



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL SUIT 9 OF 2009

IN THE MATTER OF AN APPLICATION UNDER SECTION 17 OF THE MARRIED
WOMEN'S PROPERTY ACT (1882)

BETWEEN

CATHERINE NYAMBURA KARUNDITU::::::::::::::::::::::::::::PLAINTIFF

AND

STEPHEN REUBEN KARUNDITU::::::::::::::::::::::::::::DEFENDANT

RULING

There is in place an originating summons dated 13th day of March 2009 and filed on the 16th day of March 2009. The parties to the said originating summons are named as Catherine Nyambura as the plaintiff and Stephen Reuben Karunditu as the Respondent.

A perusal of the record reveals that the Respondent was served, he entered appearance and filed a replying affidavit to the originating summons. These proceedings are pending.

The applicants have moved to this court, vide an application by way of chamber summons dated 30th day of July 2009 and filed the same date. It is brought under order XXIII rules 1-5 and 12 and order 1 rule 10 of the Civil Procedure Rules. Two prayers are sought namely:-

1. That the names of Mrs. Jane Njeri Kanyua and Ms Mary Wanjiru Karunditu be substituted for the plaintiffs herein.
2. That the costs of this application be in the cause.

The grounds in support as gathered from the grounds in the body of the application, supporting affidavit and annexures are that:-

1. The deceased passed on, on the 7th day of July 2009 as evidenced by annexure MWK1.
2. As at the time of her death she had commenced these proceedings.
3. She died testate leaving a valid will exhibited as annexure MWK2 in which the deceased appointed the two applicants as the executrixes of the said will.
4. That the applicants have a limited grant issued to them in succession cause number 1678 of 2009 to enable them be substituted.
5. That provisions under which the application has been presented allow substitution.

6. That the provision of law, under which the originating summons was presented stipulates that the cause of action survives the demise of a litigant hence the need for the substitution of the applicants in the place of the deceased herein.

The defendant/Respondent has put in a replying affidavit in opposition to the application deponed by Stephen Reuben Karunditu on 7th September 2009 and filed the same date and oral submissions in court, and the major ones are that:-

- Indeed the deceased was wife of the Respondent.
- She had commenced these proceedings and he had responded to the same.
- She died testate and was buried in the Respondents farm.
- He denies that property subject of these proceedings belonged to the deceased. He asserts they were his as per the contents of his pleadings filed herein.
- Contend that the cause of action herein did not survive the deceased.
- That as per section 2 of the married women property Act, a married woman has a right to own property distinct from joint property during the subsistence of the marriage and these are the properties whose cause of action survives the death of the wife.
- It is their stand that there is no provision in the Act for a cause of action to survive the death of a spouse on property which had not been adjudicated as between the spouses.
- The court, is invited to take note of the fact that the 1882 married women property Act of England being a statute of general application is applicable only in so far as the local circumstances permits. If the substitution is allowed, it will mean that one of the applicants who is a daughter of the deceased will be put in a fight against the surviving spouse who is her father. It is their stand therefore that even if the law allows substitution, the prevailing local circumstances in the country would not allow a daughter to fight with the father over a property on behalf of her mother.

In response counsel for the applicant stated that their application is proper because the sole purpose of the 1882 married women property Act is to recognize the right of women in marriage to own her own property.

That there are no local prevailing circumstances which would prohibit a daughter from stepping into the shoes of her deceased mother to champion the protection of the deceased mother's estate. There is nothing to support the Respondents' stand that once the deceased dies her right to property cannot be enforced.

On case law, the court, was referred to the case of **DHARAMSHI VALLABHI AND OTHERS VERSUS NATIONAL AND GRINDLLAYS BANK LIMITED (1964) EA 442** a court of appeal decision where it was held interalia that "*in construing legislation adopted from a common wealth country with a similar systems of law regard may be had to the judicial decisions of that country on the construction of the adopted legislation, if such decision disclose a consistent interpretation of the legislation in question and are not at variance with one another.*"

The case of **SAROS GANDESHA VERSUS TRANSROAD LIMITED CA NO. 19 OF 2006** decided by the court of appeal of Uganda on the 8th day of April 2009. The central theme in it is that:- "*Once a person comes forward to step in the shoes of a deceased person as an administrator, that person is liable to account for monies received by the deceased on behalf of others. This is regardless of whether the deceased was engaged in a trade or profession that the administrator had no knowledge of. Failure by the Administrator to do so, would expose the wealth of the estate to be attached. The argument of the appellant evading liability on grounds that she is not an advocate is unsustainable.*"

The case of **OMBOGO VERSUS STANDARD CHATTERED BANK OF KENYA LIMITED (2000) 2EA** where it was held interalia that "*the estate of a deceased advocate included money held in trust for his client, hence the client account was within the scope of*

the law of succession Act (section 46 of the Act). The law of succession Act did not distinguish between different categories of persons to whom it applied.

