



CATHERINE JELUGAT KIPLAGAT PLAINTIFF

VERSUS

KENNETH KIPLAGAT 1ST DEFENDANT

CASEY BURNS 2ND DEFENDANT

JACQUELINE KOSGEI..... 3RD DEFENDANT

BEATRICE KOSGEI 4TH DEFENDANT

SHEILA JEBET AMDANY 5TH DEFENDANT

MILLY CHERONO..... 6TH DEFENDANT

COVE INVESTMENT LIMITED 7TH DEFENDANT

RULING

The Defendants numbers 2 to 7 have raised objections that they are wrongly sued. They seek orders to have their names removed from the suit. The basis on which they do so is predicated on the ground that the Plaintiff has no legitimate cause of action against them as limited liability companies and as third parties not least because Section 17 of the Married Women Property Act 1882 which entitles the Plaintiff as a married woman to apply as she has done for division of property against her husband (the Defendant No.1) does not entitle her to sue them merely because her husband holds shares in the defendants-companies Nos.2, 6 and 7 or is a close friend of the female defendants Nos.3, 4 and 5 or has business connections with them.

Section 17 of the Married Women's Property Act 1882 recognizes that questions between husband and wife as to title to or possession of property may relate to stocks, funds or shares in a bank, corporation, company or public body or society. It provides that a husband or wife may apply and the bank, corporation, company, public body or society in whose books the funds, stocks or shares are standing may also apply by summons or otherwise in a summary way and the court may make such orders with respect to the property in dispute as it thinks fit **providing** that any such bank, corporation, company, public body or society shall be treated as a stakeholder only in the matter of such application.

The Defendants contend that there is no reasonable cause of action disclosed against them in the Originating Summons application dated 9.9.2011 or in the Notice of Motion of the same date. They seek orders that both should be struck out on that ground. It was contended by the Defendants that there is no jurisdiction or justification to join the Defendants to the suit.

In the Originating Summons and the Notice of Motion dated 9.9.2011 the Plaintiff seeks *a temporary injunction to restrain the Defendants and each of them from disposing of, alienating, selling or charging*

or otherwise interfering or dealing with the properties and shares listed therein. Further temporary injunctions are sought to restrain the 7th Defendant, Cove Investments Ltd, from evicting the Plaintiff from property No.L.R. 209/354/11 (No.10), Retreat Villas, and all the Defendants from disposing of, alienating or charging or interfering with the properties and shares listed in (a) to (p) of para 2 of the Motion as follows.

- (a) Shares in Cove Investment Limited;
- (b) Shares in Tetra Radio Limited;
- (c) Shares in Toads Media Group Limited;
- (d) Shares in Bonde Conservancy Limited;
- (e) Shares in Simba Radio Limited;
- (f) Shares in Southern Cross Engineering Limited;
- (g) Shares in Naivasha Cottages Limited;
- (h) No. 10 Retreat Villas on LR No.209/354/11;
- (i) Two houses in Green Park (Great Rift Valley Lodge);
- (j) 40 acres of land in Kabarak;
- (k) 100 acres of land in Kabarak in Menengai West;
- (l) A house in Eldoret, near State House;
- (m) 50 Acres of land in Eldoret;
- (n) A house in Milimani area, Nakuru, Crater climb;
- (o) Villa in Rea Vipingo, Kilifi;
- (p) A house in South Kensington, London, U.K.;

Mr. Ongoya, the learned counsel for the 2nd, 4th and 7th Defendants urged the court to strike out the suit against his clients. He submitted that Section 17 of the Married Women Property Act on which the suit was founded confers jurisdiction where the relationship of and questions pertaining to husband and wife exist and as no such relationship obtained between his clients and the Plaintiff, and as his clients were legal entities, the Originating Summons and the Notice of Motion application should be struck out with costs to his clients.

