REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

Civil Appeal 203 of 1997

TABITHA WANGECHI NDERITU...APPELLANT

AND

SIMON NDERITU KARIUKI..RESPONDENT

(Appeal from part of the judgment of the High court of Kenya at Nairobi (Mr. Justice A.I. Hayanga) dated 25th February, 1997

in

H.C.C.C. NO.2133 OF 1992 (O.S.)

****

JUDGMENT OF PALL, J.A.

This is an appeal from the judgment of the High court of Kenya at Nairobi (Hon. Mr. Justice Hayanga) dated 25th February, 1997 in its Civil Case No. 2133 of 1992 (O.S.).

This appellant sued the respondent in the superior court by way of an originating summons under section 17 of the Married Women Property Act 1882 of England for orders that all properties, movable and immovable, acquired by the joint funds and efforts of the appellant and respondent during their marriage and registered in the name of the respondent and or in his possession are owned jointly by the appellant and the respondent. She further prayed for an order that the said properties be sold and the net proceeds of the sale be shared equally between the appellant and the respondent.

By her supporting affidavit, of 21 August, 1992 the appellant deponed, and it is not in dispute, that the appellant was married to the respondent in the year 1968 under the kikuyu customary law and had lived with him as his wife upto about December, 1992. There are five children of the marriage who are all adults and settled in life except their daughter Susan Wambui, born in October, 1974, who is still a student at the United States International University in Nairobi. She further deponed, it is again not in dispute, that before their marriage in 1968, the respondent did not own any immovable property. All the nine immovable properties and the vehicles and other movable assets mentioned in her supporting affidavit were acquired during the subsistence of their marriage. All immovable properties are registered

in the name of the respondent and all the movable assets and vehicles are in his possession. She further deponed that during the period she had been living with the respondent she financially contributed towards the purchase of the assets and the welfare of the family. She thus claimed an equal share in all the aforesaid properties.

By his replying affidavit dated 26th June, 1995 the respondent deponed (inter alia) that the applicant did not earn a living. She was, however, looking after his father's coffee plants; that he had a piece of land approximately 3 acres which was enough to keep her busy; that he established his business of charcoal selling on his own initiative and without any monetary or other assistance from the appellant. However, he taught her how to run the 'Mitumba' (second hand clothes selling) business and allowed her to do the selling of clothes while he was looking for more clothes to sell and doing other side businesses. He also deponed that the appellant brought the proceeds of the sale to him which he would bank in his bank account with Kenya Commercial Bank, Nairobi.

The parties also gave viva voce evidence. The appellant in her oral evidence, testified that three last born children born in 1972, 1974 and 1976 respectively were all delivered by Caesarian sections. She however denied that she was sickly and weak because of the caesarian sections. She had attended school upto standard IV but she knew how to do business and she could read and write. In 1972 she came back to Nairobi, to live with the respondent, from the respondent's native house at Othaya in Nyeri. When she was in Othaya she was doing small jobs for money for other people. Back in Nairobi, she started selling secondhand clothes. The respondent closed his charcoal business as it "did not suffice". By that she probably meant that it did not generate sufficient income. The respondent called her to Nairobi to be his manager for the second hand clothes selling. Apart from the clothes selling business they did not have any other business until 1985 when the respondent opened a wholesale business known as "Gobbs Wholesalers". They, then, closed the secondhand clothes business and concentrated on the wholesale business which again she was managing. All the properties were bought with the income from their said business activities. In December 1992 when they were living in one of their two farms in Tigoni, trouble started between them and she left the respondent. She also then ceased to manage the said wholesale business. According to her the respondent had a monthly rental income of about Shs.200,000/= from the said immovable properties. She further said that she knew that the respondent had given one of the said properties known as L.R.209/1233 Muranga Road Nairobi to their son, Benedict Kariuki.

The respondent in his oral testimony said (inter alia) that the appellant had been a mere housewife. She had not been working. In 1972 she came down to Nairobi to deliver their third child by a caesarian section. After the delivery she disappeared with the young child to her parents' house and stayed there for one year. She joined him again either late in 1973 or early 1974 and she did not look healthy. She became pregnant again and delivered their fourth child in October, 1974 through a caesarian section. She was weak and could not do any work. She delivered the fifth child in 1976 again through a caesarian section. She did not work and never managed the wholesale business, he said. Also she never helped him to sell the secondhand clothes. He however, conceded that before he married, he had no property.

The learned Judge accepted the appellant's evidence that she was selling secondhand clothes and managing the wholesale business. He also accepted that all the properties were acquired during the subsistence of the marriage and that there was no agreement between the spouses that the appellant was completely to be excluded from the properties which they were acquiring. He went on to hold that where there was no such intention to exclude the appellant, the beneficial interest in any property acquired by the joint efforts of husband and wife belonged to them "jointly". He also found that the appellant was telling the truth when she said that she had been managing the wholesale business and, he thought the respondent was not being candid with the court and was trying to conceal his capital denying the appellant's participation in the business without getting any salary. On the other hand, he accepted the appellant's evidence that she had been selling clothes, living with her children in their rural home, paying the fees for the daughter in the United States International University in Nairobi and managing the wholesale business. He also acknowledged that her indirect contribution to the family income, looking after the children and enhancing the welfare of the family were just as important as a direct financial contribution towards the acquisition of the disputed properties. He also acknowledged that the appellant's major contribution was in respect of bringing up the children. But the learned Judge then said:

"There is however evidence that the caesarian deliveries reduced for those periods she was delivering, her capacity to exert herself in any gainful activity."

