Case Number:	Civil Case 123 of 1975
Date Delivered:	29 Nov 1976
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Alfred Henry Simpson
Citation:	K v K [1976] eKLR
Advocates:	JM Khaminwa (instructed by Khaminwa & Khaminwa) for the Plaintiff, PK Muite (instructed by Waruhiu & Muite) for the Defendant.
Case Summary:	**K *v* K** High Court, Nairobi 12th, 13th, 14th, 15th, 27th, 28th, 29th October Simpson J 29th November 1976 ***Marriage*** *– property questions – property acquired by joint venture – imputation of trust – right of woman to hold property under Kikuyu customary law – Married Women's Property Act 1882 (England) (45 & 46 Vict c 75), section 17.* Kikuyu customary law has changed radically since the days when land belonged to the tribe and section 17 of the Married Women's Property Act 1882 of England together with the English authorities decided thereunder is applicable to an African husband wife in Kenya where both are in salaried employment and contributing to household expenses and the education of the children. 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. *Pettitt v Pettitt* [1970] AC 777, HL, *I v I* [1971] EA 278, *Gissing v Gissing* [1971] AC 886, HL, and *Hazell v Hazell* [1972] 1 All ER 923, CA, applied **Cases referred to in judgment:** *Chapman v Chapman* [1969] 1 WLR 1367; [1969] 3 All ER 476, CA. *Falconer v Falconer* [1970] 1 WLR 1333; [1970] 3 All ER 449, CA. *Gissing v Gissing* [1971] AC 886; [(1970] 3 WLR 255; [1970] 2 All ER 780, HL (E). *Hazell v Hazell* [1972] 1 WLR 301; [1972] 1 All ER 923, CA. *I v I* [1971] EA 278. *Pettitt v Pettitt* [1970] AC 777; [1969] 2 WLR 966; [1969] 2 All ER 385, HL (E). **Originating summons** AK issued an originating summons (Civil Case No 123 of 1975) claiming declarations of entitlement to certain property registered in the name of her former husband J K. The facts are set out in the judgment. *JM Khaminwa* (instructed by Khaminwa & Khaminwa) for the Plaintiff. *PK Muite* (instructed by Waruhiu & Muite) for the Defendant. *Cur adv vult.*
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-

History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 123 OF 1975

A K …….. PLAINTIFF

VERSUS

J K…….. DEFENDANT

JUDGMENT

The plaintiff in this originating summons under section 17 of the Married Women's Property Act 1882 married the defendant in 1954. On her petition the marriage was dissolved in October 1974. She now seeks declarations of entitlement to certain property registered in the name of her husband. These are a 42-acre farm at Karen, the whole of which she claims, also three properties in Kangemi, one at Lavington and one in Jamhuri estate, for each of which she claims a declaration of joint ownership. She also seeks a declaration of ownership of certain moveable property listed in a schedule attached to the originating summons. Alternatively, the plaintiff seeks such order as to ownership of the immoveable property as are just. There are six surviving children of the marriage. The plaintiff has custody of a daughter aged seventeen years and two sons aged sixteen and thirteen. The two eldest sons are with the defendant who has remarried and lives at the Karen farm with his wife and two young children. The third son is at present studying in the USA. The plaintiff, having refused the offer of the house in Jamhuri estate, is living in a single room provided by a friend. The plaintiff's claim to the Karen property is based on an allegation that it was purchased with her money. Her claim to the other properties is based on contributions made by her either directly or indirectly to the purchase.

The defendant adduced evidence of Kikuyu customary law in relation to the right of a married woman to own land in her own name. I shall consider this evidence later but, since it touches on the question of the applicability to Kenya of the Married Women's Property Act 1882, it is desirable to state before proceeding further that I agree with the decision of Trevelyan J in *I v I* [1971] EA 28 that the Married Women's Act 1882, is a statute of general application, that it is applicable to Kenya notwithstanding the *proviso* to section 3(1) of the Judicature Act and that customary law is subject to any written law.