Mr. Peter Simani, the learned counsel for the 5th Defendant who also held brief for Mr. Stephen Mwenesi, learned counsel for the 3rd Defendant adopted the submissions of Mr. Ongoya and further added that there is no cause of action in the suit against the 3rd and 5th Defendants, and that none can arise not least because there is no relationship of husband and wife between the Plaintiff and the said Defendants. Section 17 of the Married Women Property Act, he contended, confines itself to property of a husband and wife and even if it were to be argued that the Defendants were nominees of the 1st Defendant, the Plaintiff would only be entitled to deal with shares in the concerned companies. It was Mr. Simani's submission that the companies where the shares are held cannot be interfered with. He contended that the 3rd and 5th Defendants have been wrongly joined. To buttress his point, he relied on the decision of the **Court of Appeal in Civil Appeal No.214 of 1996 (Housing Finance Co. of Kenya**

Ltd versus faith W. Kimeria and Harrison Kimeria in which the court removed from the suit Housing Finance Company of Kenya Ltd as a party on the ground that it had been improperly joined.

Miss Mululu, learned counsel for the 6th Defendant adopted the submissions of Mr. Ongoya with which she concurred and urged the court to strike out the Originating Summons and the Notice of Motion to the extent to which it affected her client.

Mrs. Judy Thongori, learned counsel for the 1st Defendant, left the matter to court.

In her response to the submissions, Mrs. Shaw, the learned counsel for the Plaintiff contended that the suit showed that there was a resulting/constructive trust and that as the court had not heard evidence yet so as to determine the facts, it was premature for the Defendants to seek to be removed from the suit. At any rate, she said, the Defendants had not filed affidavits to deny the alleged trust. It was Mrs. Shaw's contention also that the Defendants had varying degrees of relationship with her client's husband and that her client was seeking remedy in equity. She urged the court to exercise its discretion in favour of the Plaintiff and sustain the claims. The Plaintiff, she said, will be rendered destitute unless this was done. In any event, the striking out was too drastic an action, she said. The Defendants, she added, were trustees for the Plaintiff and it would cause injustice if the court struck out the suit against them. Mrs. Shaw referred the court to the Constitution which requires in Article 159 (d) that justice shall be administered without undue regard to procedural technicalities. She posed the question: "*can the Plaintiff reach the assets without suing the trustees who hold the properties?*" She sought to distinguish the C.A. Authority, **Housing Finance Company of Kenya versus Faith W. Kimeria and Harrison Kimeria** on the ground that in that case Housing Finance Company of Kenya Ltd was not a *cestui que* trust. She wondered whether a party can be turned away on grounds of technicality. Grave injustice would ensue if technicalities were to be upheld, said Mrs. Shaw who urged the court to reject the Preliminary Objections. She pointed out that the 7th Defendant, although a limited liability company, was registered as the proprietor of the matrimonial home. It was Mrs. Shaw's contention that a party holding shares in a suit for division of matrimonial properties can be made a party to the suit under Section 17 of the Married Women Property Act 1882 and that the question should be whether there was a relationship and not whether the relationship was of a husband and wife. Mrs. Shaw relied on **D.T. Dobie (1982) KLR**, on striking out and submitted that striking out was too drastic a step and could not be resorted to except where the case was very clear and cogent. She urged the court to reject the objections and sustain the suit against all the defendants who, in any case, had not countered the allegations of the trust alleged in the suit which had created special relationship between the parties.

In reply, Mr. Ongoya submitted that the Plaintiff bore the burden of proof and that determination of resulting trust has to be between husband and wife and not third parties. It was Mr. Peter Simani's submission that the Plaintiff had not pleaded in the suit the alleged resulting trust.

This suit was commenced by **Catherine Jelugat Kiplagat**, a married woman, by Originating Summons dated 9th September 2011 against **her husband, Kenneth Kiplagat** the 1st Defendant and **the other six Defendants**. Her prayer is for a declaration that the listed immovable properties set out in the schedule to the said Originating Summons that are registered in the name of the Defendants and or companies which the Defendants control are joint properties of the Plaintiff and the 1st Defendant.

The Plaintiff also prays for the following orders in the Originating Summons.