He took into account that the appellant had paid the fees for her daughter alone and that there was no evidence that she paid for the fees of the other children when they were schooling. He also "took note of the delivery condition" when the appellant used to suffer and would not be really productive. For these reasons he awarded 50% share of the matrimonial home at Tigoni i.e. L.R. 7660/89 to the appellant and so far as the rest of the property both immovable and movable is concerned he gave 30% share to the appellant and 70% to the respondent. He also ordered that all the motor vehicles should be sold and the proceeds be shared in the aforesaid proportions. So far as the wholesale business is concerned he ordered that accounts be taken in order to determine the capital value and yearly profits thereof for all the time that the business had been existing and each party's share should be calculated again in the aforesaid proportions.

There was disagreement between the parties as to who was responsible for the separation of the spouses. The learned Judge quite rightly did not take any account of that dispute. In Cracknell vs. Cracknell [1971] 3 All E.R. 552 Lord Denning M.R. said:-

"In determining the shares in the matrimonial home of spouses who had separated the court looked to their respective contribution and took no account of rights and wrongs of the separation."

The appellant being dissatisfied with the judgment of the superior court now appeals. The burden of the appellant's appeal is, so far as I can see it, that the trial Judge erred in law and in fact by failing to award 50% of all the properties in dispute to the appellant. It is also noted that there is no notice of cross appeal. Nor is there any notice by the respondent of other grounds for affirming the decision of the superior court.

The learned Judge correctly held that the applicability of s.17 of the Married Women's Property Act cannot be excluded simply because the marriage was according to the Kikuyu custom and tradition. (See KARANJA vs KARANJA (1976) K.L.R. 307). He correctly followed Kivuitu vs Kivuitu 2 KAR 241 where the Court of Appeal held that indirect contribution by the wife to the family income by looking after the welfare of the family must form a basis just like a financial contribution. He rightly drew inspiration from the judgment of Omolo J.A. in FATHIYA ESSA VS MOHD Alibhai ESSA Civil Appeal No. 101 of 1995 (unreported) that the burden is on the applicant to prove upon the balance of probability that she made a contribution towards the acquisition of the property in dispute.

The learned Judge having given the appellant 50% share in one property, was he justified in reducing her share in the rest of the properties to 30%?

As I have already pointed out, to the learned Judge the appellant's major contribution was in respect of welfare of the children when they were young. But he said in the succeeding years she paid school fees for one child only and there was no evidence that she paid for the school fees of the other 4 children. This was one reason for his reducing her share in the rest of the disputed properties. However as the learned Judge has held that the appellant was entitled to a share in both the capital and business of the respondent, it does not matter who provided for the fees of the other children. It must have come out of common fund of the family.

The other reason for reduction of the appellant's share according to the learned Judge was that because of her delivery condition, she was not really as productive as she should have been.

Apart from the respondent's bare word that the appellant was sickly and weak because of the three caesarian deliveries, there is no evidence to support him. If she was sickly and weak to the extent that she could not exert and attend to the business, one would have expected some medical evidence by way of medical bills etc. There is no such evidence. The bare word of the respondent who had already been discredited by the learned Judge as not being candid could not be relied upon to form a basis for reducing the share of the appellant to 30%. Against this evidence of the respondent, there is the evidence of the

appellant denying that she was sickly and weak and because of that she was unable to work. The learned Judge having declared the appellant as a witness of truth should have held that the appellant was not sick and weak which he unfortunately did not do. Moreover, even if for the sake of argument, we accept that for sometime immediately before as well as after each delivery, the appellant was unable to exert and participate fully in the business, it was the respondent who was responsible for her pregnancies. Obviously, the appellant contributed to the enhancement of the welfare of the family as the pregnancies brought about the progression of the progeny of the respondent. He alone could not have achieved it.

Thus, in my view the learned Judge did not have any good reason to reduce the share of the appellant in respect of the rest of the properties acquired during her marriage with the respondent once having granted her 50% share in one properties. At least no such reason appears upon a careful perusal of his judgment. He misdirected himself in evaluating the evidence before him and as a result arrived at a wrong conclusion.

I would therefore allow the appeal and set aside the judgment and decree of the superior court to the extent it gives less than 50% share of the disputed properties to the appellant and would order that the appellant be awarded 50% of all the disputed properties subject matter of this litigation as set out in paragraphs 5 and 6 of the affidavit of the appellant sworn on 21 August, 1992 in support of the originating summons. The costs of this appeal shall be borne by the respondent. I would also award the appellant costs of the Originating Summons in the superior court.

Dated at Nairobi this 30th day of June, 1998.

G.S. PALL

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR