



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL SUIT NO. 49 OF 2011 (OS)

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

**IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN PROPERTY ACT
(1882)**

R N R.....APPLICANTS

VERSUS

A A R..... RESPONDENT

RULING

1. The applicant filed this originating summons under **section 47** of the **Married Women Property Act (1882)** seeking a declaration that the named properties are matrimonial property which should be valued and shared equally, or that, in the alternative, the properties be valued and sold and the proceeds shared equally between her and the respondent. The summons were against the respondent to whom she got married on 15th April 1972 at Githongo Methodist Church. The couple subsequently got four children. Her case was that although the said properties were registered in the name of the respondent they were acquired during the marriage and from joint contributions, and therefore that they were so registered to be held in trust to be held for her in equal share. She further stated that in 1991 the respondent abandoned the matrimonial home in Nairobi and went to stay in Meru from where he has been issuing eviction threats.
2. The respondent's case is that the parties were still legally married and therefore the court has no jurisdiction to determine the summons. He filed a preliminary objection dated 27th January 2014 to have the summons dismissed with costs for want of jurisdiction since the parties herein are in unbroken coverture. This is the preliminary objection on which counsel for the parties addressed me. It is the subject of this ruling.
3. In my view, the point being raised is a pure point of law based on the ascertained fact that the parties are still married, but are only living apart. This is the situation contemplated by **MUKISA BISCUIT MANUFACTURING LIMITED V. WEST END DISTRIBUTORS LIMITED [1969] EA 696**.

4. The summons were filed under **section 17** of the repealed **Married Women Property Act (1882)** for the division of matrimonial property. The objection was also brought under that repealed law. In **PETER NDUNGU NJENGA V. SOPHIA WATIRI NDUNGU, Civil Appeal No. 2 of 2000** at Nairobi the Court of Appeal was dealing with a similar situation while interpreting **section 17** of the **Act** when it held that:-

“We find and hold that learned judge had no jurisdiction to alienate suit lands between spouses during their lifetime or unbroken coverture and he ought to have dismissed the suit.”

In **MNW v WNM & 3 OTHERS HCCC No. 46 of 2012** my brother Justice Musyoka was also dealing with a similar matter when he observed that:-

“The plaintiff in this suit is seeking division of matrimonial property during unbroken coverture... I have no jurisdiction over this matter...”

He cited the Court of Appeal decision.

5. The applicant took the position that the decisions above have been overtaken by the **Matrimonial Property Act, 2013** which repealed the **Married Women Property Act 1882** and whose **section 19** provides that the **1882 Act** shall cease to extend to or apply in Kenya. The **1882 Act** was an English legislature that was hitherto applicable in Kenya. The parties herein married in 1972 and separated in 1991. If they divorce today and seek the division of property, the **2013 Act** shall apply as the **English Act** no longer applies. Under **section 7** of the **2013 Act** matrimonial property shall be divided between the spouses if they divorce or their marriage is otherwise dissolved. It is agreed that the marriage has not been dissolved, or divorce granted. The applicant seeks the division of matrimonial property. It is clear that the time for that has not come. She is not seeking a mere declaration of her rights as contemplated by **section 17** of the **Act**. She seeks both declaration of her rights and the division of the property. She has to wait for divorce, or dissolution of the marriage.
6. Lastly, what the respondent seeks is not a technical remedy. He attacks the jurisdiction of this court to hear and determine the summons, and that is a substantive issue. Jurisdiction is everything. If the court lacks it, it has to down its pen, as it were (**OWNERS OF THE MOTOR VESSEL “LILIAN S” V. CALTEX OIL; (KENYA) LTD [1989] KLR 1**).
7. I allow the objection and find that the court lacks jurisdiction to hear and determine the dispute. The same is dismissed with costs.

DATED and DELIVERED at NAIROBI this 18th September, 2014

A.O. MUCHELULE

JUDGE