



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 164 of 2007

PHOEBE NYAKINGA KIBIRU.....PLAINTIFF

VERSUS

GODFREY KIBIRU GICHUKI.....1ST DEFENDANT

ANTHONY NDERITU MUNYUA.....2ND DEFENDANT

ROHI CHILDREN’S ORGANISATION.....3RD DEFENDANT

RULING

By an Originating Summons dated 23rd July 2007 the Plaintiff/Applicant sought the following declarations that:

1. L.R. Dundori/Lanet Block 5/81 (Kiamunyeki “A”) was acquired during marriage of the plaintiff and the 1st Defendant and that it is matrimonial property and the Plaintiff contributed substantially to its purchase and development and she is entitled to it absolutely or for a half share.
2. 1st Defendant is registered as proprietor of the said land in trust for himself and the Plaintiff and any sale by the 1st Defendant to the 2nd and 3rd Defendants without the Plaintiff’s consent was null and void.

The Applicant also sought costs.

The application is expressed to brought under **Order XXXVI rule 1 of the Civil Procedure Rules**. The said Rule enables among others, any person as “*heir*” claiming any deed or otherwise to apply to court to determine the extent or nature of such persons right to such interest.

The summons was also expressed to be brought under the provisions of **Section 17 of the Married Women’s Property Act, 1882 (not 1992)** as written in the Application. Section 17 provides as follows:

“17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or share of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of

county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matter in question to be made in such manner as he shall think fit.”

The Applicant and the Respondent are husband and wife. The husband is the 1st Respondent. In answer to the Plaintiff's Originating Summons the husband not only filed a Replying Affidavit but also took out a Preliminary objection on points of law:

1. THAT an Originating Summons under Section 17 of Married Women's Property Act (1882) can not be a platform to determine dispute between the plaintiff and the 2nd and 3rd defendants.
2. THAT the plaintiff can not, either by way of an originating summons or otherwise challenge a contract for conveyance of land where she is a non-party.
3. THAT by dint of ground 1 and ground 2, the application (suit) herein commenced by way of an originating summons is bad in law and ought to be struck out.

The Married Women's Property Act is premised upon two propositions:

1. THAT there is a dispute between husband and wife
2. The property is held by any either the husband or any company, public body or a society.

In this case the property in issue was according to the Replying Affidavit of the Respondent, the husband, was held by the husband and was sold to the 2nd defendant. It therefore ceases to be a question for determination as between husband and wife. The joinder of the 2nd Defendant was therefore improper and incompetent in my opinion.

In my view the proper cause for the Plaintiff/Applicant is to seek an account of the proceeds of the property directly from her husband leaving out the 2nd Defendant. Being of that mind therefore the Preliminary Objection is upheld and the Originating Summons dated 23rd July 2007 and filed on the same day is struck out with costs to the Respondent.

Dated, delivered and signed at Nakuru this 5th day of February 2010

M. J. ANYARA EMUKULE

JUDGE