**Kamore v Kamore**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 31 March 2000

**Case Number:** 63/98

**Before:** Tunoi, Shah and Bosire JJA

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Family law – Matrimonial property – Function of the court in application brought under a section 17*

*application – Jointly held properties – Whether presumption of advancement applies – Properties held*

*solely by husband – Whether there was evidence of contribution by wife – Whether trust can be implied*

*in the circumstances – Whether court can transfer proprietary interest from one spouse to another –*

*Section 17 – Married Women’s Property Act.*

*[2] Judicial review – Natural justice – Failure to cross-examine wife on an application for determination*

*of proprietary interest – Advocate instructed not to cross-examine – Subsequent application to*

*cross-examine refused – No appeal lodged against refusal – Whether the question of natural justice*

*could be taken first during the appeal against the substantive orders.*

**JUDGMENT**

**TUNOI, SHAH AND BOSIRE JJA:** This is an appeal from a decree of the superior court (Etyang J) dated 11 December 1997 by which the Learned Judge made the following orders of and concerning four properties in dispute between the parties: “1. The property registered LR Nairobi/Block 32/26 situated in Golf Course estate within Nairobi is jointly owned by the Applicant and Respondent in equal shares. That property be sold and net proceeds of sale be divided equally between the Applicant and Respondent. 2. T he property registered in LR Ngong/Ngong/3821 is jointly owned by the Applicant and Respondent in equal shares. The same be sold and the net proceeds of such sale be shared equally between both the Applicant and the Respondent. 3. P roperty registered as Ngong/Ole Kesasi/35 in the name of Pentecostal Evangelistic Fellowship of Africa had been the joint property of the Applicant and Respondent. The Applicant is entitled to half share of the proceeds of sale of this property which is to be paid to her forthwith. 4. T he property LR 19040 being LR 1160/211 original number 1160/155/20 as more particularly described in certificate of title exhibit 19 was the joint property of the Applicant and the Respondent in equal shares and the same be sold and net proceeds hereof be shared equally between the Applicant and Respondent”. The Appellant is aggrieved by these orders and hence this appeal. The proceedings in the superior court were begun by an originating summons without setting out the law or rules of procedure under which the said originating summons was brought. The originating summons application sought orders substantially as were made by the Learned Judge. The first three grounds of appeal argued by Mr *Ngatia* who led Mr *Oduol* at the hearing of this appeal are as follows: “1. That the Learned trial Judge erred in the circumstances of the case in proceeding to write a judgment without according the Appellant an opportunity to put forward his defence contrary to the rules of natural justice. 2 That the Learned trial Judge erred in the proceeding on the basis that the Applicant did not examine the First Respondent and that the Appellant did not avail himself to give oral evidence. 3 That the Learned trial Judge erred in proceeding on the basis that the Appellant was given no opportunity to cross-examine the First Respondent but declined to do so”. We will deal, first, with the said three grounds of appeal which were argued together by Mr *Ngatia*. The record shows that on 15 November 1996 the superior court made the following order: “It is the intention of the court to proceed with the substantive hearing of this cause. The two applications will be heard and determined at an appropriate stage in the proceedings. Hearing of the main cause to proceed”. At that stage Miss *Kamango* holding brief for Mr *Mukuria* for the present Appellant asked for a short adjournment to inform Mr *Mukuria* to come and cross-examine the Respondent. The superior court granted the adjournment as sought. At 11.30am on the same day when the court re-convened for the hearing Miss *Kamango* informed the court that she was unable to contact Mr *Mukuria* and that she was herself not in a position to proceed with the hearing of the main cause. She applied for an adjournment. Miss *Karua*, for the Respondent, opposed that application. Etyang J granted the adjournment directing that the Respondent’s case was to proceed to hearing next time with or without the presence of the Appellant’s advocate. The hearing of originating summons was then, by agreement of counsel, set for 16 December 1996. On 16 December 1996 the parties and their counsel assembled in court when Mr *Muia* appeared for Miss Jane *Mburu* for the interested party. The Learned Judge then ordered that the application for leave to withdraw (cease acting) be served on the interested party and stood over generally the hearing of that application. Miss *Karua* pointed out to the Court that she was ready to proceed. Miss *Kamango* however was not ready and informed the Court that the Appellant wanted Mr *Mukuria* to personally conduct the hearing. The Appellant was not in court. The Learned Judge rejected this further application for adjournment and directed that the suit do proceed to hearing immediately. He so ruled at 4:00pm on 16 December 1996. Miss *Kamango* informed the Learned Judge that she was instructed by the Appellant not to cross-examine the Respondent. Therefore Miss *Karua* closed her client’s case and the Learned Judge called for