REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE 23 OF 2002

HELEN WANJIRU MWANGI ……………………………… PLAINTIFF

VERSUS

SAMUEL NGUNGA MWANGI …………...…………… DEFENDANT

JUDGEMENT

The wife has filed this Originating Summons under Section 17 of the Married Women Property Act of 1882, which is an applied U.K. Legislation as per the provisions of the Judicature Act.

It is not in doubt that the parties are married and that they have separated since around the year 1990. It is also not in dispute that there were several properties acquired during their cohabitation which has ceased due to separation of the parties.

The Applicant has prayed for declaration to wit:

1. "THAT it be declared that the properties (movable and immovable) acquired by joint funds and efforts of the applicant and the respondent (being the following) are owned jointly by the applicant and the respondent and the same be divided into two equal shares:-

a. LAND PARCEL LOC.2/MAIRI/152

b. LAND PARCEL LOC.2/MAIRI T.27 (MATRIMONIAL HOME)

c. LAND PARCEL LOC.2/MAIRI T.26

d. PLOT NO.620 THIKA

e. C.2016 A.T. LTD NAROK RANCH 2 ACRES GEMA HOLDINGS LTD.

f. MOTOR VEHICLE REGISTRATION NO.KRX 504 CHEVROLET MATATU".

She has also asked for other prayers *inter alia*, including the order of division of the said properties between the parties in equal shares.

The Respondent has opposed the claim of the Applicant and has sworn and filed a replying affidavit on 30th May, 2002.

In short he has averred that apart from the properties mentioned by the Applicant, there were other properties acquired by the Respondent secretly, while he has solely acquired and contributed to the acquisition of the claimed properties as well as has solely provided for the upkeep and maintenance of the family. It is not in dispute that the Applicants had three children before the marriage and gave birth to two children of the present marriage. He mentioned those properties acquired by the Applicant in clandestine manner in paragraph 8 of this replying affidavit:

"**8. THAT to the best of my own personal knowledge, during the course of our marriage, while I solely acquired and contributed to the acquisition and purchase of various movable and immovable assets and also solely provided for the upkeep and maintenance of the family, the Applicant Hellen Wanjiru Mwangi contrary to the purport of her alleged affidavit both secretly and clandestinely obtained to be registered in her own name various immovable assets which she has by desire deliberately failed to disclose to this Honourable Court namely:-**

(i) Plot No.29 Mairi (Commercial Plot)

(ii) Parcel No. Kakuzi/Kirimiri/Block 9/932

(iii) Plot No.Loc.7/Gakoigo/2148 (Commercial Plot)

(iv)Parcel No.Block 11/1228 Makuyu

(v) Land No.Cs017 A.T.H. Ltd Narok Ranch Rumuruti

(vi)3 acres piece of land situate at O'lkalou (full particulars whereof are unknown to the deponent)

(vii) Kangari Jua Kali stall.

In response to the aforesaid averments, the Applicant in paragraphs 8 of her further affidavit sworn on 2nd August, 2008 had this to state:

"**That the properties in my affidavit in support and those envisaged in the respondents replying affidavit were acquired during the subsistence of the said marriage and I duly contributed to the acquisition thereof hence I am duly entitled to a share thereof**."

I may pause here and do observe that from the above averments she has not given any explanation as to why she did not disclose those properties which are in her names and which she has agreed that they were acquired during the subsistence of the marriage.

Furthermore, it is amply on record that both the parties have been gainfully employed and have been running businesses.

It is also on record that the Applicant was injuncted from selling the property known as Plot No.11 Mairi Kangari which are amongst the properties mentioned by the Respondent.

With this short background of undisputed facts, I shall first endeavour to recapture the established principles of law as regards Section 17 of the said Act and I do quote relevant portions thereof.

"**17. In any question between husband and wife as to the title or possession of property, either party ………… may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England ...………………. and the judge of the High Court of Justice of England……. may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as thinks fit………"**

The learned counsel for the Respondent contended that as the parties are still husband and wife and as the marriage is not dissolved, the Plaintiff is not entitled to the prayers sought.

