



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

MISC. APPLI. 396 OF 1992 (O.S)

J W G.....PLAINTIFF/APPLICANT

VERSUS

C G K.....DEFENDANT/RESPONDENT

JUDGMENT

This Originating Summons is premised under Section 17 of the Married Women's Property Act of 1882 made applicable to Kenya under the provisions of section 3 of Judicature Act.

On the day of hearing on 21st February 2008, the Plaintiff/wife sought to amend her prayers which was granted as the learned counsel for the Respondent, on further consideration, did not object.

The prayers thus asked for are:

1. That it be declared that properties acquired by the joint funds and efforts of the Plaintiff and the Defendant during their marriage and registered in the name of the Respondent are owned jointly by the Plaintiff and Defendant (sic)

(a) Ngong/Ngong/[Particulars withheld] Lower Matasia.

(b) A 2½ acre farm Ngong/Ngong/[Particulars withheld] purchased with the proceeds of the sale of Nairobi/Block [Particulars withheld] by the Respondent (The title Registration No. was given during hearing (P. Ex 2 being Ngong/Ngong/[Particular withheld]).

2. In the alternative to prayer No.(b) an order that the Defendant Accounts to the Plaintiff for the proceeds realized after the sale of their house on Plot No. Nairobi/Block [Particular withheld].

3. That consequential orders as to the division and/or sale of the said properties and all other properties acquired during the subsistence of the marriage be made.

4. That the defendant be restrained from disposing off or charging or mortgaging the properties mentioned in Paragraph 1 pending determination of the suit.

5. That costs of this application be provided for.

It is obvious from the said prayers, that the parties are interchangeably mentioned as Plaintiff/Defendant and Applicant/Respondent. To avoid confusion I shall refer to them as Plaintiff and the Defendant.

The Plaintiff, in her affidavits in support sworn on 27th April, 2002 and further affidavit sworn on 3rd June 1992, has stressed that although the properties were acquired through the staff loan applied by the Defendant and also repaid from his salary, she has contributed in their acquisition by looking after household needs and expenses which the Defendant would have, otherwise, to pay.

The Defendant in his replying affidavit sworn on 11th May 1992 denied her averments and stated that they started living together as man and wife after their marriage on 2nd May, 1981 and marriage was formally dissolved on 19th April 1990 though they ceased staying together as man and wife in 1986.

According to him the properties in question were purchased before the marriage and he bought Ngong/Ngong/4871 from the sale of his two acres plot at Ngong which he had acquired before the marriage through the staff loan. He further has averred that Block [Particulars withheld] was acquired long before the marriage and he used its proceeds to purchase two and half acres' farm near Ngong/Ngong/[Particular withheld].

He denied any other contributions from the Plaintiff towards household needs.

This old case eventually came before me for hearing on 21st February 2008. In her evidence, the plaintiff stated that she started cohabiting with the Defendant in 1980 and their relation was formalized by marriage solemnized in May 1981. They separated since 11th January 1987 and formally divorced in April, 1990.

They cohabited at Madaraka Estate which was a rented property. During the period of subsistence of cohabitation, they acquired a home in Buru Buru, Nairobi/Block/[Particulars withheld]. (P Exh 1). It shows that on 23rd July 1987 the said property was sold to J W G after it was acquired by the Defendant on 24th January 1981. She insisted that the property was brought by the Defendant in January 1981 when they were cohabiting as man and wife but conceded that the same was purchased with staff loan granted to the Defendant and the loan was repaid through his salary. She also agreed that the said loan was still due at the time they separated.

She was working for gain during the time of their cohabitation and marriage with Kenya Post and Telecommunication Corporation and stated that her salary was used towards the house keep and Defendant's salary was used towards payments of rent of the 'house and loan'.

