francis Xavier Catholic Church Nairobi, on 9<sup>th</sup> August 2003. She avers that the marriage between herself and the Defendant irretrievably broken down and she filed Divorce Cause No. 200 of 2010 against the Defendant. In the year 2006 up to 2007 the parties purchased LR. Nairobi/Block *[particulars withheld]* jointly from the National Social Security Fund Board. She contends that the Defendant has directed that all rental payments to be deposited with his advocate Messrs Muthoga Gaturu & Company Advocates. She asserts that she assisted directly and indirectly in the raising of the purchase of the said property and dealt with Messrs Manyarky & Company Advocates and Messrs Gikunda Miriti and Company Advocates, who carried out the conveyance process on their behalf.
3. Opposing the application, the Defendant filed an affidavit sworn on 30<sup>th</sup> September 2010. He avers that the Plaintiff's affidavit is riddled with misinformation and half-truths. He avers that the price of the property was not Kshs. 4, 500, 000.00 as averred by the plaintiff, but Kshs. 6, 500, 000.00, of which Kshs. 4, 400, 000.00 was paid to NSSF and Kshs. 2, 000, 000.00 jointly to M B. M and E S, who were the original allottees of the property. It is further his averment that out of purchase price of Kshs. 6, 500, 000.00, he paid Kshs. 4, 500, 000.00 while the Plaintiff paid Kshs. 2, 000, 000.00. He avers that he gave the Plaintiff varying amounts of cash to meet various outgoings including legal fees, utility bills, and minor renovations of the house and is now shocked to discover that the Plaintiff caused the receipts to be written in her name.
4. He contends that upon completion of the sale of the property, it was agreed that the rental

payments would go towards settling the loans incurred to finance the purchase of the said property. That upon clearing her portion, the Plaintiff moved out of the matrimonial home with everything including all personal documents.

5. The Defendant further avers that the plaintiff has failed to disclose to the court that she has been receiving all the rental income from November 2007 and failed to make statutory payments on the same thereby placing the property in jeopardy. He further states that at the time of purchase of property, it was the intention of both purchasers that the property would be inherited by their son, A N W, and a presumptive trust has been created, and that the application herein is brought with the abhorrent intention of the disinheriting A as the Plaintiff has since had another child with an unknown person, and wishes to use the proceeds of the sale to maintain that child. It is his contention that the Plaintiff has failed to demonstrate reasons for grant of the orders she seeks in the suit.
6. The case heard by GBM Kariuki J. on 2<sup>nd</sup> February 2012 and 1<sup>st</sup> November 2012. Both parties testified under oath. They gave vent to the allegations made in their respective papers filed in court. The plaintiff's case was that she contributed in cash a sum of Kshs. 1, 200, 000.00, money she had saved over a period of time before she married the defendant. On his part, the defendant denied that the plaintiff had, contrary to what he had averred in his paper's, contributed Kshs. 2, 500, 000.00 to the purchase of the property, asserting that she contributed a sum of Kshs. 400, 000.00 only. He stated that the sum of Kshs. 1, 200, 000.00 that the plaintiff was talking about came from him, as he gave to her a cheque in that sum to take to the seller and she got the receipt in her name, yet she did not in any way contribute to the raising of the said sum of money.
7. The parties were directed to file written submissions, and they did indeed do so. The Plaintiff's filed her written submissions on 4<sup>th</sup> September 2013, while the Defendant's written submission was filed on 8<sup>th</sup> August 2013.
8. The Plaintiff submits that in both the assignment, and the sale agreement the Plaintiff and the Defendant were jointly described as purchasers of the 'other part', and that this was a clear indication that they were buying together. Counsel submitted that it is trite law that a spouse is precluded from alleging different intention from what is contained in the conveyance or title created when the parties were living in harmony. counsel cited the case of *Virginia Wanjiku Njoroge vs. Francis Njoroge* Civil Appeal No. 2125 of 2000(O.S) (2008) eKLR in which Rawal J cited from a portion of *Principles of Family Law* by SN Cretney 4<sup>th</sup> Edition (1984) at 655 and 656 where it is written as follows:

*"If the conveyance contains an express declaration of beneficial interest; that is conclusive or (at least) requires a high degree of proof of fraud or mistake if it is to be rebutted. If for example the conveyance states that the parties hold property upon trust for themselves as joint tenants beneficiary (which presupposes equality), it will be difficult for one of them subsequently to assert that he is entitled to more than 50% of the sale proceeds."*
9. It her contention that in the instant case, the Defendant in his testimony went to considerable lengths in trying to whittle down the Plaintiff's contribution towards acquisition of the suit property. Further, she referred to the case of *Kivuitu vs. Kivuitu* (1991) KLR 248, where the Court of Appeal held that upon the property being registered in joint names of the husband and wife with no specifications on who owned what proportion the clear intention was to have the family property owned in equal shares. She submits that the registration particulars in this case are even clearer than in *Kivuitu's* case as the declaration expressly indicated equal shares. It is her submission that on the issue of entitlement to half of the suit premises in the instant case, the law clearly favours her.
10. On the issue of creation of a trust in favour of the parties' child as submitted by the Defendant, it is submitted that the Defendant has not undertaken the pleadings as a next friend of the minor so

as to have legal authority to pursue a claim on behalf of the minor. He contends that the Plaintiff is the next friend and has physical custody of the minor, and would be the person entitled to sue for the minor if at all. Further, he submitted that there is no legal authority by which one parent can force the other parent to hold an investment in trust for a minor child.

