



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 207 OF 2006 (OS)**

**AISHA RAMADHAN MIRAJI.....PLAINTIFF**

**VERSUS**

**JOHN MICHAEL IZUNGU.....DEFENDANT**

**RULING**

Before court is the plaintiff's originating summons dated 13<sup>th</sup> September, 2006 seeking the following:

- “1. That a declaration do issue that the applicant is entitled to a share of the permanent house and the extension on plot No. 875/XI/MN and to the collection of the rental proceeds from the extension.**
- 2. That the said properties be settled for the benefit of the Applicant in such shares as this Honourable court shall deem fit.**
- 3. That the Respondent be condemned to pay the costs of this application and incidentals thereto.”**

The grounds upon which the application is based were given as follows:

- 1. That the property above named was acquired and developed by the Applicant's efforts during their marriage.**
- 2. That the subject properties are registered in the Respondent's sole name in trust for the Applicant.**

The application was supported by the affidavit of the plaintiff **AISHA RAMADHANI MIRAJI** of even date contemporaneously with the said originating summons the plaintiff filed a Chamber Summons seeking that:

**“This Honourable court grants an order for injunction to restrain the respondent from dealing with, transferring, selling or registering the property known as Plot 875/XI/MN situated in Spaki, Mombasa (hereinafter referred to as the “subject property”) in the name of any third party pending the hearing and determination of this application.”**

This application was heard by **Hon. Justice Leonard Njagi** who granted the interim injunctive orders as

prayed above. The respondent **JOHN MICHAEL IZUNGU** on his part opposed the application by way of a Replying Affidavit dated 17<sup>th</sup> September, 2008 by which he set out the genesis of how the suit property was acquired and renovated. The matter then came before me for disposal of the main originating summons. Both parties filed their written submission with respect to the originating summons which submissions were highlighted by counsel on 30<sup>th</sup> October, 2014.

The brief facts of this case is that the plaintiff and the respondent were once a married couple. The two celebrated their marriage on 23<sup>rd</sup> May, 1984 at the Chanjale Catholic Church in the Republic of Tanzania. The certified copy of their marriage certificate serial No. 30550 is sufficient proof of the fact of their marriage. They bore three (3) children together. The respondent filed a petition for divorce at the District Court in Mwanza, Tanzania. On 24<sup>th</sup> August, 2006, the Mwanza Court delivered a judgment dissolving the marriage. In her affidavit the plaintiff claims that in 1985 one year after their marriage the couple moved into the suit property in Spaki which by then consisted merely of a dilapidated mud hut. Although she was a housewife the plaintiff claims that using proceeds from a matatu business which she operated she renovated the suit property and put up an extension consisting of a permanent house. She claims that this main house was the couple's matrimonial home where they resided for over 20 years. She asks that the court declare the suit property as matrimonial property and vest in her a fair share.

The originating summons is brought under section 17 of the Married Women's Property Act of 1882. This was the applicable law in Kenya until the enactment of the Matrimonial Property Act 2014 which became effective on 16<sup>th</sup> January, 2014, thereby repealing the Married Women's Property Act. In the case **S.R.W. VS. S.W. 2014** eKLR the High Court in Nairobi held that:

**“The present sit was filed by the Applicant for division of matrimonial property. The suit is predicated upon section 17 of the Married Women's Property Act 1882. This was a statute of general application which was applicable to Kenya. That Act is now repealed by the Matrimonial Property Act (Act No. 49 of 2013). However, since this suit was filed before the enactment of the Matrimonial Property Act, this suit will be determined on the basis of the law as it was then applicable.”**

The same situation pertains in this case since the plaintiff filed her suit **before** the Matrimonial Property Act, 2014, became effective, this suit will be determined on the basis of the provisions of the Married Women's Property Act 1882.

### **Can the suit property be deemed to be matrimonial property?**

The question to be determined here is whether the suit property was matrimonial property and following on that whether the plaintiff has a beneficial interest in the same. The plaintiff does not allege that the property was acquired by the respondent during the subsistence of the marriage. What she does allege is that the property was renovated, improved and developed by her efforts and that it was registered in the respondent's name in trust for the plaintiff. However the plaintiff failed to exhibit any Title to the suit property to show that it was in actual fact registered to the respondent. She only states that the family lived in the said property for about 20 years. The fact that the couple lived in the said property for this amount of time does not make it their property. Ownership to property is proved by virtue of a document of title of which none has been exhibited in this particular case.

On his part the respondent denies that the suit property was ever the matrimonial home. He states that despite the family having lived there for all those years he was not and has never been the owner of said property. The respondent in his replying affidavit gave a clear narration of the ownership of the suit property. He explains that the plot which was originally plot No. 139 was bequeathed to his great grandmother known as '*Jeromine Ashiri*' who was as house maid by her European master one '*William Africanus Bowen*'. In 1954 the colonial government auctioned the land due to unpaid rates. The highest bidder in the auction was one '*S. K. Patel*' who thereafter acquired title to the land. The respondent's great grandmother became a tenant at will and paid ground rent to Mr. S. K. Patel the new owner. In the 1970's S. K. Patel sold the land to a '*Mr. John Thuo*' who proceeded to subdivide the land into smaller

parcels for sale. The mother of the respondent ‘Margaret Makanju John’ and one ‘Thraya Amir Ali’ jointly purchased one of the subdivided parcels and were issued with title on 13<sup>th</sup> September, 2006. The respondent did annex to his replying affidavit a copy of the said Title deed which clearly names **Margaret Makanju John** and **Thraya Amir Ali** of P. O. Box 98288, Mombasa as the owners of Mombasa/Block XI/875. This title which has not been challenged nor disproved by the plaintiff provides absolute proof that in fact the suit property **does not** belong to the respondent. That being the case, the respondent cannot be deemed to be holding in trust for the plaintiff a property which does not even belong to him. As such this court cannot declare the suit property as matrimonial property capable of being divided as prayed by the plaintiff. The suit property clearly belongs to third parties. To make orders adverse to the proprietary rights of these third parties, without granting them an opportunity to be heard would be against the principles of natural justice. From the annexures of proceedings in the court in Tanzania it is clear that the courts in Tanzania did decide on this matter. The plaintiff did not get orders in Tanzania and is now probably trying to get a ‘*second bite at the cherry*’ by filing this suit in Kenya. All said and done I find that the plaintiff has not proved her claim beyond a balance of probability. The orders she seeks cannot be granted. I therefore dismiss this suit with costs to the respondent.

**Dated and Delivered in Mombasa this 11<sup>th</sup> day of December, 2014.**

**M. ODERO**

**JUDGE**