2. *THAT the Honourable Court be pleased to declare and do issue a declaration that all the shares of the companies listed in the schedule herein below which are registered in the name of the Defendants herein or individuals and entities the Defendants control are jointly owned by the Plaintiff and the 1st Defendant and that the 2nd to 6th Defendants hold the said shares in trust for the Plaintiff.*

(a) *Cove Investments Limited (with estimated value of Kshs.100 million).*

(b) *Tetra Radio Limited (with an estimated value of Ksh.500 million).*

(c) *Toads Media Group Limited (with an estimated value of Kshs.8 billion).*

(d) *Bonde Conservancy Limited.*

(e) *Simba Radio Limited (with an estimated value of Ksh.1 billion).*

(f) *Southern Cross Engineering Limited.*

(g) *Naivasha Cottages Limited.*

3. *That the Honourable Court be pleased to declare and issue a declaration that all the bank accounts held with the Banks listed in the schedule herein below and held in the name of the Defendants or entities they control are joint accounts of the Plaintiff and 1st Defendant herein and that the Defendants hold the same in trust for the Plaintiff*

BANK ACCOUNTS

(a) *Standard Bank, Kenya*

(b) *Oriental Bank, Kenya*

(c) *NIC Bank, Kenya*

(d) *Account in Jersey*

(e) *Switzerland*

(f) *U.K.*

CASH

(a) *Kshs.600,000,000/=*

(b) *USD 2 million from sale of shares in Trunking Systems Limited*

(c) *Kshs.1 billion from HCC 141 of 2008 (Milimani Commercial Courts)*

(d) *Kshs.87 Million from the sale of shares in Simba Radio to KTN.*

4. *THAT the Honourable Court be pleased to order that the said properties, shares and funds enumerated hereinabove in paragraphs 1, 2 and 3 be valued and sold and the net proceeds be divided equally between the Plaintiff and the 1st Defendant herein.*

5. *THAT the Honourable Court do order that the Defendants **do provide and disclose** a comprehensive list of all properties, shares and bank accounts they hold and own both locally and outside the jurisdiction of this court and that upon the said disclosure of the properties, accounts and shares, the same be declared to be held in equal share between the Plaintiff and the 1st Defendant.*

6. *THAT in the event that the Defendants refuse and/or decline to disclose the properties, shares and funds that are not within the knowledge of the Plaintiff the court do order that all the properties, shares and funds enumerated in the schedule herein be declared to belong to the Plaintiff alone.*

7. *THAT the Defendants disclose the transfers of funds, shares and properties they made in anticipation of this suit and the Divorce Cause between the Plaintiff and 1st Defendant.*

The grounds on which the Originating Summons was premised included:-

(a) *An averment that the properties were acquired by the joint efforts of the Plaintiff and the 1st Defendant during the course of their marriage but registered in the 1st Defendant's name or the 2nd to 6th Defendants' names.*

(b) *The 1st Defendant acquired the properties due to the Plaintiff's input and contribution and caused*

them to be registered in the names of companies of the 2nd to 6th Defendants.

(c) The Plaintiff has helped the 1st Defendant to acquire his multi-billion empire.

In her Affidavit sworn on 9.9.2011, the Plaintiff avers in paragraphs 19, 20, 22, 25, 26, 27, 28, 29, 31, 32, 34, 40, 41 and 43 as follows:-

19. THAT in addition, the 1st Defendant through my influence and connection, acquired several licenses from the Communications Commission of Kenya, which he has in the last four years been selling for millions of dollars.

20 THAT I am aware that the 1st Defendant through the 2nd Defendant and 3rd Defendant owns a company known as Toads Media Group Limited which was allocated more than ten frequencies by the Communications Commission of Kenya, two of which the 1st Defendant has disposed off during our marriage for a cool sum of US Dollars 4 million. Annexed hereto and marked **CJK 2** is a search for Toads Media Group Limited and a schedule of the frequencies that are owned by the said company which are worth a lot of money.

22. That I am aware that all the companies through which the 1st Defendant trades, or invests the shares are held in the names of the 2nd to 6th Defendants herein and other friends and members of his family. Annexed hereto and marked **CJK 3** are copies of the official searches from the Registrar of Companies.