She also agreed that the property Ngong/Ngong/[Particulars withheld] (P. Exh. 2) was bought in July 1990 after the dissolution but asserted that the same was purchased from the sale proceeds of the aforesaid Buru Buru property wherein she has contributed. She stated that the Defendant sold the Buru Buru property at Kshs.375,000/= but she was shown (P Ex 1D) wherein the sale price was mentioned as Kshs.335,000/= during her cross examination. In any event, it is not disputed by any party that the Defendant sold the said property at Buru Buru on 23rd July, 1987, which was after the cessation of cohabitation.

She finally talked about property bearing L.R. No. Ngong/Ngong/Particulars withheld] at Lower Matasia which was acquired in the year 1982. The said property, as well, was acquired through the Defendant's Staff-loan and repaid similarly from his salary. She, however, reiterated that she took the sole responsibility of the upkeep of the house and three children. The first one whereof was from her previous relation, who was accepted as their children. She denied that her 1st born was maintained by his biological father one Mr. M.

Though she did not produce her pay-slips since 1980 or 1981. She denied that her salary was Shs.1,050/= per month at the time of marriage. Once again without any document to support she stated that on retirement her salary was Shs.19,000/=. She did not even state when did she retire.

She also could not estimate the household expenses towards which she contributed. She denied also

that she left for Mombasa in 1984 and stated that they did not have differences during the said period. She denied that a kiosk which she was running in Upper Matasia was put up for her by the Defendant to fend the family expense. She did not give estimate of income derived from kiosk.

She denied that she had drinking problem and the Respondent had been protesting against her alcohol consumption. She further denied that she left the house in 1982 with house hold goods. Earlier she had admitted that the flat wherein they lived after marriage was found to be fully furnished. She also admitted that Pick up [Particulars withheld] was her vehicle bought in 1985 and she sold it for Shs.40,000/= but explained that she did so to pay back a loan taken to put the children to school. She agreed that her brother stayed with them for one year when he was studying.

This in short is the evidence from the Applicant.

The Defendant testified and called 3 witnesses in support of his case.

According to the Defendant he applied for a loan in respect of the Buru Buru property to CDC in the year 1978, and on 14th June, 1979 he was granted a loan for Shs.12,800/= and vide a letter from Barclays Bank dated 23rd April, 1980 his further loan for Shs.122,516/= was approved. As per the manager's remark and approval on the said letter (DEX 1), it was clearly specified that due to his four years salary, he was entitled to the said loan and was given authority to draw Shs.30,629/= to pay deposit to CDC, adding also that the balance of the loan will be drawn towards the completion date of the house and repayments will commence as soon as the full loan has been made. He was not married by then. His house at Makadara Estate (and not at Buru Buru as had been testified by the Applicant) was at a rent of Kshs.500/= initially which was later increased to Shs.900/ and which was paid by him. J M G was the one who gave him the house on rent. It was shown that Plaintiff was only having a salary of Shs.1,050 p.m.

He sold the aforesaid house in early 1987, when the Applicant had already left him. He received around Shs.370,000/= out of the sale. He paid part thereof in paying the balance of loan and remainder was used to buy another piece of land known as Ngong/Ngong/[Particulars withheld] admeasuring 2 and half acres. He reiterated that Plaintiff was not living with him when he bought the said piece of land.

He also stated that the vehicle registration No. [Particular withheld], Datsun pick up in make, was bought by him from his friend Mrs. M transferred the said vehicle in her name after the Plaintiff told her to put it in her name because of income tax problem. He also stated during cross examination that in February 1987, she took away the pick up under a pretext from his driver. She then sold it for Shs.40,000/= as per his information and kept those money by herself. He also claimed that the Plaintiff took the rent proceeds for Buru Buru property for six years and spent it on her drinking. He did allege that she had been secretly drinking alcohol. He also got the passbook of her account with Barclays Bank, Kenyatta Avenue Branch through DW4 Mary Atieno Okoth an Operational Manager, Barclays Bank – Queensway Branch. DW4 confirmed that D Ex 4 was an authentic passbook issued by Queensway Branch – which was closed and all accounts therein were moved to Moi Avenue Branch. The pass book showed that sum of Shs.1,700/= per month was deposited in the account of the Plaintiff from March, 1986 to June 1986, which confirmed his averments.

