



**IN THE COURT OF APPEAL  
AT NAIROBI  
(CORAM: OMOLO, GITHINJI, J.J.A. & DEVERELL, AG. J.A.)  
CIVIL APPEAL NO. 236 OF 2001**

**BETWEEN**

**D M M ..... APPELLANT**

**AND**

**M N M ..... RESPONDENT**

**(An appeal from the Judgment of the High Court of Kenya at Nairobi  
(Ransley, Commissioner of Assize) dated 13th January, 2000**

**JUDGMENT OF THE COURT**

This is an appeal from the judgment and decree of the superior court (Ransley, Commissioner of Assize), (CA) (as he then was) dated 13th January, 2000 whereby the learned CA, allowed the respondent's application under section 17 of the Married Women's Property Act 1882 hereinafter referred as (1882 Act) and awarded her half interest in L.R. *[particulars withheld]*– Karen House; half of the shares in *[particulars withheld]* Investments Limited and a car Registration No. *[particulars withheld]*.

The appellant (husband) married the respondent (wife) in church on 3rd February, 1979. The marriage was blessed with four children, namely, M M born on 14th April, 1979, N M born on 15th March, 1982 and K M and W M (twins) born on 3rd December, 1984. On 30th April, 1986, the husband filed a Petition in the superior court, Divorce Cause No. 32 of 1986, praying that the marriage be dissolved on the ground of the wife's cruelty. The wife filed an Answer and a crosspetition seeking the dissolution of the marriage, also on the ground of husband's cruelty.

By an Originating Summons made under section 17 of the 1882 Act, the wife sought an order for the distribution of all the family or matrimonial properties. On 18th May, 1995 the superior court allowed the husband's petition and dissolved the marriage on the ground of the wife's cruelty and a Decree Nisi was issued.

The Decree Nisi was made absolute on 21st November, 1995. By an agreement contained in the consent letter dated 20th November, 1997 the custody of the children was given to the husband and the husband agreed to pay maintenance to the wife including transferring motor vehicle Reg. No. *[particulars withheld]* to her.

The Originating Summons filed on 19th February, 1993 was amended on 15th June, 1995 apparently without the leave of the court. There were two main declarations sought in the amended originating summons thus:

- (a) That it be declared that the property registered as Number *[particulars withheld]*, Karen Nairobi and L.R. No. *[particulars withheld]* Nginda Samer, Murang'a District together with the buildings

and improvements thereon acquired by the joint funds and efforts of the appellant and the respondent during their marriage and registered in the name of the respondent be declared joint properties and that \ the same be sold and the proceeds be shared equally and/or as this Honourable court may deem just to order.

(b) That it be declared that the motor vehicles registration Numbers (i) [particularswithheld] Mercedes Benz,

(ii) [**Particulars withheld**] Mercedes Benz,

(iii) [**Particulars withheld**] Pajero,

(iv) [**Particulars withheld**] Pick Up,

(v) [**Particulars withheld**] Toyota.

and all assorted domestic goods and appliances currently at L.R. No. Particulars withheld] Karen and at Murang'a be declared joint properties and the same be shared equally.

The husband started giving evidence on 21st December, 1999 after the wife finished giving her evidence. In the course of cross-examining the husband, the wife's counsel, Miss. Kamau, made an oral application to amend the Originating Summons to include shares in [particulars withheld] Investments Limited. The oral application was opposed by Ochieng Oduol, learned counsel for the husband. But in a ruling delivered on 23rd December, 1999, the learned CA allowed the oral application for amendment but gave leave to the husband to appeal.

As a consequence, an amended Originating Summons was filed on 6th January, 2000 which added prayer (d) as follows:

*“That it be declared that the applicant is entitled to one half share of the respondent's shares in [particulars withheld] Investments Ltd”.*

The Originating Summons was supported by two affidavits. The appellant also filed a replying affidavit.

The following facts emerge from the wife's supporting affidavits and from her evidence. She was a graduate teacher at Mangu High School between 1979 and 1988 where she was earning Shs.2,200/= per month. She was housing her husband who was then employed in Nairobi by an insurance company. They moved to Nairobi in 1980 and started living at Kariobangi South in a City Council house. She was then teaching at [**particulars withheld**] High School. In 1980, she resigned as a teacher and was employed by [**particulars withheld**] as an assistant manager at a monthly salary of Shs.8,900/= until 1984. She then went to Thika to run a chemist shop – [**particulars withheld**] Chemists which was established by her husband and her brother-in-law, J K but she was stopped from running the chemist shop after 6 months. She and her husband were directors in the chemist shop. She has not been in gainful employment since 1984.

