



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 2133 OF 1992

T W N APPLICANT

VERSUS

S N K.....RESPONDENT

RULING

The applicant wife has taken out an originating summons against the respondent husband under the Married Women's Property Act 1882 (England) which is applied to Kenya for a declaration that the properties mentioned by her in her supporting affidavit were acquired by joint funds and efforts of the applicant and the respondent during their marriage although they are registered in the name of the respondent alone.

At the same time she has applied by way of a chamber summons that the respondent be restrained from disposing of or in any way wasting the movable or immovable property pending final determination of these proceedings. She has also sought an order directing the respondent to release motor vehicle No [particulars withheld] Toyota Saloon to the applicant for her use pending determination of these proceedings and that rent from LR [particulars withheld] and LR [particulars withheld] Eastleigh Nairobi be collected by her pending determination of these proceedings.

In her supporting affidavit the applicant has enumerated 11 valuable properties and 5 vehicles which were all acquired through the joint efforts of herself and the respondent and that all the properties enumerated by her yield a monthly income of Shs 243,000/- which is received by the respondent and they were all acquired during the wedlock of her and the respondent. The applicant has further said that unless the Court orders that she collects the rent of the said properties, she will be rendered a destitute and will suffer irreparable loss and damage.

In her further affidavit in support she has stated that at the time of her marriage to the respondent, he had no property and he was staying at his parents' house. After the marriage the applicant started farming in her mother in law's farm while the respondent went to Nairobi and started a small business of charcoal selling. In 1992 she and her husband pooled together whatever small savings they had and set up a second hand clothes business at Gikomba. She used to physically participate in selling the second hand clothes whereas the respondent used to order clothes and pay for them from the proceeds of sale collected by the applicant. With income raised from the sale of second hand clothes, they managed to acquire the first property namely LR [particulars withheld] Eastleigh in 1975. In the same year they acquired plot No LR [particulars withheld] Limuru Road. Again in the same year they bought a motor vehicle namely Peugeot 404 pickup from their joint income. All the other properties were acquired similarly with the joint funds and the rental income of the properties already purchased. Soon thereafter the applicant and the

respondent acquired a shop and set up a business of wholesale of textiles and new clothes. She had been managing the said business until December, 1992 when she left the matrimonial home after she had been physically assaulted by the respondent causing her actual bodily harm.

The special nature of the relationship between husband and wife gives rise to difficulties of proof when marriage breaks down and questions of ownership of property have to be decided. It is not to be expected that the transaction between them when they are happily married will be evidenced in the same way as an ordinary commercial transaction. In determining proprietary interests the Court will therefore have regard to both direct as well as indirect contributions for example a wife who has helped her husband regularly and continuously in a business and has received no wages will be entitled to a share in property acquired with the proceeds of business (*Halsbury's Laws of England* 4th Edition Vol 22 para 1030)

In *Karanja v Karanja* [1976] KLR 307 Simpson, J as he then was said "the fact that property acquired after marriage is put into the name of the husband alone and that the husband has evinced no intention that his wife should share in the property does not necessarily exclude the imputation of a trust nor preclude the wife in appropriate circumstances from obtaining a declaration that the property acquired by virtue of a joint venture is held on trust for them both." In the same case His Lordship went on to say that "the wife's contribution need not be direct payment towards the purchase of property but may be indirect such as meeting of the household and other expenses including expenditure on clothing for the wife and children and the education of children which the husband would otherwise have had to pay".

In *Mary Ann Kivuitu vs Samuel Mutua Kivuitu* Civil Appeal No 26 of 1985 (unreported) Omolo JA said that under sec 17 of Married Women's Property Act the wife's contribution should not be limited to monetary contribution only. If a wife remains in house, prepares food for the family and generally keeps the house going and generally attends to matters which enhance the welfare of family, surely such a woman is contributing to the family welfare and its assets, His Lordship remarked.

In this case evidence is there that all the properties owned by the respondent were acquired during the wedlock. There is *prima facie* evidence that the applicant was more than a mere housewife. She had been contributing to the welfare of the family at first by farming in her father in law's farm. Thereafter the couple ventured a second hand clothes business and she was selling second hand clothes at Gikomba in Nairobi. Then they opened a shop in River Road according to her affidavit evidence and carried on the business of wholesalers of textiles and readymade clothes. She used to manage this business until 1989 when the couple separated from each other. She had never drawn any salary or wages. On this evidence I am inclined to say that the applicant has a *prima facie* case with a probability of success that she had contributed to the acquisition of the properties owned by the respondent so far as the applicant's prayer for injunction to restrain the respondent from disposing any of the properties registered in his name is concerned, although the respondent has stated that he has no immediate intention of selling or encumbering them or any of them. At the same time, however, he has vigorously opposed the application for injunction. It is only fair that the present status quo should be maintained until the final determination of this litigation. I therefore grant the first prayer in the amended chamber summons which shall be effective until further order of this Court.

The other prayers sought by the applicant are in the nature of allowance by the husband for the interim maintenance of the wife while this litigation is pending. I do have power to make any interim orders while the proceedings are pending on such terms as I think just (*Halsbury's Laws of England (supra)* para 1040). However, the applicant has already obtained an order for her maintenance in proceedings for judicial separation brought by her against the respondent being this Court's Matrimonial Cause No 35 of 1992. In the said proceedings she has been awarded a monthly payment of Shs 10,000/- for her maintenance. If I grant the applicant's said prayers it will be tantamount to varying the maintenance order in these proceedings.

I quite agree the cost of living in Nairobi has gone up tremendously. I am also prepared to concede that with this amount the applicant will not be able, perhaps, to make her ends meet. The applicant should be able to enjoy the same status and style of life which she had been enjoying before the separation took place. I further agree that the respondent has a very substantial income and can very well afford to pay

more. But as I have said I cannot vary the said order of the Court in these proceedings. The applicant can always apply in the said other proceedings for variation of the order. According to *Halsbury's Laws of England (supra)* at p 639 "where there have been previous matrimonial proceedings between the parties, the Court hearing the section 17 proceedings is bound by the findings in these proceedings". In *Razelos v Razelos* [1972] 1 All ER 386 it was held that findings of a county court judge in undefended proceedings for judicial separation were binding on the High Court in application under s 17 of the Married Women's Property Act 1882.

For these reasons I disallow the said prayers (except one of the injunction) in the plaintiff's application and order that costs of this application shall abide by the final result of this originating summons.

Dated and delivered at Nairobi this 5th day of November, 1993

G.S. PALL

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JUDGE