Section 17 of the Married Women's Property Act 1882 provides that "in any question between husband and wife as to the title to or possession of property" either of them may apply to the High Court or a County Court and the judge "may make such order with respect to the property in dispute… as he thinks fit".

Mr Muite for the defendant cited *Pettitt v Pettitt* [1970] AC 777 in support of his submission that the Court is not empowered to order the transfer of the Karen property or any other property to the plaintiff. In that case the House of Lords reversed a decision of the Court of Appeal to the effect that a husband was entitled to part of the proceeds of sale of a house belonging to his wife on the basis of improvements effected by him which had enhanced its value. On the facts disclosed by the evidence it was not possible to infer a common intention that the husband should acquire any beneficial proprietary interest. It was held that section 17 was a procedural provision only and did not entitle the Court to vary the existing

proprietary rights of the parties. Lord Reid said, at page 793.

The meaning of the section cannot have altered since it was passed in 1882. At that time the certainty and security of rights of property were still generally regarded as of paramount importance and I find it incredible that any Parliament of that era could have intended to put a husband's property at the hazard of the unfettered discretion of a judge (including a County Court judge) if the wife raised a dispute about it.

Lord Morris of Borth-y-Gest put it this way, at page 798: The language is inapt if there was any thought of taking title away from the party who had it. The procedure was devised as a means of resolving a dispute or a question as to title rather than as a means of giving some title not previously existing. One of the main purposes of the Act of 1882 was to make it fully possible for the property rights of the parties to a marriage to be kept entirely separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this, in my view, negatives any idea that section 17 was designed for the purpose of enabling the Court to pass property rights from one spouse to another. In a question as to the title to property rights from one spouse to another. In a question as to the title to property the question for the Court was – 'Whose is this' and not – 'To whom shall this be given'.

I am aware of at least one unreported East African case where an order was made for the transfer of property but the parties in that case invited the Court to make a distribution of their joint property following the dissolution of their marriage. My attention has not been drawn to any East African cases in which the House of Lords decision in *Pettitt v Pettitt* was considered or to any conflicting decision. I do not think this decision precludes me, if the facts disclosed by the evidence warrant it, from granting declarations of ownership or joint ownership of the properties concerned or to making such orders as are just, other than an order for the transfer of any property from the defendant to the plaintiff. In passing it may be observed that in England power to transfer was specifically conferred by the Matrimonial Causes Act 1973. It was conceded that I can order the sale of any part of the defendant's property and payment of the proceeds to the plaintiff in the event of my finding that the plaintiff has contributed towards the purchase price of instalments or to a deposit paid in respect of the purchase of any of the properties registered in the name of the defendant and the intention of the parties was that she should have part ownership.

On the English authorities this is too narrow a view of the powers of the court. In *Chapman v Chapman* [1969] 3 All E R 476, 477, Lord Denning MR said:

It is still the law that when the matrimonial home or the furniture is acquired by the couple as a joint venture, each of them contributing directly or indirectly to the deposit or the mortgage instalments, then it is to be regarded as belonging to them both jointly, no matter that it stands in the name of one only; and, in the absence of any clear division, their interest are to be regarded as equal.

Lord Reid in *Gissing v Gissing* [1970] 2 All ER 780, 782, considered the question of intention:

If there has been no discussion and no 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 these 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.

He could see no reason for any distinction between direct payments and indirect payment “by way of paying sums which the husband would otherwise have had to pay”. A rough-and-ready evaluation, he thought, was required and this did not mean that the wife would as a rule get a half-share. With regard to the intention of the parties he said, at page 783:

If the evidence shows that there was no agreement in fact then that excludes an inference that there was an agreement. But it does not exclude an imputation of a deemed intention if the law permits such an imputation.

Lord Denning MR followed this up in *Falconer v Falconer* [1970] 3 All ER 449, 452:

It may be indirect, as when both go out to work, and one pays the house keeping and the other the mortgage instalments. 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 a trust.