As regards the property Ngong/Ngong/[Particulars withheld] he testified that the property was bought by him in early 1982 at a price of Shs.120,000/=. He took loan of Shs.65,500/= from Bank (D.Ex.2). When he found it difficult to repay the same, he approached the Plaintiff for help, but she did not oblige. He then sold a piece of land he bought in 1978 and paid the loan. The said property, as per his explanation during his cross examination was situate at Olkei/Ngong.

He further said during cross examination that he was repaying the loan taken in 1986 which was taken in 1982 in the sum of Shs.65,500/= as well as the loan taken to open a shop at Matasia in 1984. Her brother was operating the said shop. He explained that he managed to repay the loan and to support the family from his employment, proceeds from farming and from the income of shop. Mainly the food came from the shop.

DW2 N N shared the house of the Defendant at [Particulars withheld] estate with her husband. But after the Respondent married they moved away.

She was aware of the farm owned by the Respondent who cultivates the same. She testified that the Plaintiff sometimes used to supervise the farm after work but never cultivated. The said farm is near their home. She also told the court that after the parties separated. The Plaintiff took away all the goods from the shop in a pick up as well as those from the home.

DW3 N W is sister to the Defendant who used to stay with the parties at Ngong. She stayed with the Plaintiff for about five months during which time she observed that sometimes the Plaintiff would come late at home around 11.00 p.m. and the Defendant on many occasions used to go to pick her up at late night. When the Plaintiff left the Defendant, she took over running of the shop wherein she used to help the Plaintiff previously. she said shop was run by the Plaintiff's brother and sometime by the Defendant. She said the Plaintiff used to drink as some times she would accompany her. However, she said she could not hear any quarrels between the two as she was sleeping in a kitchen which was separate from the main home.

Considering the evidence of DW2 and DW3, I may only state that their evidence did not add much value to the case of the Defendant except to support his evidence that the Plaintiff took goods in the pick-up which she sold. The Plaintiff herself has conceded having sold the same for Shs.40,000/=. Their evidence further showed that the Plaintiff used to drink.

This is the evidence in brief before the court.

The Defendant's learned counsel Mr. H. Kinyanjui first raised a legal issue on the jurisdiction of this court to entertain this Originating Summons after the Decree absolute was issued by the court. It was specified that the parties were married on 2nd May, 1981, the Plaintiff left the Defendant in 1986, the parties formally divorced on 19th April, 1990 and Decree absolute was issued on 3rd September, 1990. It is evident that the Originating Summons was filed on 30th April, 1992 long after the decree absolute was issued.

It was also accepted that Githinji J (as then he was) ruled, vide his ruling delivered on 13th October 1999, that the court has jurisdiction to determine the dispute before the court and invoked order XXXVI Rule 10 of Civil Procedure Rules and ordered that the proceedings do continue as if the case had been began (*sic*) by plaint and that affidavits filed by parties do stand as pleadings.

Mr. Kinyanjui was given leave to appeal but I do not have any record to show that such an appeal was filed and/or heard

The contention that the said ruling was a nullity shall be difficult for me to accept, without an appeal or an application for review. Hon. Githinji J (as then he was) while accepting that the Originating Summons filed under section 17 of Married Women's Property Act, 1882 was not competent, exercised his discretion under order XXXVI Rule 10 of Civil Procedure Rules and converted the Originating Summons as a plaint. With this ruling it can be said that what I have is a plaint and not Originating Summons under section 17 of Married Women's Property Act, 1882. Without properly addressing by way of an application for review, I have to accept the said ruling as a court's order, whether I would agree or not with the reasoning of the said ruling.