Some judgments of the High Court were cited, namely:-

(i) Civil Appeal No.66 of 2000 – Sabina Syovinya Musyoka –Vs- Peter Musyoka Mwanzia (Unreported)

(ii) Divorce Cause No.44 of 2004 between James Peter Kinuthia –Vs- Philomena Njambi Kinuthia (Unreported)

(iii)H.C. (O.S.) No.4 of 2006 – Beatrice Bonareri Nyabuto Eldad Kanyanya Wapenyi (Unreported)".

In my considered view, none of the above quoted cases have considered the issue contended by the learned counsel for the Respondent. The first two cases are Divorce Matters and the settlement of the properties were presumably under the Matrimonial Causes Act (Cap152).

In the last authority the issues were clearly spelt out on page 3 of the judgment and the fact of the separation between the parties was apparent. Nowhere in the said Judgment the issue that the parties can only apply under the Act on dissolution is even suggested.

On the other hand the wordings of Section 17 of the Act are very clear which mention that "**the question between a husband and a wife**" and those words clearly presupposes the existence of a marriage.

In the case of **Pettit –vs- Pettit (1969)2 All. E.R. 385**, the House of Lords specifically observed on the scope of Section 17, namely:-

"**It is available while husband and wife are living together as well as when the marriage has broken up"**

All these observations do not thus support the propositions put forth by the Defendant.

In the premises aforesaid, I shall definitely reject the contention by the learned Defence counsel, that the present cause can only be filed after the dissolution of the marriage.

The power of the court to determine or establish the contribution by a married person has been also somehow established over the years.

I shall start with the observations made by **Lord Reid in Gissing –Vs- Gissing (1970) 2 All E.R. 780 at 782 – 783**.

"**It is perfectly true that where she does not make direct payments towards the purchase of property, it is less easy to evaluate her share. If her payment are direct she gets a share proportionate to what she paid. Otherwise there must be a more rough and ready evaluation. I agree that this does not mean that she would as a rule get a half share. I think that high sounding brocard 'equality is equity' has been misused. There will be many cases where a fair estimate might be a tenth or a quarter or sometimes even more than half".**

On page 788 the following observations are further made:-

"**Contributions are not limited to those made directly in part payment of the price of the property or to those made at the time the property is conveyed into the name of one of the spouses. For instance, there can be a contribution, if by arrangement between the spouses one of them by payment of the household expenses enables the other to pay the installments.**"

Lastly, I shall quote a very pertinent observation made by Lord Reid as to creation of trust in the

matrimonial properties at page 192 of **Gissing's Case** (***supra***),

"**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?"**

Based on those principles our courts have developed the law of contribution in the matrimonial properties. I shall mention a few, **Essa Vs. Essa (1995) LLR 384 (EAK), Karanja vs. Karanja (1976) KLR 307, Kivuitu vs. Kivuitu (1985) LLR 1411 (ACK), Muthemba vs. Muthemba** and Lastly, **Echaria vs. Echaria**. I shall also refer to some High Court cases like **HCCS No.2123/2000 (O.S) Virginia Wanjiku Njoroge –vs- Francis Njoroge**. **HCCS No.18/05 Mary Wambui Mwatha –vs- Charles Mwatha Njoroge.**

In any event it cannot be gainsaid that the concept of indirect contribution is still alive in our jurisprudence and the court is entitled to evaluate those contributions while ascertaining the shares of each spouse in a matrimonial properties.

It is also now an indefeasible principle that the matrimonial properties are those properties which are acquired during subsistence of a marriage. If acquired before the cohabitation or after the cessation of such cohabitation such property cannot be termed as a matrimonial property. However, if a property is acquired before the marriage and during the subsistence thereof a spouse contributes to its development adding in its value and welfare of the family, such contributions can be considered by the court in determining respective shares of the parties therein.

With these observations of the relevant principles of law, I shall now deal with the merit of the case.

I must lament at the start that none of the parties have furnished sufficient and/or adequate details of the purchase of several properties referred by them. In the premises, I shall do my best to determine the claims of respective parties.

