



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO: 26 OF 2011

DORSCAS WANGU MWANGIAPPLICANT

VERSUS

PETER MWANGI GITHAIGA.....RESPONDENT

RULING

This ruling is delivered in the Notice of Preliminary Objection dated 23rd November 2011 challenging the Preliminary of Originating Summons dated 10th June 2011. **Dorcias Wangu Mwangi**, the applicant in the Originating Summons dated 10th June 2011, has sued her husband, **Peter Mwangi Githaiga under Section 17 of the married Women's Property Act** praying that the immovable properties known as L.R. No Laikipia/Tigithi Matanya Block 5/548 and plots Nos: 494 and 504 (being portions of L.R. No. 8469/11 Nairobi including the developments thereon on be declared matrimonial properties and as being owned by the parties jointly in equal shares, on the ground that the same were acquired by the joint funds, contribution and efforts of the both the applicant and the respondent during the subsistence of their marriage. The marriage is still in force.

The applicant prays also that the matrimonial home erected on Plots Nos: 494 and 504 be declared a family asset owned by the couple in equal shares and that the defendant be restrained from alienating it or disposing of it in the manner stated in the Originating Summons. An interim injunction in this regard was granted to the plaintiff on 28th July 2011. The plaintiff prays that the Preliminary Objection be disallowed to enable the court determine the Originating Summons expeditiously and conclusively. A procedural challenge to the Preliminary Objection was raised, namely, that the same, having been filed outside the 7 days allowed by the court, and without leave, was improperly before court. The court has accepted the defendant's explanation that the court file could not be traced to ensure compliance.

The Preliminary Objection raises a blanket challenge to the filing of the Originating Summons, on the basis that the invocation of **Section 17 of the Married Women's Property Act 1182** is an abuse of the process of the court since there is no animosity or dispute between the parties hereto as to the ownership of the suit properties. Also that there are no divorce proceedings in place in regard to the plaintiff's marriage to the defendant and that the defendant holds indefeasible title to the suit property which is guaranteed under **Sections 27 and 28 of the Registered Lands Act (Cap-300 of the Laws of Kenya**. In regard to the latter the respondents view is that the Married Women's Property Act cannot be invoked to defeat the proprietary rights of a husband who is registered as owner of certain property.

Submitting in support of the Preliminary Objection, learned counsel for the objector Mr. Momanyi told the court that there was no prove of trust in the ownership of the suit land by the defendant and that the plaintiff is attempting to have the same bequeathed to her while her husband, the defendant, was alive. To support this submission, counsel cited the Court of Appeal decision in **Muriuki Murigi –vs- Richard**

Muriuki & 3 Others Civil Appeal No: 189 of 1996, a copy of which was furnished to the court and served on the advocate for the plaintiff.

In reply, learned counsel for the plaintiff, Mr. Kiarie submitted that the Preliminary Objection is not a Preliminary Objection in law since all it states is that the Originating Summons goes against **“the spirit and intention”** of **Section 17 of the Married Women’s Property Act** without raising any objection in a point of law. He submitted further that the Act is not intended solely for breaking up or broken down marital union and/or for the division of Matrimonial Property upon divorce. Also that the intention of the plaintiff is not to have the property transferred to her but for a declaration that she is entitled to joint ownership with the defendant, the property having been acquired during the subsistence of the marriage and her family having lived thereon for 21 years. Counsel submitted that the Registered Land Act did not apply.

I have considered the Preliminary Objection and the submissions by counsel. I do not consider the Preliminary Objection as meeting the legal essentials laid down in the celebrated case of **MUKISA BISCUITS MANUFACTURING CO. LTD –VS- WESTEND DISTRIBUTORS LTD (1969) E.A. 696** which defines a Preliminary Objection as one which raises a pure point of law.

The objection as raised herein tends to challenge legal validity and/or applicability of the **Married Women’s Property Act 1882** and the very purpose for which this English statute of General application was incorporated in our laws, which is to protect the interests and/or rights of married women in relation to property acquired during the subsistence of their marriage.

There is nothing in the wording of **Section 17 of the Married Women’s Property Act 1982** that suggests that it is to be invoked only where a marriage has either broken down or is in the process of being annulled or revoked, or that the separation of the married couple is in issue. The application of the said section was well tested in the case of **Njoroge –vs- Ngari (1985) KLR 481** where the plaintiff sought declaration that half of the property registered in the name of her husband was held in trust beneficially for her. The court therein held, inter alia, that:

1. “If property is held in the name of one person but another contributes towards acquisition of the property, then both persons have proprietary interests in that property. If legal ownership of such property is registered in the name of only one of them, that one is deemed to hold the land in trust beneficially for himself and the other person.

2. Section 17 of the Married Women’s Property Act 1982 does not defeat the rights of the proprietor protected by the Registered Land Act but merely provides a summary way by which property rights between a wife and a husband can be decided.

3. The purpose of the Married Women’s Property Act 1982 Section 17 is not to defeat rights but to provide a machinery for ascertaining and defining rights and once ascertained then the register is to be changed to take account of them. The system of registration is meant to serve proprietorship is not designed to serve the system of registration.

4. Section 28 of the Registered Land Act has a provision that directs that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as trustee”

The case before court can therefore not be challenged on the basis of an objection such as has been filed since what the plaintiff seeks is to have her interest in the named immovable properties ascertained and defined. She claims a legal right which is available in law and the court has been properly moved to do so. It is up to the defendant to disprove her claim to entitlement which can only be done down after the matter has been heard.

For the above reasons, I find that the preliminary Objection is not valid. The same is hereby overruled and dismissed with costs to the plaintiff.

DATED, SIGNED and DELVIERED at NAIROBI this 22ND DAY OF March 2012.

**M.G. MUGO
JUDGE**

In the presence of :

Mr. Wachira for the petitioner.

Mr. Momanyi for the defendant.