Section 2 and 23 of the married women property Act 1882 on the other hand provides “section (2), A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property in any contract, and suing and being sued either in contract or in tort or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceedings brought by or taken against her, and any damages or costs recovered by her in any such action or proceedings shall be her separate property, and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise.

Section 23. For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living”

On the courts', assessment of the rival arguments herein, the following facts do not seem to be in dispute:-

1. That the deceased filed or commenced these proceedings before her death.
2. That she was the wife of the Defendant/Respondent and even remained so as to the time of her demise and was even buried on the defendant's land.
3. That she had commenced proceedings under the section 17 of the married women property Act 1882 of England claiming the right to own certain properties in her own right as opposed to them being regarded as matrimonial property.
4. The said cause remains unadjudicated
5. That she died testate and appointed executrixes of her will.
6. That it is this executrixes who have moved to court, obtained a grant of letters Ad litem who are seeking to be substituted in these proceedings to prosecute the cause for the benefit of the deceased's estate and beneficiaries.
7. That one of the applicants is a daughter to the deceased and the defendant/Respondent herein.

That provision exists in order XXIII rules 1-5 for substitution of a deceased plaintiff or defendant with a legal representative.

8. The applicant asserts that the cause survives the deceased and it is proper for the substitution order to be made.
9. The respondent on the other hand asserts that the cause does not survive the deceased, and 2ndly the application of the 1882 married women property Act of England which is a statute of general application in this jurisdiction has to be applied with regard to the provisions of the Judicature Act cap 8 laws of Kenya which require that it be applied in so far as the local circumstances permit. In the learned counsel's opinion, it would be improper to pitch a daughter against her father on account of all alleged protection of her late mother's property.
10. Both sides have referred the court to case law none of which has interpreted or construed the provisions of the 1882 married women property Act of England.

This court, on its own sourced the decision of the court of appeal in the case of **NDERITU VERSUS NDERITU (1995-1998) 1EA 235 CAK** on the applicability of the above Act. It was held inter alia that:-

“The married women's property Act did not discriminate between statutory and customary law marriages and the applicability of section 17 could not be excluded simply because the parties had married according to Kikuyu customary and traditions. All that a wife needed to prove under the Act, was that she was married to the husband at the time of launching her application, that the property was acquired during the subsistence of the marriage, and that she had contributed directly or indirectly to the acquisition of the assets. Moreover it was clear from the language of the section and the weight of authority that the section applied to all property and not just the matrimonial home.

In determining contribution a court had to assess the value of a wifes' non-monetary contribution in order to determine her interest in the disputed property.....”

A reading of this holding leaves no doubt that the deceased had rightfully moved to this court, to champion her right in so far as property acquired during the subsistence of the marriage was concerned.

This court, has also on its own revisited a reading of the said section, a copy of which was availed to the court, by the applicants counsel, and in its opinion it allows presentation of such applications or causes even during the subsistence of the marriage.

Section 2 on the other hand whose content is already set out herein recognizes the right of a married woman to own her own distinct property, distinct from that of the husband. It is the stand of the applicants counsel that this is what the intended substitutes want to protect. Indeed, the defendant has asserted that, all the properties that the deceased had laid claim on in these proceedings were all his acquired by him solely. In this court's opinion, the defendant is entitled to assert so, and this is what the court, is going to inquire into. The question for determination is how this inquiry is going to be carried out after the death of the deceased? It is on record that section 23 of the 1882 married women property Act of England has been fronted by the applicants as the avenue through which this court, can resolve the issue in controversy herein. As mentioned, the content has already been set out herein.

This court, has construed the said section and in its opinion, the command to the legal representatives is mandatory in so far as the deceased separate “estate” is concerned. Indeed herein the proceedings to determine the separate estate had just been commenced. This separate estate had thus not been determined.

The question for determination is whether this section bars legal representatives from moving in to protect own in determined separate estate?. In this courts', opinion, if the legislature had intended. So then it would have gone ahead and specified that the legal representatives were to have power in respect to her separate estate duly adjudicated and determined or undisputed”

By framing the provisions in the manner framed, leaves room for the protection of the deceased married women's un adjudicated separate estate. There is also no distinction as to the class of legal representatives who are to champion those rights. Meaning that ,close relatives are not excluded as legal representatives. It follows that the deceased wish of naming a daughter as one of those to protect her estate was proper. More so when no prejudice has been stated to be suffered by the Defendant/Respondent who will have a chance to assert and prove his entitlement to the property claimed by the deceased and at the same time disapprove the assertions of the deceased through the legal representatives.

For the reasons given in the assessment. The court, finds the application dated 30th day of July 2009 and filed the same date has merit. Prayer 1 and 2 thereof are granted as prayed.

DATED, READ AND DELIVERED AT NAIROBI THIS 5TH DAY OF FEBRUARY 2010.

R.N. NAMBUYE

JUDGE