The Plaintiff's evidence was that at the time of their marriage, she was working with Ministry of Health and then in 1973 joined Family Planning Association wherein she worked for 20 years. On the date of her evidence (February, 2002), she was 63 years of age. Apart from the said job, she ran a shop and started tea plantation on the Parcel of Land bearing No. Loc II/Mairi /52 which admeasures five acres. The said cultivation was undertaken by her from 1971 to 1990. The aforesaid property was acquired during subsistence of the marriage. Next to the said property, two plots were purchased namely Mairi/T26 and Mairi/T27. Other plot bearing Thika/620 and Gema C.2016 as well as a motor vehicle registration KRX 504 Chevrolet Matatu were also acquired during cohabitation. The motor vehicle was purchased after the Defendant retired from KTDA. The money from retirement package was used to buy the same plus added by a loan (not specified the sum) which was secured against her salary.

She further averred that the Respondent used to be away from home and when at home he used to beat her and eventually she was chased away from matrimonial home in 1994 and at present she is a destitute and stayed with her daughter upto 1999 and then she now stays with her sister.

In her cross- examination, she gave more details on her income and other properties which are registered in her names.

She stated that she started working since she was 21 years of age and on her retirement in 1993, she was

earning Shs.5,000. In 1973, her salary was Shs.700 which was usually increased.

As regards other properties, she first testified that she has several properties before marriage but immediately changed her version and stated that she had one property in Murang'a (not specified) which she purchased but was sold at the behest of the Respondent. Similarly after stating that the couple acquired only the properties mentioned by her, she was asked questions as regards a plot No. Mairi/29 and she said that it was allotted to her during marriage and as she was unable to pay the required sum, it was repossessed in the year 2000. Then she agreed that she does possess a parcel of land bearing Kakuzi/Kirimiri/Block 9/832 which is admeasuring 4 acres, and that she bought the same during subsistence of the cohabitation and that the title thereof is charged on behalf of her married daughter.

She also similarly conceded that the following properties were acquired by her during marriage and still possessed by her:-

1. Makuyu/Karia-ini/Block II/1228 which is admeasures 4 acres and was sold during the cohabitation.

2.   Plot C-2017 Gema Holding. Another C-2016 is in the Respondent's name.

3. Loc 7/Gakoigo/2148 Commercial Plot.

4. Plot No.29 Mairi Market (but she said she had not fully paid for the same).

On all these aforesaid properties, she insisted that she had solely paid for them and added that those mentioned by her were acquired jointly by both of them contributing.

Furthermore, without substantiating, she denied that the Respondent earned more than her and claimed that it is she who earned more than him.

She also conceded that one of the properties claimed by her namely, Plot No.620 Thika was bought by the Respondent's father but added that the Respondent also contributed without stating how much.

This Is, in short, the evidence from the Plaintiff/Applicant.

The Defendant at the outset in his evidence disclosed that a property bearing Mairi Shop No.11, is jointly owned by the parties though none of them has disclosed its existence.

He produced green card of a property. Murang'a/Gikindu/Kambirwa/1051. It is clear from the said document that the property was acquired during the marriage on 7th September, 1970 in the name of the Respondent and thereafter the Applicant got it transferred in her name on 28th January, 1972. Thus according to him, the claim of the Plaintiff that she acquired that property before the marriage is proved to be a total lie. He also added that he is totally unaware of the circumstances under which she got that plot transferred in her name. This evidence was not seriously challenged during his cross-examination except to show that it was transferred in her name during subsistence of cohabitation. It is also clear that it was sold in 1985 for Shs.30,000. He denied having given consent or signed an application for consent to transfer made to Land Control Board.

No evidence was produced to show that the Mairi Plot 29 is still in her name, due to failure to produce a letter dated 27th August, 2007 from the County Council of Maragua. However, I do note also that no evidence to show that, it was repossessed also is before the court, from the Plaintiff.

It was also averred that she sold Naivasha plot 276 in 1980 which admeasured 2 acres that the Plaintiff has not disclosed, in the pleadings, but has agreed in evidence that she had acquired one of the plots at Narok Ranch. She, however claims contribution on the other plot on the same Ranch which is in his name.

