



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 34 OF 2004 (OS)

R H L.....APPLICANT

VERSUS

J L.....RESPONDENT

RULING

1. The Originating Summons herein, dated 15th July 2004, was filed on 17th November 2004, premised on *Section 17* of the Married Women's Property Act, 1882.
2. The defendant was served with the Originating Summons and to it he replied by his affidavit sworn on 9th May 2006, filed in court the same day. In it he raised several issues – that some of the assets were acquired before the marriage, that some were acquired during coverture but the plaintiff did not participate in their acquisition and that the suit for decision of matrimonial property was filed long after the dissolution of the marriage in 1992.
3. The reply prompted the plaintiff to amend her Originating Summons so as to bring it under – Sections 27, 28 and 31 of the Matrimonial Causes Act, instead of Section 17 of the Married Women's Property Act, 1882. The orders to file the amended Originating Summons were made on 11th May 2006. The amended Originating Summons, dated 16th May 2006, was filed on 17th May 2006.
4. The defendant filed a preliminary objection on 30th March 2011, dated 29th March 2011. The objection is premised on three (3) grounds. One, the suit is incompetent for it was filed twelve (12) years after the dissolution of the marriage between the parties. Two, the suit was instituted by way of Originating Summons under the Married Women's Property Act, 1882, at a time when the parties had ceased to be husband and wife. Three, as the suit was not a matrimonial matter but an action for recovery of certain property it was incompetent for offending the provisions of the Limitation of Actions Act.
5. It was directed on 10th October 2013 that the preliminary objection should be disposed of by way of written submissions. Both sides filed their respective written submissions. The defendant's submissions are dated 8th November 2013 and were filed in court on 13th November 2013, while the plaintiff's submissions are dated 14th November 2013 and were filed in court on 15th November 2013.
6. The defendant's submissions target the Originating Summons dated 15th July 2004, rather than the

amended Originating Summons dated 16th May 2006. The objection raised no doubt focuses on a pleading that is non-existent for the same has since been amended. The preliminary objection ought to have been founded on the amended Originating Summons rather than the initial pleading.

7. There is however a moot point in the objection, to the effect that since the pleadings were filed long after the dissolution of the marriage the proceedings were not matrimonial, but a simple suit for recovery of movable and immovable property. It is argued that that being the case the said proceedings were time-barred according to Section 4 (e) and 7 of the Limitation of Actions Act. It is submitted that the suit ought to have been commenced by way of plaint. The cause of action accrued from the date of dissolution of marriage and expired six (6) years thereafter in respect of movable property and twelve (12) years for the immovable property.

8. The plaintiff on the other hand argues that the proceedings in question are matrimonial proceedings brought under the Matrimonial Causes Act. It is submitted that the Matrimonial Causes Act does not provided for a limitation period for division of matrimonial property brought under the Matrimonial Causes Act, and in any event the Limitation of Actions Act does not apply to matrimonial proceedings.

9. The objection as it relates to the proceedings being brought under *Section 17* of the Married Women's Property Act, 1882, is incompetent for the reasons that I have given above. What I need to consider is whether there is a valid suit properly brought under the Matrimonial Causes Act and should I find that the suit under the Matrimonial Causes Act is incompetent whether I can entertain the suit as an ordinary civil suit for recovery of property.

10. *Sections 27(1), (2), 28 and 31 (1)* of the Matrimonial Causes Act, under which the Originating Summons is premised, provide as follows:-

“27 (1), If it appears to the court that in any case in which the court pronounces a decree for divorce or for judicial separation by reason of the adultery, desertion or cruelty of the wife that the wife is entitled to any property either in possession or reversion, the court may if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage or either or any of them;

(2) An instrument made under any order of the court made under this Section shall be valid and effectual notwithstanding the existence of coverture at the time of execution thereof;

(3)...

28. The court may, after pronouncing a decree for divorce or for nullity of marriage, inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or for that of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this Section notwithstanding that there are no children of the marriage.

29...

30...

31(1). When a petition for divorce or nullity of marriage has been prescribed, proceedings under... Section 27, Section 28... of this ordinance may, subject to

and in accordance with the rules made under this ordinance, be commenced at any time after the presentation of the petition. Provided that no order under any of the said sections or under the said subsections... shall be made unless and until a decree nisi has been pronounced, and no such order, save in so far as it relates to the preparation, execution or approval of a deed or instrument, and no settlement made in pursuance of any such order shall take effect unless and until the decree is made absolute.”

11. On procedure, the relevant provisions are to be found in Rule 40(1) (2) of the Matrimonial Causes Rules, which provide as follows:-

“40 (1) An application for ... settlement of a wife’s property, in the case of proceedings for divorce, may be made by the petitioner at any time after the time for entering an appearance to the petition, but no application shall be made later than one month after the final decree except by leave of a judge.