In 1982, the husband bought a house in Ngumo, High View Estate – L.R. No. [particulars withheld] and fully paid for it. The husband eventually transferred that house to the wife. Later, however, she gave a power of attorney to the husband who mortgaged the house. The house was eventually sold by the financier when the husband failed to service the loan. In 1983, the husband bought a house in Lavington – L.R. No. [**particulars withheld**] for Shs.885,000/=. This was a three – bedroomed house on one acre piece of land and the couple moved there. The Lavington house was sold in 1991 and the husband bought the Karen house L.R. No.[particulars withheld] for Shs. 4 million and the couple moved to that house. It was bought from a loan from H.F.C.K. The Karen house is on 2 acres and was valued at Shs. 11 million in 1992.

In 1991, the husband bought L.R. No. **[particulars withheld]** which is a 100 acre farm at Maragwa, but the farm was registered in the name of a company – **[particulars withheld]** Investments Limited.

It was her case that her contribution to the purchase of Karen house was indirect in that between 1985 – 1991 she was looking after the family and supervising work done in small shambas they had acquired in Murang'a. One of those pieces was Gatura farm – a five acre tea farm. There was a 1½ acres coffee farm at Kandara and another 4 acres farm at Kandara. She claimed that she used to supervise work in the farms.

The husband gave evidence. He was admitted as advocate in 1978. He was employed by an insurance company and I.C.D.C. between 1978 and 1981 and in 1981 he opened his law practice. He bought the High View House from his savings. He bought the Lavington house from a loan from H.F.C.K. He later sold the Lavington house and then bought the Karen house. The Karen house has an outstanding loan of Shs. 2 million. He claimed that his company **[particulars withheld]** Investments bought the Maragwa property which is 83 acres in 1995 for Shs. 3 million and that he holds 2499 shares in **[particulars withheld]** Investments Ltd. while his wife holds one share.

He claimed that he bought all those properties without any assistance from his wife and that the wife did not contribute financially or in any other way to the welfare of the family.

The learned CA considered the evidence and made a finding in part as follows:

***“I accept that the wife did make indirect contributions to the welfare of the family by providing the services she said she gave namely, working looking after the children and taking them to school and generally running the matrimonial home in which the parties lived. Further, I consider that by providing the respondent with a home at Mangu School, this was tantamount to a financial contribution as it saved the respondent from rent. I do not accept his answer that it was of no value to him as he had to drive to Nairobi. Also I do not think the respondent gave the applicant full credit for her contributions during the marriage. He is strongly of the view that she was disruptive influence in his life. If so it is difficult to understand why he put up with her for so long”.***

The learned CA awarded the wife a half in interest in the Karen house. The learned CA further ordered that the husband do hold half of the shares in **[particulars withheld]** Investments Limited in trust for the wife.

We will start with the law. In *Pettitt v Pettitt* [1969] 2 All ER 385, Lord Upjohn, said at page 405 paragraphs F, G, H, thus:

***“In my view, s.17 is a purely procedural section which confers on the Judges in relation to questions of title no greater discretion than he would have in proceedings begun in any Division of the High Court or in the county court in relation to the property in dispute, for it must be remembered that apart altogether from s.17, a husband and wife could sue one another even before the Act of 1882 over questions of property; so that, in my opinion s.17 now disappears from the scene and the rights of the parties must be judged on the general principles applicable in any court of law when considering questions of title to property and although the parties are husband and wife these questions of title to property must be decided by the principles of law applicable to the settlement of claims between those not so related, while making full allowances for that relationship”.***

Later at page 407 paragraph H, his Lordship continued:

***“But where both spouses contribute to the acquisition of a property, then my own view (of course in the absence of evidence) is that they intended to be joint beneficial***

***owners and this is so whether the purchase be in the joint names or in the name of one. This is the result of the application of the presumption of resulting trust. Even if the property be put in the sole name of the wife, I would not myself treat that as a circumstance of the evidence enabling the wife to claim an advancement to her; for it is against all the probabilities of the case unless the husband's contribution is very small.***