25. THAT our son and I are currently resident in No.10 Retreat Villa, on Dennis Pritt road, which I verily believe belongs to the Respondent, and is owned through a company known as Cove Investments Limited. Annexed hereto and marked **CJK 4** is a copy of the official search form the Registrar of Companies.

26. THAT I am aware that Beatrice Kosgei, the 4th Defendant herein, who is a shareholder in Cove Investments Limited, the 7th Defendant herein, is a personal friend of the 1st Defendant.

27. THAT the 1st Defendant is currently having a relationship with the 6th Respondent with whom they have a child.

28. THAT No.10 Retreat Villa on L.R. No.209/354/11 is my matrimonial home, having lived there for over ten years.

29. THAT in January, 2011 after the 1st Defendant left the matrimonial home, he caused a notice of eviction to be sent to himself by the 7th Defendant to vacate the matrimonial home. Annexed hereto and marked **CJK 5** is a copy of the notice.

31. THAT I verily believe that the 1st Defendant's net worth is over US dollars 2 billion.

32. THAT the divorce proceedings have not yet been determined.

34. THAT the properties, shares and bank accounts I disclose herein are a fraction of the matrimonial properties the 1st Defendant owns jointly but to which the documents are solely held by the 1st Defendant or his law firm and hence I am unable to identify them by their actual L.R. numbers.

40. THAT I verily believe that the 1st Defendant, a lawyer by training, has used his knowledge and expertise to hide all his assets and dealings from me in order to defeat any claim I have arising from my marriage and contribution to the acquisition of the assets.

41. THAT although it is public knowledge that the 1st Defendant is a very wealthy man, he holds no real assets in his name, despite having been declared Kenya's biggest tax payer by the Kenya Revenue Authority in 2003.

43. THAT if this Honourable Court does not intervene, I will be denied justice as a wife, and will be reduced to living life at a standard much lower than I have been accustomed to.

I have perused the Originating Summons dated 9.9.2011 and the Notice of Motion of the same date. I have also duly considered the submissions made by the learned advocates for the Defendants and the learned advocate for the Plaintiff all of whom argued their respective cases with gusto and conviction. Counsel for the Defendants with the exception of advocate Judy Thongori (for the 1st Defendant who left the matter to the court) were in unison in their contention that the action under Section 17 of the Married Women Act 1882 could not legitimately be maintained against 2nd to 7th the Defendants and that even if it were established that shares in any limited liability company were joint property of a husband and wife, that would not entitle a spouse to interfere with the affairs of the company which was a distinct and separate legal entity. The celebrated case of **Solomon v Solomon (1895 – 9) All E.R.33** was cited to buttress the legal position that a limited liability company is separate and distinct from the individual members of the company and that it has rights and liabilities appropriate to itself and that it is not an agent of its shareholders to carry on their business for them nor is it the trustee for them of their property. The legal questions involved are not commonplace. Where the matrimonial home is acquired during marriage with the wife's contribution and registered by the husband in the name of a limited liability company in which the husband has controlling shareholding, would there be a legitimate basis for suing the company? In such case, is a spouse precluded from making a claim in respect of such property because the matrimonial home has been put away from reach by being registered in the name of a limited liability company in which the husband holds either directly or through a nominee the shares? Is a married woman remediless in such circumstances? Should equity step in to help? Mrs. Shaw has urged the court to invoke equitable intervention so as to award equitable relief. The cry by her client, she said, is a cry for justice. She has urged the court not to have regard to legal technicalities that impede equity and justice. It is true that equity does not allow a statute to be used as an instrument for fraud (**Re Duke of Marlborough, Davis v. White head [1894] 2 Ch 133 pg 1241**). But is this the case here? Is there such proof? The hearing of the suit is yet to start and there is no adduction yet of evidence. The action by the Plaintiff is founded on Section 17 of the Married Women's Property Act 1882 which provides that "*in any question between husband and wife as to the title to or possession of property either party may apply by summons or otherwise in summary way to any Judge of the High Court of Justice and Judge may make such order with respect to the property in dispute as he thinks fit.*" The application of Section 17 (supra) is said to have been whittled down in **Pettit v Pettit [1969] 2 all ER 385** when the House of Lords held that it is purely procedural and confers on the court in relation to questions of title no greater discretion than the court would have in other proceedings in relation to property in dispute. In **D.M. v. M.M. [2008] 1 KLR 263** the Kenya Court of Appeal in Nairobi held that "*where there were disputes between the husband and wife as to their respective rights to shares in a company registered in the name of one of the spouses then the court like on any other property in dispute between spouses had the power to ascertain their respective beneficial rights thereof.*"