written submissions which were to be filed by 20 January 1997. The Respondent’s counsel handed in her submissions on 20 January 1997. At that stage Mr *Mukuria* was present in court and sought leave to cross-examine the Respondent, saying that Miss *Kamango* had no instructions to say what she told the Judge earlier. The Learned Judge after considering the sequence of events gave the Appellant two weeks’ time to file a formal application to have the Learned Judge’s orders of 16 December 1996 set aside or varied. Such an application indeed was filed but was dismissed after the Learned Judge had once again considered the sequence of earlier events. Although Mr Mukuria obtained leave to appeal against the Learned Judge’s refusal to set aside or vary the orders of 16 December 1996 no such appeal was lodged. In our view it is too late in the day, now, to argue the first three grounds of appeal and in any case we say that the Learned Judge was fully justified in refusing to grant any further indulgence to the Appellant or his advocate. On the contrary, the Learned Judge went out of his way, to accommodate the escapades of the Appellant’s counsel Miss *Kamango*. We have already set out the sequence events leading up to the Learned Judge’s refusal to vary the orders of 16 December 1996. The Learned Judge’s patience was obviously exhausted and correctly so. We cannot fault the Learned Judge on that issue at all and we reject the first three grounds of appeal and we must express our disgust towards the attitude of counsel having the conduct of the defence of the Appellant. The Appellant chose his counsel then and must bear the consequences. Eventually the hearing of the originating summons in the superior court revolved around four properties afore-mentioned. Claims in respect of movable properties referred to in what was described as schedule “S” were abandoned by the Respondent. She also abandoned the claim to her alleged share in a motor vehicle registration number KPZ 722. The four properties in question were described in the originating summons as: “1. Property registration number LR Nairobi/Block 32/36, situate in the Golf Course Estate in Nairobi admittedly jointly owned by the spouses, that is the Appellant and the Respondent. 2. P roperty registration number Ngong/Ngong/3821 admittedly jointly owned by the spouses. 3. P roperty known as Ngong/Ole Kesasi/35 which in reality turned out to be Ngong/Ole Kesasi/37. 4. P roperty known as LR number 1160/211”. The third of the above-mentioned properties was registered in the name of the Appellant on 16 May 1983. According to the title document the Appellant acquired the same from one Joseph Karimi Mbiriri for a consideration of KShs 80 000 and on the same day sold it to Pentecostal Evangelistic Fellowship of Africa for a sum of KShs 140 000 which church is the present registered proprietor of the said property. The fourth of the above-mentioned properties was acquired by the Appellant, according to entry number nine on the certificate of title, for KShs 840 000 on 12 July 1983 and on the same day he charged the same to British American Insurance Company (Kenya) Limited for securing a loan of KShs 651 498. On 13 March 1990 the Appellant created a further charge in favour of the said insurance company for a further loan of KShs 600 000. It is common ground that the Appellant and the Respondent cohabited together as husband and wife from 25 May 1974 until 1981. They were married at St Andrew’s Church, Nairobi. The couple was blessed with three children (all boys) namely Hilary Mwangi, born on 14 January 1975, Duncan Nduracha born on 28 December 1978 and Peter Macharia, born on 1 March 1980. After cessation of cohabitation in 1981, the Respondent filed for divorce on 1 March 1982 and a decree *nisi* of divorce was granted on 23 September 1983. The decree had not been absolute by the time the originating summons was filed on 14 October 1983. We come to the format of the originating summons proceedings lodged by the Respondent. As pointed out earlier by us the originating summons fails to show under what provision of the law or procedure the same was brought. It can be seen however that it was based on section 17 of the Married Women’s Property Act of 1882 of England (“the Act”). Reliance was also placed on the application of the presumption of resulting trust and the presumption of advancement to transactions between husband and wife. When a property is acquired during the course of coverture and is registered in the joint names of both the spouses the court in normal circumstances must take it that such property, being a family asset, is acquired in equal shares. We do not see any error, therefore, on the part of the Learned Judge when he decided that the properties so owned were held in equal shares. As to whether or not the Learned Judge was right in ordering sale of those two properties is an issue we will refer to when we look into the power of the court in dealing with an application under section 17 of the Act. The Learned Judge decreed that the property registered as Ngong/Ole Kesasi/35 in the name of the Pentecostal Evangelistic Fellowship of Africa had been the joint property of the Respondent and the Appellant and that the Respondent was entitled to a half share of the proceeds thereof which half share was to be paid to her forthwith. The evidence in regard to this property as brought up by the Respondent was contained in the affidavit sworn by her in support of her originating summons as well as in her oral evidence. She said that she had contributed directly or indirectly