As regards shop along plot 11 Mairi he averred that he obtained an injunction against her to sell the same although, she had failed to disclose or mention it in her pleadings or in evidence. He agreed that the said property is in their joint names and that she receives the rent proceeds therefrom. Parcel Loc 2/Mairi.152 was acquired by him solely in 1969 and Mairi T-27 and T-26 were also similarly acquired in 1972 through his salaries.

In cross-examination he stated that their matrimonial home is on T-27 and her son occupies the same and cultivates thereon. Her son lives with him. He further stated that Murang'a property (Ex.D1) was in his name and he realized only when he applied for green card that she had transferred in her name and sold to a third party.

As regards motor vehicle he stated that it was acquired through a loan in May 1978 using Loc 2 Mairi/152 as a security. The loan was repaid through his business.

That was the case of the Defendant.

From the evidence and pleadings before the court it is quite clear that the parties acquired several properties during the subsistence of their cohabitation. I say so advisedly that their marriage at least on paper still subsists. It is similarly evident that both of them were working as well doing side businesses during the subsistence of cohabitation. But their respective direct contributions are not specifically pleaded or testified. Further, the Applicant did concede having purchased several properties which she had not disclosed to the court, but agreed that the same were acquired during their coverture. It is also further in evidence that some of the properties are registered in the name of the Respondent and others in the name of the Applicant.

Considering the pleadings, evidence and submissions made, I do find that the Plaintiff has absolutely failed to satisfy me that the properties claimed by her which were acquired solely by her or for which she has also contributed towards the purchase thereof. Her credibility also received dents when her evidence on Gikindu/Kambirwa/1051 to the effect that she acquired the same before marriage was totally shattered, when the Respondent produced the green card to prove that it was first registered in the name of the Respondent in the year 1970, (which is after their marriage) and then she got it transferred in her name in January, 1972. She also could not prove that Plot No.29/Mairi Market was repossessed as averred by her.

Her failure to disclose all the properties registered in her name and acquired during the subsistence of coverture, as well as her failure to substantiate the acquisition as alleged by her, does compel me to regard her evidence with some circumspection.

It is also averred by the Respondent and not denied that her son occupies and cultivates one of the properties namely; Loc 2/Mairi/T26 and their matrimonial home is on T 27 whereon the Respondent presently lives.

Even if, I disregard her failure and lack of substantiation, I am entitled to assume that the parties evinced intentions to distribute the matrimonial properties by having some of them registered in the name of the Applicant and others in the name of the Respondent.

These actions on the part of the parties did tantamount to declaration of their agreement or the trust without specifying it overtly.

From what was placed before the court, I can safely find that the parties are almost on an equal position. Each having their own properties duly registered during their coverture.

I may also add here by borrowing the words of Lord Reid in the case of **Gissing** (***supra***) namely;

"The facts may impose on him an implied , constructive or resulting trust. Why does the fact the he has agreed to accept those contributions from his wife not impose such a trust on him?"

In this case this constructive trust is imposed by the court on both the parties, as they acquired several properties and registered then in their names.

Lastly, I may specially deal with shop No.11 at Mairi which none of the parties has mentioned in their pleadings. The Respondent has averred that it is jointly owned by both the parties and that he is the one who is using the same to the exclusion of the Applicant. The Applicant in turn has not denied or controverted this assertion. In the premises I shall made a specific finding only in respect of the said property, which I humbly do, and declare that the said property is held in equal shares by the parties.

The Respondent shall thus file the accounts of the income and expenses, received and incurred by him since 1994 within 30 days from the date hereof. Thereafter he has to pay 50 per cent of the net balance to the Applicant and continue to do so till one of them departs to heavenly abode.

Except for the above order, I shall order that this Originating Summons is dismissed with no order as to costs.

I shall mention the matter to give further orders on the specified order as regards shop No.11/Mairi on the date convenient to both the counsel.

Orders accordingly.

Dated Signed and delivered at Nairobi this 2nd day of July, 2009.

K.H. RAWAL

JUDGE

2.7.09