I shall be thus constrained to reject the said contention raised on the jurisdiction of the court, and I do so reject.

I shall thus also review my earlier observations that this matter is under Section 17 of the Married Women's Property Act and confirm that I shall treat this suit as a plaint.

I also observe that list of documents were exchanged and filed.

From the pleadings I can easily state that the issue to be determined is whether the properties specified in the prayers referred to hereinbefore, were jointly acquired through joint funds and joint efforts; if so, whether an Implied or resulting trust was created to be assumed in favour of the Plaintiff.

These issues shall need to be proved on balance of probability. From the evidence led and pleadings made, I shall tend to agree with the submissions made by the learned counsel for the Defendant that the Plaintiff was unable to prove that she made direct or indirect financial as well as social contribution towards the acquisition of the two properties.

It is on record that core property known as Nairobi/Block [Particulars withheld] was purchased in 1981 after the application to acquire was made in 1979 and the loan was approved on 23rd April 1980 and deposit of Shs.30,629/= was paid by the Defendant. The Defendant has denied that they were cohabiting since 1980 as averred by the Plaintiff and the Plaintiff despite such denial failed to prove such cohabitation. The marriage as agreed by both, was solemnized on 2nd May, 1981.

The Plaintiff has agreed that the said property was acquired through staff loan which was repaid by the Defendant. Her assertion that she contributed in the house keep has not been proved on balance of probability. Her denial that the rent from the Buru Buru Property was taken by her was controverted and proved to be wrong by the production of Barclays Bank Passbook. That evidence put a dent on the credibility of the Plaintiff, she has not shown the court any evidence of her income and expense incurred by her from the said income.

The Defendant on the other hand through his witnesses has shown that he was the one cultivating the farm while the Plaintiff came only to supervise. His sister (DW3) also stated that the Defendant employed a house-maid who was doing all the household chores.

As against that apart from verbal assertion that she paid for all the household expenses, the Plaintiff did not support her verbal evidence by any documents or other direct evidence.

It is contended by the Plaintiff's counsel that the contention of the Defendant that the Plaintiff was drinking was not relevant to the issue and further it was also not substantiated. It is also stressed that the Plaintiff and Defendant had two children and the child of the Plaintiff who was living with them and the Plaintiff has continued to stay with them even after the Divorce. That apart, it was strongly put forth that it was impossible for the Defendant to cater for three loans without the support from the Plaintiff. She had testified that her salary from Shs.1,050/= was increased to Shs.19,000/= at the time of her retirement. That could be true, but the Plaintiff has not stated that during the subsistence of cohabitation how much was her salary, so that the court would be in a proper position to evaluate her contribution. I would, however, dismiss the contention made by the learned counsel for the Defendant that she did not contribute anything when she was also a working wife and with children, husband and a house to look after. If I may state, neither of the parties has shown any proof for the household expense.

Considering all the evidence and submissions made, I would not agree with the Plaintiff that she is entitled to 50 per cent of the property. I would also reject the submissions made by the Defendant that she has not made any contribution towards the acquisition of the two properties claimed by the Plaintiff. The loans were repaid by the Defendant during cohabitation.

Doing best I could, I declare that the Plaintiff contributed 10 per cent to the acquisitions of Ngong/Ngong/Particulars withheld] and 10 per cent in the property known as Ngong/Ngong/[Particulars withheld].

The Defendant either can transfer the aforesaid shares in the aforesaid properties in the names of the Plaintiff or give her the money of her shares after valuations thereof is made. I may however, note that the Plaintiff has produced valuation of Ngong/Ngong/[Particulars withheld] and the Defendant has not challenged the value estimated at Shs.923,000/= in the Report (P Ex 3(b)).

The parties to bear their own costs.

Orders accordingly.

Dated and signed at Nairobi this 2nd day of October, 2008.

K.H. RAWAL

JUDGE

2.10.08