



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 37 OF 2013**

**IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY**

**AND**

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

**TECLA MWAKE NYANGE.....APPLICANT**

**VERSUS**

**MUTUKU KILEWE.....RESPONDENT**

**RULING**

The Respondent through Counsel Ms. Mbulu & Co. Advocates filed a notice of Preliminary Objection on 6/9/2013. The gist of the Preliminary Objection is that the Applicant's Originating summons of 25/6/2013 is not properly before the Court because of the following reasons;

- a. The Court lacks jurisdiction to hear and determine the O.S for the reason that Section 17 of the Married Women's Property Act of 1882 does not grant jurisdiction to alienate and make settlement of matrimonial property during an unbroken coverture.
- b. The Court lack jurisdiction to determine the applicant's suit on the basis of Section 17 of the Married Women's Property Act of 1882 for the reasons that at the time of filing of Applicant's suit on 27/6/2013 no proceedings for termination of marriage or separation had been commenced and /or determined.

On 29/4/2014 the Respondent amended the Preliminary Objection notice and filed on 29/4/2014 on the following grounds.

- a. The Court lacks jurisdiction to hear and determine the Originating Summons of 25/6/2013 for the reasons that the Married Women's Property Act, 1882 being the law upon which the Originating Summons is based, has since 16/1/2014 ceased to extend or apply in Kenya.
- b. The Originating Summons dated 25/6/2013 is consequently void and a nullity.

The same was served on the applicant and on 7/10/2014 filed summons on the preliminary objection. The matter of Preliminary Objection proceeded orally on 23/10/2014.

- a. The Respondent stated that Section 19 of the Matrimonial Property Act of 31/12/2013 states;

***“The Married Woman Property Act shall cease to extend to or apply in Kenya”.***

The O.S filed in this case on 25/6/2013 is based on the repealed law and therefore the Court cannot adjudicate on it.

- b. The 2<sup>nd</sup> ground is in relation to the interpretation and General Provisions Act Cap 2 Section 20 states;

***“Where a written Law repealing in whole or in part a former written Law is itself repealed, that last repeal shall not revive the written law or provision before repealed or his words are added reviving the written law or provisions”***

In the instant scenario, the O. S of 25/6/2013 was brought under Married Women Property Act of 1882 which was repealed by Section 19 of Matrimonial Property Act of 2013 and contains no matrimonial provisions therefore the Court lacks jurisdiction to adjudicate the matter under repealed Law.

- c. The Originating Summons of 25/6/2013 is null and void the Court cannot proceed with the matter as it is.

The Applicant through Counsel J. Thongori & Co. Advocate objected to the Preliminary Objection on the following grounds;

- a. The Originating Summons filed on 25/6/2013 were filed under the relevant and applicable Law then; The Married Woman Property Act 1882.
- b. The repeal of Married Women Property Act 1882 did not create a vacuum but rather for an alternative and better way of dealing with disputes pertaining to matrimonial property under the New Matrimonial Property Act 2013 that commenced on 16/1/2014.
- c. The Originating Summons of 25/6/2013 is not null and void as it had been filed under the repealed Act and Order 37 CPR 2010 and all other enabling provisions of Law.
- d. Order 2R14 CPR 2010 provides that no technical objection may be raised to any pleading on the ground of any want or form.
- e. Article 159 2 (d) of the Constitution provides that justice shall be administered without undue regard to procedural technicalities.
- f. Section 23(3) of the Interpretation and General Provisions Act Cap 2 is applicable to confirm the repeal of Married Women Property Act 1882 did not vitiate any existing right.

Section 23 (3) of Cap 2 states; where any written Law repeals in whole in part another written Law, then unless a contrary intention appears, the repeal shall not;

- a. Revive anything not in force or existing at the time at which the repeal takes effect; or
- b. Affects the previous operation of a written Law so repealed or anything duly done or suffered under a written law so repealed; or
- c. Affect a right, privilege, obligation or liability acquired, accrued or incurred under a written Law so repealed; or
- d. Affect a penalty for forfeiture or punishment incurred in respect of an offence committed against a written Law so repealed;

This Court has carefully considered submissions by both Counsel on the Preliminary Objection which is a legal issue that goes to the root of the substantive matter before the Court.

On the one hand the Originating Summons of 25/6/2013 seeks orders, redress that can only be provided by the New Matrimonial Property Act, 2014 but filed under the repealed Married Women Property Act 1882. On the other hand the Matrimonial Property Act of 2014 Section 19 is crystal clear that the Married Women Property Act is no longer in force and is explicit that the Repealed Act

***“shall cease to extend or apply in Kenya”***

The dilemma is that no transitional provisions are prescribed in the new Act to illuminate on the existing

matters under the repealed Act. Thus as counsel have ably relied on the Interpretation and General Provision Act Cap 2 to provide a just and fair recourse to the parties to achieve the ends of justice; it is clear the repeal of Law does not intend to absolve litigants of existing rights. Section 23(3) of the Act safeguards all rights, obligations, liability and privileges where legislation is repealed.

Secondly, Article 159 (d) of the Constitution provides;

***“Justice shall be administered without undue regard to procedural technicalities”***

Although in the case of

**China Sichwan Corporation for international Techno-Economic Corporative (SIETCO) Vs Kigwe Complex Ltd HCCC No. 464 of 2012.** The Court was of the view that Article 159 (2) (a) of the Constitution is not a panacea for incompetent proceedings, the instant case in the Originating Summons of 25/6/2013 was filed under prevailing proper Law which was thereafter repealed.

Therefore since the purpose of engaging the justice system is to ensure administration of justice, the rights available in the repealed Law will not be vitiated by the repeal of Law. This Court with respect has original jurisdiction in Article 165 of the Constitution and has jurisdiction to hear and determine disputes under the repealed Married Women Property Act 1882 and can still hear and determine disputes under the Matrimonial Property Act, 2014.

The crux of the matter is that though the rights are not vitiated by the Law, the orders sought can only be legally and validly granted under a legal provision otherwise it will be a nullity and the Court should not act in vain. The prayers and /or redress sought can only be granted by the Matrimonial Property Act of 2014.

It is with the above issue in mind that this Court finds that though the Originating Summons was validly and legally filed on 25/6/2013, and in the Act was repealed, the rights, obligations, liability and privileges are not- vitiated, to legally resolve the dispute before the Court, the Originating Summons as it is now currently is not competent before Court.

The upshot of the matter is that this Court finds the Preliminary Objection of 6/9/2013 and amended on 29/11/2014 is upheld. However, as noted earlier the central issue before the Court is to resolve the dispute between the parties and to do so procedural technicalities will be resolved to pave way for the substantive determination of the Originating Summons of 25/6/2013.

In that regard, the Applicant is granted leave has to amend the Originating Summons in line with the New Marriage Property Act 2014 and serve the Respondent within 30 days from today.

Applicant to pay costs to the Respondent.

**READ, DELIVERED AND SIGNED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER, 2014.**

**MARGARET MUIGAI**

**JUDGE**

***In the presence of:***

M/s Mbulu for the Respondent and Ms. Githinji Holding Brief for M/s Thongori.