to the purchase of all the properties in question; that land parcel number Ngong/Ole Kesasi/35 was purchased from Joseph Karimi Mbiriri at a sum of KShs 75 000 which sum was part of a further loan of KShs 130 000 obtained as a result of creation of a charge on property known as LR Nairobi/Block 32/26 in Golf Course Estate. In her oral evidence she said: “Out of the loan of KShs 130 000 I paid KShs 60 000 towards the purchase of parcel number Ngong/Ole Kesasi/3821 as part payment. This property is referred in paragraph 2 of the originating summons . . . The balance of the loan of KShs 130 000 that is KShs 70 000 paid for the purchase of parcel of land known as Ngong/Ole Kesasi/35. This property was sold to us by one Joseph Karimi Mbiriri at KShs 80 000 measuring 5 acres. The Respondent (Appellant here) undertook, at my request, to be responsible to effect transfer of this property. In 1983 this property was registered in the Respondent’s name. However, it has been sold off to Pentecostal Evangelistic Fellowship of Africa for KShs 140 000 and title issued on 16 May 1983. This parcel was sold by the Respondent without my consent. In fact, I had placed a caution but it must have been removed before the sale. The Respondent has not paid me any money for the proceeds of this sale. I want this Court to take this fact into account when determining the dispute before court”. This evidence falls short of proof, on a balance of probabilities, that the Appellant used the said sum of KShs 70 000, the balance of the loan taken on plot number LR Nairobi/Block 32/26, for purchase of Ngong/Ole Kesasi/35. It is in fact evidence of the nature which does not connect the 32/76 property loan to the purchase of Ngong/Ole Kesasi/35. We are of the view that the Learned Judged erred in finding that the Respondent contributed substantially to the purchase of properties so claimed. We are, here, referring in particular to Ngong/Ole Kesasi/35 property. It is difficult to connect the sum of KShs 70 000 to the purchase of Ngong/Ole Kesasi/35 property. There is a clear gap of many years between the period the second loan on Nairobi/Block 32/26 was raised and the Ngong/Ole Kesasi/35 property was acquired. The fact remains that this particular property was not acquired during the period of coverture. There is no evidence as to when the KShs 130 000 loan was obtained so as to leave KShs 70 000 available for purchase of property in 1983. The evidence of the Respondent, though not challenged, is too tenuous to make a finding of presumption of advancement or presumption of resulting trust in favour of the Respondent. In the case of *Ayoub and others v Standard Bank of South Africa Ltd and another* [1961] EA 743 Newbold JA said in his dissenting opinion at page 765: “The courts will not imply a trust save in order to give effect to the intention of the parties. As was said by Lindley LJ, in *Standing v Bowring* (11) [1886] 31 Ch D 282, at 289: ‘Trusts are neither created nor implied by law to defeat the intentions of donors or settlers; they are created or implied or held to result in favour of donors or settlers in order to carry out and give effect to their true intentions, express or implied’. ” Although the judgment of Newbold JA was the dissenting one, it was approved and upheld by the Privy Council on an appeal to it from the then Court of Appeal for Eastern Africa. See *Ayoub and others v Standard Bank of South Africa Ltd and another* [1963] EA 619. There is no evidence in our view, of any implied or resulting trust in favour of the Respondent so as to enable the court to say that she was a co-owner of the Ngong/Ole Kesasi/35 property. There is another matter which we must point out. The property in question is Ngong/Ole Kesasi/37 and not 35 and no attempt was made at any stage to seek any amendment to the originating summons to reflect this position. As regards property known as number IR 19040, that is LR number 1160/211 (the Karen property) the Respondent said that the Appellant purchased the same from the proceeds of the sale of Ngong/Ole Kesasi/35 property and that therefore she was entitled to claim one half of the share of that property. Two matters arise here. If all the proceeds of the sale of Ngong/Ole Kesasi/35 (or 37) were used to purchase the Karen property, the Respondent cannot have claim to both the properties, that is to say, half the profits of Ngong/Ole Kesasi/37 property and half of the Karen property. The Learned Judge granted her both such reliefs. That was a clear misdirection. However, in the end result, nothing will turn on that misdirection. There was no cogent evidence, acceptable on the standards applicable in civil matters, that is on a balance of probability, that the Karen property was acquired from joint resources of the Appellant and the Respondent. The certificate of title in regard to the Karen property produced in the superior court shows as pointed out earlier in this judgment, in entry number nine that this property was transferred to the Appellant for a consideration of KShs 840 000 on 12 July 1983 by one Dighton William Abercromby and on the same day this property was charged to British American Insurance Company Limited to secure a loan of KShs 651 498. That is entry number ten. Entry number 11 shows that Mr Abercromby lodged a caveat against the title claiming chargee’s interest pursuant to clause number one of the special conditions contained in an agreement attached to the caveat. This caveat was withdrawn on 5 February 1990. The purchase of the Karen property some two years after cessation of the coverture