



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NUMBER 206 OF 2008 (O.S)**

**R W.....PLAINTIFF/APPLICANT**

**VERSUS**

**A M K..... DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff **R W** is the 2<sup>nd</sup> wife of the Defendant **A M K** having married him under the **Kikuyu Customary Marriage Rights** in 1965. The marriage is still subsisting save that the parties are separated.

During the subsistence of the marriage, property known as **LR Nyandarua Kaimbaga/ [particulars withheld]** measuring about 12 acres was acquired and/or allocated to the family but was registered in the names of the defendant.

When the parties relationship was strained the plaintiff moved out of the said property where their matrimonial home is built, to live with her son in Kinangop.

2. By this suit brought under the **Married Womens' Property Act 1882, Section 17** (now repealed), she seeks

(1) A Declaration that **LR No. Nyandarua Kaimbaga/ [particulars withheld]** together with the buildings and improvements thereon acquired by joint efforts and funds of the applicant, the 1<sup>st</sup> wife **D W M** and the Defendant and registered in the names of the defendant that the Defendant holds  $\frac{1}{3}$  share thereof in trust for the Plaintiff/Applicant.

(2) That there be an order that the property be valued and  $\frac{1}{3}$  share be assigned to the Plaintiff/Applicant.

Upon service of the Originating Summons the Defendant/Respondent filed a Replying affidavit opposing the application on the 9<sup>th</sup> March 2010, and another (without leave of court) sworn on the 2<sup>nd</sup> November 2014 and filed on the 20<sup>th</sup> November 2014.

3. Before hearing of the application, the Defendant/respondent filed a PRELIMINARY OBJECTION to the Originating Summons on the 5<sup>th</sup> November 2015, that the entire suit is incurably bad in law.

Grounds in support of the Preliminary Objection and dated 25<sup>th</sup> May 2015 were filed on the 26<sup>th</sup>

May 2015. I reproduce them here below.

1. That the Originating Summons are based on the Married Women Property Act which is repealed and the same cannot stand.
  2. That the Originating Summons seeks division of matrimonial property which contravenes **Section 7 of the Matrimonial Properties Act** since parties are neither divorced nor the Marriage dissolved.
  3. That **Section 17 of the Act** the plaintiffs recourse is limited to right to access and benefit to the property at this stage.
4. The Plaintiff/Applicant filed Grounds of opposition to the Preliminary objection dated 26<sup>th</sup> June 2015 are as follows:
1. That the **Married Women's Property Act, 1882**, being Statute of General Application ceased to apply in Kenya on 16<sup>th</sup> January 2014 upon the commencement of The Matrimonial Property Act, 2013 by dint of Section 19 thereof.
  2. The former statute as still applicable when the Plaintiff/Applicant filed a Summons under Section 17 of the former Statute and the Application(Plaint) is competent and proper.
  3. The latter Statute(The Matrimonial Property Act, 2013) cannot operate retrospectively.
  4. The Application (plaint) is still proper and competent because under prayer 1, it seeks declaratory orders which prayer can still be decided inspite of prayer 2 which seeks division of matrimonial property.
  5. Nothing on the former Statute bars the Applicant from filing the Application (plaint) in its current form and the Court has jurisdiction to issue declaratory orders or any other orders by dint of Section 17 thereof.
  6. The Preliminary Objection is therefore incompetent, a sham and an abuse of the Honourable Court's process. The same should be struck off and/dismissed with costs to the plaintiff.
5. In support of the Preliminary Objection, the Defendants Advocate argued that since the parties are still married to each other, the New Marriage Act 2013 ought to be invoked, and find that the declarations cannot issue as there ought to be a dissolution of the marriage first.
6. In Opposing the Preliminary Objection, the Plaintiff/Applicant submitted that the application (O.S) is competent as it was filed in 2008 before the enactment of the Matrimonial Property Act 2013. He confirmed that the parties are still married to each other and under the **1882 Act, Section 17** (now repealed) the court can determine the issues as stated. He stated that the **Matrimonial Property Act 2013** cannot be applied retrospectively.
7. The issues for this court's determination as raised in the Preliminary Objection in the court's view are:
1. Whether the Originating Summons, having been filed before Repeal of the **Married Women Property Act 1882** is competent.
  2. Whether under the **Matrimonial Property Act 2013**, matrimonial property can be divided when there is a subsisting marriage between couples.

8. I have considered the oral arguments by both counsel. **Section 17 of the Married Women Property Act (1882)** ceased to apply in Kenya on the 16<sup>th</sup> January 2014 when the **Matrimonial Property Act No 49 of 2013** came into force.

The former **Act – Section 17** – gave married women the right to bring claims against their husbands in matrimonial property matters. The application could only be made by married Women. There is no dispute in this matter that the two parties are husband and wife. To that end, the originating summons is competent as it was filed before the said Act was repealed.

9. The issue of retrospective legislation was discussed at length in the matter of distribution of matrimonial properties by a very learnt bench of five Court of Appeal Judges in **RMM -VS- BAM - Nairobi Civil Appeal No 267 of 2011**.

The Learned Judges referred to the **Supreme Court decision in Samuel Kamau Macharia - vs- KCB & 2 Others (2012) KLR** where quoting from Blacks Law (6<sup>th</sup> Edition), defined retrospective law as :

*“ A law which looked backward or contemplates the past, one which is made to affect acts or facts occurring or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes anew duty, or attaches anew disability in respect of transactions or considerations already past. On that relates to previous transactions and gives it different legal effect from that which it had under the new law when it occurred.”*

It was further stated that:

*“in Halsbury's Laws of England 4<sup>th</sup> Edition Volume 44 Page 570 that the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie, prospective and retrospective effect is not to be given to them unless, by express words or necessary, implication.”*

10. Reading from the above it is my view that transition from the **English 1882 Act Section 17**, to the current **Matrimonial Property Act No. 49 of 2013**, is merely a matter of procedure and declaratory, just like the 2010 Kenya Constitution which is not necessarily subject to the same principles, as it looks backwards, forward, horizontally and vertically.

The application before the court was competently filed before coming into force of the 2013 Matrimonial Property Act, and concerns rights to property in a Marriage Contract.

11. In line with the Supreme Court decision referred to above, I think the vested rights of the parties which accrued before the **Matrimonial Property Act, 2013** ought to be determined under the **Repealed Section 17 of the English 1882 Act**.

Having so determined, the Preliminary Objection dated the 5<sup>th</sup> November 2015 is dismissed with costs to the Plaintiff/Applicant

**Dated, signed and delivered in open court this 16<sup>th</sup> day of December 2015.**

**JANET MULWA**

**JUDGE**