



IN THE REPUBLIC OF KENYA

HIGH COURT AT NAIROBI(MILIMANI LAW COURTS)

CIVIL SUIT NO.29 OF 2011

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT (1882)

NJOKI WAINAINA APPLICANT

VERSUS

WALTER KONGO WAINAINA RESPONDENT

JUDGMENT

The matter before the Court is instituted by an Originating Summons dated 15th June, 2011. It was taken out under **Order XXXVII Rules 1, 14 and 15 of the Civil Procedure Rules, Section 17 of the Married Women's Property Act (1882)**, and all other enabling provisions of the law. The Applicant thereby seeks from the Court the following orders –

- 1. That a declaration do issue that all that portion of land measuring about 20 acres, and located on the Deed Plan No.137207, being the subject of the agreement of sale signed by the Respondent on February 4, 1973, and which portion was to be excised from L.R. No. 152/5 (registered in the name of John Mungai Itiru and James Kamau Mungai is jointly owned by the Applicant and the Respondent.***
- 2. That an order do issue declaring that 50% of the said 20 acre portion aforesaid is held by the Respondent in trust and for the beneficial interest of the Applicant.***
- 3. That an order does issue declaring that the Applicant is entitled to 50% of the said property or the proceeds of sale of the same or such other proportion as this Honourable Court may deem fit.***
- 4. That a temporary injunction do issue restraining the Respondent, his servants and/or agents from alienating, wasting, damaging and/or otherwise interfering with the above mentioned properties pending the hearing and determination of the Originating Summons.***
- 5. That an order do issue declaring that the Applicant is entitled to 50% of the proceeds of sale of L.R. No.2/368, Kilimani or such other proportion as this Honourable Court may deem fit.***
- 6. That this Honourable Court be pleased to make such further orders as the interests of justice may require.***

7. That the Respondent be condemned to pay costs of this Originating Summons.

The application is supported by the annexed affidavit of Njoki

Wainaina and is based on the following grounds –

(a) That the Applicant and the Respondent are husband and wife.

(b) That the suit properties were acquired and/or developed during the marriage with the Applicant's direct and indirect contribution.

(c) That though the suit properties were acquired with the Applicant's direct or indirect contribution, certain of the said properties were registered in the sole name of the Respondent.

(d) That due to her direct and indirect contribution of the said properties, the Applicant is entitled to a proportional share of the same.

(e) That the matrimonial home measuring about 20 acres, and which portion was to be excised from L.R. No.152/5 (registered in the name of John Mungai Itiru and James Kamau Mungai) has not been transferred to the Respondent by the vendors of the same.

(f) That the Applicant is apprehensive that the Respondent will dispose of the matrimonial home or alienate the same in total disregard of the Applicant's interest.

In her oral testimony in Court, the Applicant emphasized that she

sought the properties at Kilimani and Redhill to be declared as jointly owned by the Applicant and the Respondent. Thereafter, she also seeks declaration that 50% of the 20 acre plot is held by the Respondent in trust for the beneficial interest of the Applicant. She therefore prays for an order declaring that the Applicant is entitled to 50% of the said property or the proceeds of sale of the same. She also claims an order to issue declaring that she is entitled to 50% of the proceeds of sale of L.R. No.2/368 Kilimani.

The evidence before the Court is that the couple had opened a joint account as early as in 1969 into which they both deposited money. In the purchase of the Kilimani property, the Respondent used that account as evidence that the couple qualified for a mortgage as his income alone did not meet the required threshold. Although the loan deposit was paid through the Respondent's bank account, the monthly repayments were paid through the joint account. After the joint account was closed in 1986, the parties continued to contribute towards the mortgage repayments through their separate bank accounts. When the Respondent sold the property in March, 2008 for Kshs.7 million, he vehemently declined to share the proceeds of the sale with the Applicant.

With regard to the matrimonial home, the purchase price was paid from the couple's joint account. However, from the time the Respondent closed that account in 1986, the Applicant took up the responsibility of catering for the family upkeep. She also paid fees for the couple's 3 children from primary school to university, both locally and overseas. Owing to the tension that has crept in between the parties, the Applicant is now apprehensive that she might be forcibly ejected from the matrimonial home and further that the said home might also be disposed of without her knowledge.

On the basis of this evidence and that in the supporting documents, there is no doubt that the suit premises were acquired and/or developed during the subsistence of the marriage between the parties. The Applicant has demonstrated beyond doubt that she made both direct and indirect contribution towards the acquisition of that property. Even though some of the properties were registered exclusively in the Respondent's name, she had nonetheless actively contributed in monetary terms.

It is unfortunate that in spite of having been served with the application, the Respondent did not find it fit to respond either by way of a replying affidavit, or grounds of opposition, yet the evidence adduced

against him is very weighty. He was also served with a copy of the hearing notice but decided to ignore it by not attending Court. In such circumstances, the application is uncontested. I must hasten to emphasize that from the affidavit evidence and the oral testimony of the Applicant, she has proved her case on a balance of probability and is entitled to the orders sought. For this reason, prayers 1, 2, 3 and 5 of the Originating Summons dated 15th June, 2011 are hereby granted as prayed. The Respondent will pay the costs of this application.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 1st day of March, 2012.

L. NJAGI
JUDGE