



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL CAUSE NO. 71 OF 2017

MWM.....APPLICANT

VERSUS

JMM.....RESPONDENT

RULING

1. The applicant and the respondent got married on 23rd December 1961 under the Marriage Act. The marriage was dissolved by an order of the Chief Magistrate's Court Milimani in **CMCC No. 413 of 2016**.

2. On 15th November 2017, the applicant filed summons dated 23rd October 2017 seeking orders that:

- a. a declaration do issue that the movable and immovable properties known as Plot No. [particulars withheld]at Muthuini; 58 cows and 40 goats; [particulars withheld]Motor Vehicle; property in Makuyu, Matrimonial house in Nyeri Uaso Nyiro/[particulars withheld] and Mweiga/Muthuini/[particulars withheld] with all developments thereon acquired by the funds and efforts of the applicant and respondent during their marriage all registered in the name of or are in the possession of the respondent are owned jointly by the applicant and respondent;
- b. a declaration that the respondent holds the said properties in trust for the applicant and himself too;
- c. a declaration that the said properties are jointly owned and the same should be sold and/or divided and/or income derived from the rent be equally shared between the applicant and the respondent as the court deems fit and just;
- d. the applicant do manage the matrimonial property divided to her absolutely and/or exclusively without the respondent's interference; and
- e. the respondent himself, his agent and/or his agent be restrained from alienating, encumbering or in any manner disposing of the said property without the consent of the applicant.

The application was based on the grounds that the named properties were acquired by the joint efforts of both the applicant and respondent during the subsistence of their marriage; and that all the property were registered in the name of or are in the possession of the respondent. The application was supported by the affidavit of the applicant dated 10th January 2017.

3. On 20th December 2017, the respondent filed a notice of preliminary objection to the petitioner's summons dated 23rd October 2017 on the grounds that:

- i. the suit is *res judicata* and as such this court lacks the requisite jurisdiction to entertain, hear and determine it because the matter in issue in this suit was directly and substantially dealt with in a previous instituted suit between the parties herein in Provincial Lands Appeals Board No. 1 of 2002, Nyeri HCCC No. 84 of 2005 and Nyeri HCCC 182 of 1992 (OS);
- ii. the entire suit is a nullity and void *ab-initio* by virtue of pleadings being based on a repealed set of laws;
- iii. the entire suit is fatally defective and incapable of constituting the foundation of an originating summons dated 23rd October 2017.

4. Parties files written submissions in favour of and against the notice of preliminary objection.

5. On the issue of the application being *res judicata*, it was the submission of the respondent that the piece of land known as Nyeri/Uaso Nyiro/[particulars withheld]and its subdivision had been extensively dealt with in Provincial Lands Appeal Board No.1 of 2002; that the applicant later filed another suit in the High Court of Nyeri, HCCC No. 84 of 2005 where the court through its judgment allocated 19 acres to the applicant, 19 acres to the respondent's second wife AWM while the respondent was allocated 25 acres. He further submitted that the property known as Mweiga/Muthuini/[particulars withheld]was dispensed with in the same matter. He relied on **Section 7** of the **Civil Procedure Act** and the cases of **John Florence Maritime Services Limited & Another Vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2015)**.

6. It was, however, the applicant's submission that at the time the case was lodged parties had not filed for a divorce, neither were they dividing matrimonial property; and that the said matters were not determined to their logical conclusion but that parties abandoned the matter. She submitted that it cannot be said that a decision was made by competent court with regards to division of matrimonial property.

7. On the ground of the preliminary objection that parcels Nyeri/Uaso Nyiro/[particulars withheld]and Mweiga/Muthuini/[particulars withheld] had been extensively dealt with in **Provincial Lands Appeal Board No.1 of 2002** and in the **High Court of Nyeri, HCCC No. 84 of 2005**, and therefore that to raise issues between the parties over the parcels would be *res judicata*, I consider the decisions of the **Board** and of the **High Court** were not annexed for the court to make an informed decision on the matter. In any case, it is clear from the cited cases that the **Board** and the **High Court** were not dealing with the division of matrimonial property between the parties. If, however, in the course of this hearing evidence is led to show that indeed the issue was division of matrimonial property, the respondent will be at liberty to raise the issue of *res-judicata*.

8. The respondent also submitted that the applicant sought to rely on the **Married Women's Property Act of 1887** which was repealed by **Section 19** of the **Matrimonial Property Act No.49 of 2013**. On this issue, it was the applicant's submission that the **Matrimonial Property Act** does not give a procedure for the filing of such cases and that the only legislative instrument that gave elaborate procedure for the filing of division of matrimonial property was the **Married Women's Property Act** under **Section 17**.

9. It is true that **section 19** of the **Matrimonial Property Act** repealed the **Married Women's Property Act, 1882**. In the sense that this cause, which was filed on 15th November 2017, was brought under the repealed law, the same was defective and not competent. However, the substance of the applicant's claim was that she was married to the respondent and that they jointly acquired property during the period and she wants that property to be shared between them, now that the marriage was dissolved. Even if she had not cited any law in the originating summons, it is common knowledge that such claim falls under the **Matrimonial Property Act**. This is the **Act** that provides

“for the right and responsibilities of spouses in relation to matrimonial property and for connected purposes.”

10. I find that the objection being taken is a procedural one. Under **Article 159(2)(d)** of the Constitution of Kenya, 2010 it is material to note that –

“justice shall be administered without undue regard to procedural technicalities.”

The court shall proceed with the summons as if the same was filed under the **Matrimonial Property Act, 2013**.

11. The consequence is that the prohibitory objection fails and is hereby dismissed with costs.

DATED and SIGNED at NAIROBI this 25TH day of OCTOBER 2018

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 25TH day of OCTOBER 2018

A.N. ONGERI

JUDGE