***Whether the spouse contributing to the purchase should be considered to be equal owner or in some other proportion must depend on the circumstances of each case”.***

In the subsequent case of *Gissing v Gissing* [1970] 2 All ER 780 the House of Lords made it clear that where both spouses contribute towards the purchase of a matrimonial home and there was no agreement as to the sharing of the beneficial interest, and the spouse in whose name the matrimonial home was purchased evinced no intention that the contributing spouse should have a beneficial interest therein, then the question whether the contributing spouse is entitled to a beneficial interest in the matrimonial home is a matter dependent on the law of trusts. Further, the House of Lords recognized that there was no distinction to be drawn in law between direct contributions towards the purchase of a matrimonial house and where the contributing spouse makes indirect contributions. In that case, Lord Pearson, at page 788 C cautioned against excessive use of the maxim “Equality is Equity” in determining the proportional share of a contributing spouse. The cases of *Falconer v Falconer* [1970] 3 All ER 449 and *Hazell v Hazell [1972]* 1 All ER 925 which followed *Gissing v Gissing* (supra) have exhaustively considered the principles applicable in these kind of cases.

All these English authorities were considered and applied by the High Court (Simpson J) in *Karanja v Karanja* [1976] KLR 307 where the learned Judge said at page 311 paragraph b, c, d:

***“On the basis of these authorities, payments by the wife need not be direct payments towards the purchase of the property, but may be indirect such as meeting house-hold and other expenses including expenditure on clothing for the wife and children and the education of the children which the husband would otherwise have had to pay; and even though the husband may never have evinced an intention that his wife should have a share in the property the wife may in the circumstances of the case be entitled to a declaration that the property registered, in the husband’s name is held wholly or in part in trust for her by virtue of its acquisition as a joint venture. Although most authorities deal with disputes in relation to the matrimonial home, it is because the majority of married couples in England have only one house. Section 17 is not limited in its application to the matrimonial home and its contents”.***

That passage with respect is a correct summary of the law in this country. The law has been expounded by the Court of Appeal in *Kivuitu v Kivuitu* [1988 – 1992] 2 KAR 241 j *James Kamore Njomo v Phoebe Wangui Kamore & Another*, Civil Appeal No. 63 of 1998 [1998] LLR 714 and other cases.

There are 33 grounds of appeal which were argued under seven categories. In respect of the Karen house, the appellant contends that the learned Judge was wrong in failing to appreciate that the Karen house was not a family asset having been purchased by the appellant through mortgage and without any contribution from the respondent and also in failing to appreciate that the appellant met all the house-hold expenses, paid school fees and carried out all the work that the respondent alleged to have carried out. It was submitted that the respondent should have been given less than a half share – probably 1/3 of the Karen property.

The wife’s claim to a half share of the Karen house was based on indirect financial contributions to the acquisition of the property. In *Falconer v Falconer* (supra) Lord Denning MR in expounding the principles of law enunciated in *Gissing v Gissing* (supra) said in part at page 452 e:

***“The law imputes to the husband and wife an intention to create a trust, the one for***

***the other. It does so by way of inference from their conduct and surrounding circumstances, even though the parties themselves made no agreement on it. This inference of trust the one for the other, is readily drawn when each has made a financial contribution to the purchase price or to the mortgage instalments. The financial contributions may be direct, as where it is actually stated to be a contribution towards the price of instalments. It may be indirect, as where both go out to work, and one pays the house-keeping and the other the mortgage instalment. It does not matter which way round it is. It does not matter who pays what. So long as there is a substantial financial contribution to the family expenses, it raises the inference of trust. But where it is insubstantial no such inference can be drawn”.***

It should also be remembered that realistically spouses do not keep accounts of their day to day expenditure or adjust their affairs in binding legal arrangements.

In this case, the wife is a university graduate while the husband is a lawyer. She was a High School teacher for sometime. She was then employed as an assistant manager by **[particulars withheld]**. She also ran the family chemist shop for a short while. It is not denied that she attended and looked after the four children of the marriage and also looked after the house. She also supervised farming activities in the several farms that the husband had bought. At one time she owned the Ngumo High View house after the husband transferred it to her as a gift. Later she gave a power of attorney to the husband who then mortgaged it and as a result the house was sold by the financier. In these circumstance, we agree with the learned CA that the wife made substantial financial contribution towards the purchase of the Karen house. The Karen house was bought for Shs. 4 million.