has not been shown to relate to any monies in reality contribution by the Respondent. The evidence adduced by the Respondent to bring this property within the ambit of section 17 of the Act or any implied or resulting trust is too tenuous to enable a court to say that the Appellant was holding half a share thereof, or any share thereof, in trust for the Respondent. The Learned Judge, on the evidence before him, erred in arriving at the conclusions he did arrive at in regard to Ngong/Ole Kesasi/37 property and the Karen property. The issue that falls for consideration next is whether or not section 17 of the Act can be used to pass proprietary interests from one spouse to another. This section came under close scrutiny in the House of Lords in England in the case of *Pettitt v Pettit* [1969] 2 All ER 385. Lord Reid said of and concerning this section at 388: “I would approach the question this way. 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 husband’s property at the hazard of the unfettered discretion of a Judge (including a country court Judge) if the wife raised a dispute about it. Moreover this discretion if it exists, can only be exercised in proceedings under section 17: the same dispute could arise in other forms of action: and I find it even more incredible that it could have been intended that such a discretion should be given to a Judge in summary proceedings but denied to the Judge of ordinary character. It is perfectly possible to construe the words having a much more restricted meaning and in my judgment they should be so construed. I do not think a Judge has any more right to disregard property rights in section 17 proceedings than he has in other form of proceedings”. Lord Morris of Borth-Y-Gest in the *Pettitt* case at said 398F: “But when an application is made under section 17 there is no power in the court to make a contract for the parties which they have not themselves made. Nor is there power to decide what the court thinks what the parties could have agreed had they discussed the possible break-down or ending of relationship. Nor is there power to decide on some general principle of what seems fair and reasonable how property rights are to be re-allocated. In my view, these powers are not given by section 17”. Lord Hodson in the same *Pettitt* case said at 401A: “The matter has now been again fully argued and the same authorities, considered together with the relevant statutes which preceded the Act of 1882, and I would only say that I adhere to the opinions expressed in the *National Provincial Bank* case [1965 2 ALL ER 472] in effect re-affirming the language of Romer LJ in *Cobb v Cobb* when he said: ‘I know of no power that the court has under section 17 to vary agreed or established titles to property. It has power to ascertain the respective rights of husband and wife to disputed property and frequently has to do so on very little material, but where as here, the original rights to property are established by the evidence and those rights have not been varied by subsequent agreement, the court cannot in my opinion under section 17 vary those rights merely because it thinks that in the light of subsequent events, the original agreement was unfair’.” Lord Upjohn in the *Pettitt* case said at 405F: “In my view, section 17 is purely procedural section which confers on the Judge in relation to questions of title no greater discretion then he would have in proceedings begun in any division of the High Court or in the country court in relation to the property in dispute, for it must be remembered that apart altogether from section 17, husband and wife could sue one another even before the Act of 1882 over questions of property; so that, in my opinion, section 17 now disappears from the scheme 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 though the parties are husband and wife these questions of title must be decided by the principles of law applicable to the settlement of claims between those who are not so related, whilst making full allowances in view of that relationship”. Lord Diplock in the *Pettitt* case said at 411G: “I agree with your Lordship that the section confers no such powers on the court. It is, in my view, a procedural section. It provides a summary and relatively informal forum which can sit in private for the resolution of disputes between the husband and wife as to the title to or possession of any property not limited to ‘family assets’ as I have defined them. It is available while husband and wife are living together as well as when the marriage has broken up. The power conferred on the Judge to ‘make such order with respect to property in dispute . . . as he shall think fit’ gives him a wide discretion as to the enforcement of the proprietary or possessory rights of the spouse in any property against the other but confers on him no jurisdiction to transfer any proprietary interest in property”. The reason why we have referred to relevant portions of the speeches of all the five Law Lords in the *Pettitt* case is that we wish to make our view clearer that section 17 of the Act does not give power to the court to substitute title from one spouse to the other or to give a portion of the property to one of the spouses. That would have meant that the court can effectively change the title of the property from one name to another when section 17 does not cater for that drastic innovation. But we are not alone in this as Gicheru JA, in the case of *Kimani v Njoroge* [1997] LLR 553 (CAK) said this: “The rejoinder of counsel for the Respondent (husband) to the