11. On his part, the Defendant submits that it was the Defendant who he made the bulk of the payments towards the acquisition of the property. It is further submitted that the purchase price of the property was Kshs. 6, 500, 000.00 and that the Plaintiff's contribution was Kshs. 400,000.00 only, and that she made no other financial contribution. It is their submission that the Plaintiff has not made out a case for her to be entitled to a half share of the property. It is further submitted that the parties did not contribute equally to the acquisition of the property, and that in the event that the court finds that it does not have the discretion to create a trust, then the proportional contribution of the parties should be taken into account in determination of the value each of them is entitled to, arguing that this is a matter where the degree of financial contribution is clear or capable of being ascertained.

12. On the equality principle, and whether the court can presume equal ownership from the fact of registration in joint names, the Defendant cited the case of *WMM vs. BML* (2012) eKLR where the court made reference to Article 45 of the Constitution and held that:

*“...the equality in this Article does not create nor is intended to create equal spousal ownership of property acquired during marriage regardless of which spouse has acquired and paid for it or regardless of how it has been acquired and paid for. Rather, and contrary to the assumption that it makes property acquired during marriage the property of both spouses in equal shares, it relates to and recognizes personal rights of each spouse to enjoy equal rights to property and personal freedoms and to receive equal treatment without discrimination on the basis of gender and without being shackled by repugnant cultural practices or social prejudices.”*

13. It is submitted that the Defendant does not wish the property to be sold as it will lead to increased costs. It is submitted in the alternative the Defendant be ordered to pay the Plaintiff such sum as will be found to have been her contribution to the acquisition of the property. It is submitted the court has discretion to preserve this property and create a trust. He contends that the property was bought with the intention of having their children inherit it, and as such they were holding it in trust for them. The Defendant relied on the case of *Appleton vs. Appleton* (1965) 1 WLR 25, where the court expressed itself that neither spouse can insist on the sale of a house owned jointly. Where an application is made to sell a house, the court must consider if the sale is right and proper and will generally refuse to sanction it if there are children needing the house or if the sale would defeat the purpose for which the joint ownership was created.

14. It is contended that it is trite law that one of the court's duties is to give first consideration to welfare of any child of the family under 18 years of age, and that selling the house would be prejudicial to the child's interest. He submits that the Plaintiff has not indicated how her rights as the biological mother of the child will be hampered if the property is vested in him. It is submitted further that the aim of granting the court jurisdiction to hear disputes is to give the judge wide powers to do what he thinks is fair and just under the circumstances of the case before him. It is argued that it would be fair and just as well as in the child's best interests to have the property in question held in trust and not be sold until the child attains the age of majority.

15. Having carefully, considered the application, affidavits on record and the rival submissions by counsel for respective parties, I form the view that the main issue for consideration is whether the Plaintiff is entitled to a 50% share of the said property acquired during marriage and registered in the joint names of the parties. For the most part the facts are not significantly in dispute. The said property LR. No. Nairobi/Block 146/21 – House No. M17 – Hazina Estate South “B” Nairobi was registered in the couples' joint names and it must be pointed out that this state of affairs creates a presumed equal ownership which is an undivided equal share.

16. In the case of *Kivuitu vs. Kivuitu* (1991) 2 KAR 241 it was observed that: “*The fact that the property is registered in the joint names means that each party owns an undivided equal share thereon. ... Because of the conveyance of the property to be held by them as joint tenants, there was a presumption at the time, that the intention of the parties was to hold the matrimonial home as joint tenants, provided that if one of them died, the other would take the entire ownership.*” This was also the case in *Kamore vs. Kamore* (2000) 1 EA 81, where the Court held that: “*where property is acquired during the course of coverture and is registered in the joint names of both spouse, the court in normal circumstances must take it that such property, being a family asset is acquired in equal shares.*” Further, in *Gathiya Essa vs. Mohamed Alibhai Essa* (CA No 141 of 1998), the court, observed that “*where the property is acquired during the subsistence of a marriage is registered in the joint names of the spouses, the law assumes that such property is held by the parties in equal shares.*”

17. I am satisfied that in the circumstances of this case the Plaintiff is entitled to equal share of the said property. I say so particularly with reference to the Assignment Agreement dated 15<sup>th</sup> June, 2006, the Sale Agreement dated 13<sup>th</sup> April, 2007 all refer to both the Plaintiff and the Defendant as jointly called ‘the purchasers’ and further, a perusal of the Transfer of Lease dated 13<sup>th</sup> April, 2007 reveals that they hold the leasehold interest as equal joint proprietors. It is noted that the Defendant’s main wish is that this court should exercise its discretion to create a trust in favour of the child, a position that the Plaintiff vehemently opposes. However, it is observed that the Defendant has failed to establish that the creation of a trust was their intention. In the absence of such proof, this court cannot exercise its discretion as sought by the Defendant. This court cannot devise arrangements which the parties never made. Similarly, the court cannot ascribe intentions which the parties in fact never had.

18. In view of the foregoing this court makes the following orders:-

- a. That the Plaintiff is entitled to half share beneficial interest in the property known as LR. NO. Nairobi/Block **[particulars withheld]** – House No. **[particulars withheld]** – Hazina Estate South “B” Nairobi;
- b. That the said property shall be valued with the participation of both parties and shall thereafter be sold and the proceeds realized from the sale shared equally between the Plaintiff and the Defendant;
- c. That, in the alternative, the Defendant shall buy out the beneficial interest of the plaintiff in the said property in monetary terms; and
- d. That the plaintiff shall have costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 6<sup>th</sup> DAY OF June 2014.

**W. MUSYOKA**

**JUDGE**

**In the presence of Ms. Mwhaki advocate for the respondent.**