Although there is no concrete evidence of her proportionate indirect financial contribution towards the purchase price of the Karen house there are no grounds for interfering with the learned CA assessment that the wife made an equal contribution. Regarding the award of half of the shares of **[particulars withheld]** Investments Limited to the wife, the appellant stated in the grounds of appeal, among other things, that the order of amendment to introduce a claim for the shares was made without jurisdiction and introduced a totally different cause of action; that the learned CA erred in failing to appreciate that the issue of ownership of a share in a limited liability company could only be dealt with under the provisions of the Companies Act and not under section 17 of the 1882 Act, and that the learned CA erred in law in implying a trust in relation to shares in **[particulars withheld]** Investments Limited.

Mr. Ochieng Oduol, submitted in particular that the court does not have jurisdiction under section 17 of the 1882 Act to adjust shares in a limited liability company.

He relied on the judgments of Kwach, JA and Shah, JA in **Mungai vs. Mungai**, Civil Appeal No. 191 of 1995 [1995] LLR 405. In that case, the parties who were wife and husband respectively, each held shares in family companies, **[particulars withheld]** Holdings Limited and **[particulars withheld]** Limited. Apparently, the wife had filed an Originating Summons under section 17 of the 1882 Act for determination of the wife’s rights to various properties including rights to shares in the two companies. She had also filed a petition for the winding up of the two companies. The superior court struck out the petition on the ground that the petition was an abuse of the process of the court in view of the existence of an application under section 17 of the 1882 Act. On appeal Kwach, JA said in part:

***“The application under section 17 of the Married Women’s Property Act 1882 could only deal with property held by the respondent as a husband. It would not cover shares held by the respondent in a limited liability company in which the wife also held shares in her own right”.***

On his part Shah, JA said in part:

***“The 1882 Act remedies are of a special nature. Section 17 of the 1882 Act being a procedure section merely declares the rights of a married woman to properties jointly held by spouses or by the husband. The Act cannot decide anything that a company***

***court exercising its independent and separate jurisdiction under the Companies Act Cap 486 can decide. The two jurisdictions are totally independent of each other”.***

Later in the judgment Shah, JA added:

***“The wife’s rights under section 17 of the Married Women’s Property Act of 1882 are separate and distinct from her rights as a shareholder/ director of a company”.***

The decision in that case was cited before Ransley, CA to support the objection to the oral application for leave to amend the Originating Summons but the court ruled on 23rd December, 1991 thus:

***“There is nothing in that decision which inhibits a court from dealing with the title to shares under the Married Women’s Property Act 1882. In fact if it did so it would have been a surprising decision. The Married Women’s Property Act deals with rights to property and apart from specifically dealing with shares clearly the court has power to deal with any form of property the parties may be in dispute over”.***

The issue directly arose in this Court later in the year 2002 in the case of **Muthembwa v Muthembwa** Civil Appeal No. 74 of 2001 [2001] LLR 3496 where this Court construed the jurisdiction of the court under section 17 of the 1882 Act as extending to shares in limited liability companies owned by the parties while making it clear that the court has no jurisdiction to distribute properties registered in the name of the company in which the spouses are the shareholders. Thus the interpretation of section 17 of the 1882 Act by the trial court in relation to the dispute regarding shares in a company has been supported by this Court. The views of Kwach and Shah, JJ.A. in **Mungai’s** case (supra) were obviously obiter as they were not dealing with an application under section 17 of the 1882 Act. The law is now correctly stated in the **Muthembwa case** (supra). If there are disputes between husband and wife as to their respective rights to the shares in a company registered in the name of one spouse, then, the court like, in the case of any other property in dispute between husband and wife has power to ascertain the respective beneficial rights of husband and wife to the disputed shares. It can declare, like the learned CA did in this case, that one spouse holds a certain number of shares in trust for the other spouse. What the court cannot do under section 17 of the 1882 Act, like in respect of all other properties, is to order the transfer of the legal titles to property or in other words to pass proprietary interest from one spouse to the other (see **Pettitt v Pettitt** (supra), **Essa v Essa** [1995] LLR 384 and **Kamore v Kamore** [1998] LLR 714. Had the learned CA ordered that the allotment of shares in the register of the company be varied and the wife be registered as proprietor of a half of the shares registered in the name of the husband then it could be said that he exceeded his jurisdiction under section 17 of the 1882 Act.