The ratio decidendi in the decision of **Solomon v Solomon & Co. [1895-9] All ER Rep.33** is that a limited liability company is a legal entity separate and distinct from the individual members of the company and once incorporated and registered it must be treated like any other independent person with rights and liabilities appropriate to itself and it is not the agent of the shareholders to carry on their business for them, nor is it the trustee for them of their property. What then is the solution where it is the legal owner of a matrimonial home where the family has lived all along if the shares are held by one spouse or such spouse's nominee? Is the wife who alleges that she has contributed to the acquisition of the house remediless? Although the company is a distinct and separate legal entity and although the wife can pursue the husband's shares in the company without interfering with the company as such, at the end of the day it becomes clear that it is the house itself whose title is held by the company that is the object of the action because that is what offers her security. To determine this, and whether or not circumstances obtain in which the alleged trust exists, the court would have to hear evidence from which it can make such determination. Pending such hearing, the ends of justice would dictate that no transfer to third

parties of the husband's shares in the company should be allowed. An injunction to this effect or an order to prevent the transfer of such shares would not be inappropriate in relation to matrimonial home. But in relation to a wife's contribution to acquisition of properties registered in names of other companies, such orders can only be made in suits in which the wife has sued her husband, his nominees or shareholders and such companies away from Section 17 of the Married Women's Property Act 1882. The Defendants nos.2, 3, 4, 5 and 6 in this suit cannot be retained in the suit. I am aware that striking out of a pleading in the manner sought in this case is very drastic and I agree with Mrs. Shaw in this regard. It was Madan JA, as he then was, who said in **D.T. Dobie & Co. (K) Ltd. v. Muchina [1982] KLR** stated

"The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.

(Obiter Madan JA) The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out."

The matrimonial home is held in the name of the 7th Defendant. The Plaintiff lives in the property. It is desirable that the status quo be maintained until the suit is set down for hearing and evidence is adduced to enable the court make a determination. It has not been shown with clarity and precision what properties Defendants Nos.2, 3, 4, 5 and 6 hold or are registered in their names and the plaintiff's actual contribution to their acquisition and the circumstances that give rise to constructive or resulting trust in favour of the plaintiff. There is no basis in my view for joining Defendants 2, 3, 4, 5 and 6 in this suit. But this is not to say that they cannot be sued in separate litigation that is not of a summary nature. After all, if, as she claims, the Plaintiff contributed to the acquisition of the said properties which are not registered in the name of her husband and if she claims that there is ensuing trust, that is a matter that falls outside the purview of Section 17 of the Married Women's Property Act. It is for this reason that I am constrained to partially uphold the objections to the extent that Defendants numbers 2 to 6 are wrongly joined in that there is no reasonable cause of action against them in the light of Section 17 of the Married Women's Property Act 1882. In the result, I strike out the 2nd to 6th Defendants from the suit. They are entitled to costs against the plaintiff. It is so ordered.

Dated at Milimani Law Courts, Nairobi, this 1st day of March 2012.

G.B.M. KARIUKI, SC
JUDGE

COUNSEL APPEARING

Mrs. Shaw Advocate for the Plaintiff

Mrs. J. Thongori advocate for the 1st Defendant

Mr. Ongoya Advocate for the 2nd, 4th and 7th Defendants

Mr. Steve Mwenesi Advocate for the 3rd Defendant

Mr. Peter Simani Advocate for the 5th Defendant

Ms Ann Mululu Advocate for the 6th Defendant

Mr. Kugwa – Court Clerk