submission of counsel for the Appellant (wife) was that the Appellant’s right to a share of the properties in question was in the realm of constructive trust in respect of which there was no evidence. It was for the Appellant to prove on a balance of probabilities that she directly or indirectly contributed towards acquisition of the properties in respect of which she claimed to be entitled to a share without losing sight of the fact that in regard to indirect contribution, the same was invariably to be considered in its own special circumstances. That onus of proof the Appellant, from the evidence available before the Learned trial Judge, was unable to discharge. To counsel, therefore, she was not entitled to any share of the properties set out in the judgment. The Appellant’s claim in the superior court was dependent on evidence of her direct and/or indirect contribution towards the acquisition of the properties listed in the originating summons in that court. Indeed, her counsel said as much in her submission to this Court at the hearing of this appeal. It is only with that kind of evidence that the trial court would have been able to say what its effect in law was for as was observed by Lord Morris of Borth-Y-Gest in *Gissing v Gissing* [1971] AC 888 at 898C–D: ‘The court does not decide how the parties might have ordered there affairs: it only finds how they did. The court cannot devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had. Nor can ownership of property be affected by the mere circumstances that harmony has been replaced by discord. Any power in the court to alter ownership must be found in statutory enactment’ ”. Here we must point out the other two Judges of appeal (Omolo and Lakha JJA) whilst not disagreeing with Gicheru JA ordered a retrial in the superior court on the basis that the Learned Judge in the superior court (Kuloba J) had shown a patently unfair bias against the wife. But the principle as enunciated in *Gissing v Gissing* (*supra*) was not the subject of dissent. We would add our own observations, that is to say, that until such time as some law is enacted, as indeed it was enacted in England as a result of the decisions in *Pettitt v Pettitt* and *Gissing v Gissing*, to give proprietory rights to spouses as distinct from registered title rights, section 17 of the Act must be given the same interpretation as the Law Lords did in the said two cases. Such laws should be enacted to cater for conditions and circumstances in Kenya. In England the Matrimonial Homes Act of 1967 was enacted which was later replaced by the Matrimonial Proceedings and Property Act of 1970. The Matrimonial Cause Act of 1973 also made a different. At least what was decided in *Gissing v Gissing* (*supra*) opened a way to seek relevant relief by pleading trusts, express, implied or resultant. Such a claim can be brought by way of declaratory suit. Even if the Learned Judge was correct in his findings to the effect that Ngong/Ole Kesasi/37 property and the Karen property belonged equally to the two spouses he could not properly have ordered transfer of proprietary interest in the properties from one spouse to another. He could have only ordered that the Appellant do pay to the Respondent one-half or such appropriate share of the value of each property after a market valuation thereof was carried out by a reputable valuer. As it stands now it is not necessary to make any such order as we have come to the conclusion that the Respondent did not prove any entitlement to any share in these two properties. We come back to the first two properties which are jointly owned. We see no reason to depart from what the Learned Judge found in regard thereto save as to his order for sale of the two properties and proceeds thereof to be divided equally. Before we formulate our orders we must consider that this litigation has been going on between the spouses since 1983. The Appellant has had a better measure of control and benefit over these properties and has gained more therefrom than the Respondent has. We do not wish to leave any room for doubt. We do not want the parties to litigate over what the two properties have earned since cohabitation ceased. To compensate the Respondent for the loss she has suffered as a result we would apportion their shares over the properties so that the Respondent gets 60% share of both the said properties and the Appellant gets 40% share of both the said properties. We order that both the said properties be valued by an independent valuer to be agreed upon between the Appellant and the Respondent. In the absence of such an agreement the superior court may nominate such valuer. Upon valuation thereof either party to be at liberty to buy out the share of the other party whereafter there could be effected, if necessary, transfer of title by ordinary conveyancing methods. We would therefore vary orders one and two of the Learned Judge in terms as set out above. We would set aside orders three and four made by the Learned Judge. We would leave the fifth order undisturbed. We would also amend order number six and give to the wife Respondent 60% of the costs of the suit in the superior court instead of full costs. The Appellant had a measure of success in this appeal and we would award to him one-half the costs here. We would make no order as regards costs of the interested party. These are then our orders.

For the Appellant:

*F H Ngatia* instructed by *Ngatia and Associates*

*J Ochien’g Oduol* instructed by *Ochien’g Oduol and Co*

For the Respondent:

*M W Karua* instructed by *Martha Karua and Co*