(2) An application for settlement of a wife’s property, in the case of proceedings for judicial separation or for restitution of conjugal rights may be made at any time after the pronouncement of the decree.”

12. The pleadings and proceedings in the divorce cause – being **Nairobi SPMCDC No. 3 of the 1990** – have not been placed before me, save for the certificate of making the decree *nisi* absolute dated 7th September 1992. It shows that decree nisi was pronounced on 29th August 1991, and was made absolute on 18th August 1992.

13. From the papers filed in the present cause it would appear that *Section 28* of the Matrimonial Causes Act is not relevant. The parties hereto have not availed to court any ante-nuptial or post-nuptial settlements made by them after the celebration of the marriage. *Section 28* is intended to give effect to such settlements, since none are pleaded, it would mean that no such settlements were made and did not exist.

14. Settlement in favour of the wife may be made by the court under *Section 27(1)* of the Matrimonial Causes Act. Procedure on these matters is stated in *Section 31(1)* of the Matrimonial Causes Act and *Rule 40* of the Matrimonial Causes rules. By virtue of *Section 31(1)*, proceedings relating to settlement of a wife’s property may be commenced anytime subject to *Rule 4*, after the prosecution of the petition, but no order can be made unless and until a decree *nisi* has been pronounced and the order cannot take effect unless and until the decree is made absolute. *Rule 4 (1)* provides that no application for settlement of a wife’s property should be made later than one month after the final decree without the leave of the judge. It would appear by virtue of *Rule 4 (2)* that no such limits exist where the proceedings relate to judicial separation or restitution of conjugal rights.

15. Several issues arise from the above. The first one touches on whether the proceedings herein were commenced within time. From the certificate making the decree *nisi* absolute, the petition presented before the court was not for dissolution of marriage based on adultery and cruelty, it was a petition for judicial separation or restitution of conjugal rights. Consequently, the provision applicable in the circumstances is *rule 4(1)* and not *Rule 4(2)*. This then means that the plaintiff’s application for settlement of her property ought to have been made not later than one month after the final decree, except with leave of court. The final decree was pronounced on 18th August 1992. The proceedings for settlement of the plaintiff’s property should have come by 18th September 1992, unless leave of court was obtained. Evidence has not been provided of any such leave. To that extent the proceedings before this court are incompetent.

16. The other aspect of the matter is that the proceedings for settlement of the wife’s property ought to be made within the matrimonial proceedings, that is the proceedings for either divorce, judicial separation or restitution of conjugal rights. The language of *Sections 27, 28 and 31* of the Matrimonial Causes Act and

Rule 4 of the Matrimonial Causes Rules envisages the settlement proceedings being prosecuted within the proceedings for divorce, judicial separation or restitution of conjugal rights. It is not envisaged that the same be prosecuted in separate proceedings commenced by way of Originating Summons initiated under the Civil Procedure Rules. Ideally, the prayers sought in the amended Originating Summons ought to have been sought in Nairobi **SPMCDC No. 3 of 1990**.

17. Can I treat the Originating Summons as an ordinary suit for recovery of certain properties as between the parties? As the plaintiff ran out of time to obtain division of matrimonial property under the Married Women's Property Act and for settlement of her property as a wife under the Matrimonial Causes Act, she had the option of commencing a civil suit to recover what she claimed to belong to her. A civil suit of that kind would be by a plaint filed in accordance with the provisions the Civil Procedure Act and Rules. However, such suit would be subject to the Limitation of Actions Act. In such case, the cause of action would accrue from the date of the dissolution of the marriage. For movable property the limitation period is three (3) years if founded on tort and six (6) years is based on contract. For immovable the limitation period would be twelve (12) years.

18. The final decree was pronounced in **Nairobi SPMCDC No. 3 of 1990** on 18th August 1992. This became the effective date from which the limitation periods began to run. The three (3) year limitation expired on 18th August 1992, while the six (6) year limitation period ran out on 18th August 1998. The twelve (12) year limitation period expired on 18th August 2004. The suit before court commenced on 17th November 2004, three (3) months after the expiration of the limitation period.

19. Even if the instant suit were filed within the limitation period set out in the Limitation of Actions Act, it would still have challenges, to the extent that it would be seeking settlement of a wife's property under the provisions of the Matrimonial Causes Act, rather than recovery of certain properties.

20. In view of everything that I have said above, I have come to the conclusion that the objection raised by the defendant stands. I therefore do hereby uphold the same. The amended Originating Summons dated 16th May 2006 is misconceived, incompetent and bad in law, it is dismissed, with costs to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 11th DAY OF December 2014.

W. MUSYOKA

JUDGE

No appearance of the advocate for the applicant

In the presence of Mr. Ombasa for the respondent.