The relevant issue here is whether the wife proved that she made a substantial direct or indirect financial contribution to the acquisition of the 2499 in [[particulars withheld] Investments Limited registered in the name of the husband.

The wife’s case until the amendment of the Originating Summons was that she was entitled to a half share of Maragwa land, L.R. No. **[particulars withheld]** by virtue of indirect financial contribution. But when the husband was being crossexamined by the wife’s counsel, he disclosed that the Maragwa land was registered in the name of a company, **[particulars withheld]** Investments Limited, in which the wife owned one share while the husband owned 2499 shares. The court could not entertain a dispute on a property registered in the name of a company (see **Muthembwa case** (supra). The wife’s counsel then successfully made an oral application for amendment of the Originating Summons to include a claim to husband’s shares in the company. By the time the amendment was made the wife had already given evidence and closed her case. She was not recalled to give further evidence to establish her claim to half share of the shares of the husband in the company. The Maragwa land – L.R. No. **[particulars withheld]** is registered in the name of the company and is different in character from the 2499 shares owned by the husband in the company. The wife’s contention that she was entitled to half of the shares registered in the name of the husband was untenable. It was not supported by any documents including the companies register. She did not explain why she was registered as holder of one share and the husband as the holder of 2499 shares. The wife did not show that she contributed to the purchase of the shares registered in the

name of her husband. In sum, there was no evidence, documentary or otherwise, to show that the wife had a beneficial interest in the shares in the company registered in the name of her husband.

Alternatively, since in this case, the principal, if not the only asset of [particulars withheld] Investments Limited is the Maragwa land, [particulars withheld], if the wife proves that she made substantial direct or indirect contribution to the acquisition of the land, she would be entitled to a declaration that an appropriate proportion of the shares in the company be held by the husband in trust for her.

There was evidence from the wife that the Maragwa land was bought in 1991 but registered in the name of the company. The husband, however, said, that the property was bought in 1995. Thus, the Maragwa land was acquired after the marriage had broken down. Indeed, the wife in her evidence stated that the marriage was already strained in 1991 and that since 1992 the couple has never shared the matrimonial bed. The divorce petition had long been filed by the time the Maragwa land was bought. The marriage was dissolved in 1995. In the circumstances, there was no concrete evidence that the wife made any direct or indirect financial contribution to the purchase of the Maragwa farm so as to be entitled to a beneficial interest in the farm.

In these circumstances, we do not consider that the wife is entitled to a declaration that any of the husband's shares in [*particulars withheld*] Investments Limited are held by the husband in trust for the wife.

She is the registered owner of one share in the company which remains hers and entitles her to a proportionate share in any dividends or payments due to the shareholders upon liquidation of the company or upon any sale of the Maragwa land and any other assets of the company.

The appeal against the award of motor value Reg. No. [particulars withheld] to the wife has no merit as by the consent letter dated 20th November, 1997, already referred to, the husband had agreed to transfer that motor vehicle to the wife.

The wife's prayer in the Originating Summons was, inter alia, that the Karen house be sold and the proceeds be shared equally. This Court has said in the Muthembwa case (supra) that the court has jurisdiction to make such an order. That is the order which commends itself to us in respect of the Karen house as such an order is likely to conclusively and effectually resolve the disputes on Karen property.

For those reasons, we would partly allow the appeal to the extent that we set aside that part of the judgment and decree of the superior court holding that the appellant holds half of the shares in [particulars withheld] Investments Limited in trust for the respondent and dismiss the wife's claim to those shares. Otherwise, the appeal against the award of half interest in Karen house, L.R. No. [*particulars withheld*] to the respondent and motor vehicle Reg. No. [*particulars withheld*] is dismissed. In respect of Karen property, we would make further orders that it be valued by an independent valuer agreed upon by the parties and in the absence of any agreement a valuer to be appointed by the superior court. Upon valuation, the appellant (husband) to pay the respondent (wife) the market value as per the valuation less the cost of valuation for half share of the Karen property. The husband to initially pay for the costs of the valuation. The appeal has partially succeeded in this family dispute. There will be no orders as to the costs of this appeal.

**Dated and delivered at Nairobi this 22nd day of December, 2004.**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**W. S. DEVERELL**

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**AG. JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**