



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 127 OF 2008

M W G.....PLAINTIFF

VERSUS

E G M.....DEFENDANT

RULING

The application that was before J. Maraga for hearing was the Chamber Summons dated 9/2/2010 in which S N G sought to be substituted as the plaintiff in place of M W G, his mother, who had passed away. It was the applicant's contention that these proceedings were brought under the **Married Women Property Act** and that though the plaintiff had passed away, the cause of action had survived her. He contended that an application for division of matrimonial property can be made even when the marriage is still subsisting.

Counsel for the applicant, Mr. Nyamwange, made reliance in the case of **GRACE WANJIKU WAINAINA V. BENSON WAINAINA KIBURI NKU HCC NO. 205/08 (OS)**. Counsel urged that there had not been any pending proceedings for dissolution of the marriage.

As to whether a personal representative of a deceased married woman has the same right as the deceased under **Section 17 of the English Married Woman's Property Act of 1882, paragraph 1039 Vol.22 Halburys Laws of England 4th Ed.**, provides that such proceedings can be continued by a personal representative.

Mr. Karanja, counsel for the respondent opposed the application for substitution for the reasons that these are proceedings under the Married Women Property Act in which the plaintiff had sought to be declared a joint owner of the suit property with the defendant. It was counsel's contention that upon the death of the plaintiff, the cause of action did not survive her. He argued that the plaintiff and defendant were married and one died during the subsistence of the marriage and there is nothing to be determined as to what property belonged to who. He urged that the children cannot come and determine what belonged to which parent. Counsel relied on the **RE COHEN (deceased), NATIONAL PROVINCIAL BANK LTD V BATA (1953)1 ALL LER 378**. Mr. Karanja did not dispute the fact that proceedings for division of matrimonial property can be brought without necessarily there being proceedings for dissolution of the marriage. The only objection to this application is that the cause of action did not survive upon the death of one spouse.

Paragraph 1039 of Halburys Laws of England reads as follows:-

“Death of a spouse or former spouse. For the purpose of Section 17 of the Married Women's Property Act 1882, it was originally provided that the legal personal representatives of any married woman were in respect of her estate to have the same rights and liabilities and subject to the same jurisdiction as

she would have been if she had been living. The repeal of the provision does not affect the law, and, subject to time limitations, proceedings under Section 17 may be commenced, or, if already commenced continued, by a deceased spouse's personal representative."

From the above, it seems that the applicant has the right to take over and continue with the plaintiff's application as the legal representative.

The plaintiff (deceased) had sought to have the properties that were listed in the Originating Summons to be held jointly and in equal shares between the plaintiff and the defendant, the same having been held by the defendant as proprietor and trustee for himself and the plaintiff. If the plaintiff had lived to have the application concluded in her favour and she died thereafter, the law is that the same would vest exclusively in the surviving tenant. In **IRUNGU V THAYU (2004)**. In **RE COHEN (supra)** it was held:-

"In such a case, the presumption would be, not for a division but for an equality in ownership, in such that the incest egg was intended to remain intact for the benefit of the survivor after the death of one of the spouses"

In **PETER MBURU ECHARIA V PRISCILLA NJERI ECHARIA (2007)** the court observed as follows:-

"One characteristic for joint tenancy is that the joint tenants have a unity of interest, that is to say, that, although they have separate rights, the right of each joint tenant is the same in extent and duration and in reality they are in the position of a single owner. The second characteristic of a joint tenancy is of survivorship. On death of the joint tenant, his interest accrues to the other tenant by right of survivorship."

In **RE COHEN V KATZ AND OTHERS (1953) ALL ER 378**, \ husband, it was held:-

"The fund was intended to be a joint fund in which both spouses were equally interested and which, in the death of one of them, accrued to the survivor."

The plaintiff had brought this application to protect her interest in the matrimonial property whose titles were held by the defendant. She alleged that the same was being wasted and that would be detrimental to her and her children. Taking into account all these circumstances, and **Section 17** of the **Married Women's Property Act**, I am of the view that the legal representative of the plaintiff has the same rights and obligation as the plaintiff because the plaintiff's interest in the property had not yet been determined. It cannot be assumed at this stage that they were joint owners when the application had not been heard and determined. It is upto the plaintiff's legal representative to proceed with the same to its conclusion. Whether or not the surviving spouse will be entitled to the estate will be determined at the hearing of the Notice of Motion. The plaintiff had a real interest in the said properties and the same must be protected by allowing the legal representative to come into these proceedings to collect her assets and settle the liabilities of the estate and generally exercise the powers of a personal representative under **Section 82** of the **Law of Succession Act**. The said properties would include interest in the properties listed in the Originating Summons. The special circumstances of each case have to be taken into account. It seems the plaintiff and respondent were not using the said property in harmony as a family. It is in the interest of fairness that I do allow the Chamber Summons dated on 9/2/2010. S N G is hereby allowed to be joined to these proceedings as the legal representative of the plaintiff's estate.

Costs to be in the cause.

DATED and DELIVERED this 11th day of March 2011.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Mukura holding brief for Mr. Ndegwa for the plaintiff.

Mr. Kimani holding brief for Mr. Nyamwange for the defendant.

Kennedy – Court Clerk.