In *Hazell v Hazell* [1972] 1 All ER 923 the Court of Appeal held that in order to entitle the wife to a share in the proceeds of the matrimonial home it was unnecessary to show an agreement, express or implied, that the wife should have a share; it was sufficient if the contributions made by the wife to the family expenses were such as to relieve the husband from expenditure which he would otherwise have had to bear, thereby helping him indirectly with the mortage expenses; it was unnecessary to show that if the wife had not made the contribution the husband would have been totally unable to carry out payments towards the acquisition of the home.

Mr Muite submitted that those English authorities were inapplicable to the African way of life where no intention to share land with his wife could be attributed to a husband. Two expert witnesses were called by the defendant to give evidence of Kikuyu customary law. Both conceded under cross-examination by Mr Khaminwa that customary law had changed radically from the days when land belonged to the tribe. Mr Kinyanjui, who impressed me with the honesty and fairness of his answers, agreed that an unmarried woman can now own land and a married woman can now own her own land. Mr Mungai Kihara appeared quite unyielding. He maintained, contrary to facts of which I think that I can take judicial notice, that married women do not have title deeds. He said he had seen women driving cars but maintained that they were not married. A married woman, he said, cannot report to the police if her husband beats her. All property belongs to the husband because the wife should be under him. I preferred the evidence of Mr Kinyanjui which accords more with the statement of Kikuyu customary law in C*otrans’ Law of Marriage and Divorce* page 17, paragraph 7 (c) which reads:

In the event of a dissolution of the marriage, the wife is entitled to take all her property, whether acquired before or after the marriage. Property obtained through the joint efforts of the husband and wife is divided between them.

Again at page 21, paragraph 5, he writes:

“Modern development. Any of the wife’s self-acquired property, ie property which she acquires during the marriage through her won efforts, remains with her upon divorce.

If I were to accept the evidence of Mr Kihara that all property belongs to the husband, this is inconsistent with written law, namely the Married Women’s Property Act 1882 which enables the property rights of a husband and wife to be kept entirely separate.

I can see no reason to hold that, where an African husband and wife in Kenya are both in salaried employment and both contributing to the household expenses and education of the children, these English authorities are not applicable. Their way of life may still result in the registration in the husband's name with the full approval of the wife of any property purchased while the marriage subsists but this does not necessarily exclude the imputation of a trust in favour of the wife.

On the basis of these authorities, payments by the wife need not be direct payments towards the purchase of property, but may be indirect such as the meeting of household 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 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 this 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.

[His Lordship then considered the facts of the case and concluded:] The plaintiff is entitled to a declaration that the defendant holds the immoveable properties of which she claims ownership or part ownership in trust for himself and the plaintiff in the proportions of two to one respectively and a declaration of part ownership to the extent of one-third of the moveable property specified in the schedule to the originating summons and I so order.

Such declarations will, however, satisfy neither party. The defendant indicated through his counsel that he would be prepared to clear the balance due on the Jamhuri property and sell it if the Court so ordered in order that the proceeds might be given to the plaintiff. When it was pointed out that the Jamhuri property might not realise sufficient funds to meet the share due to the plaintiff, he said that alternatively, he would be prepared to do the same with the Lavington property. The plaintiff wants the Karen farm but, quite apart from the fact that it would probably realise more than my estimate of her share and that I am unable to order a transfer to her, she ceased to occupy it four years ago and it is now the matrimonial home of the defendant and his new wife. Even an order for possession would be inappropriate. The most satisfactory answer I think would be to order the sale of the Lavington property. In case that property might realise substantially less than the price estimated, I order the defendant to pay to the plaintiff within six months of the date of this judgment Shs 300,000.

This leaves the defendant free to raise the money otherwise than by the sale of property should he think fit. On receipt of this sum, the plaintiff will raise the caveat which she placed on the Karen farm claiming a purchaser's interest.

Liberty is given to the parties to apply for further orders which might, for example, include a consent order for the transfer of any immoveable property to the plaintiff, an order for extension of time or for the distribution of the moveable property.

For the defendant it was submitted that there should be no order for costs but the defendant, having maintained that the plaintiff was not entitled to any of the property registered in his name, he must pay the plaintiff's costs.

Orders accordingly

Dated at Nairobi this 29th day of November 1976.

A.H. SIMPSON

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JUDGE

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