



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 29 of 2005

ANJU CHANANDIN APPLICANT

VERSUS

JAHANAGIR ALAUDIN CHANANDIN AND THREE OTHERS RESPONDENTS

RULING

The Applicant filed an Originating Summons on 6th September, 2005 which was amended after the application dated 9th November, 2005 was granted. The amended Originating Summons sought to join the 2nd to 4th Respondents. Thereafter the Applicant who is a wife to the 1st Respondent filed the Chamber Summons dated 15th November, 2005.

Extensious affidavits are filed in this cause. The replying affidavits both to this application as well as to the Originating Summons have been filed.

However, along with these affidavits, the 1st Respondent has raised Preliminary Objections as to the jurisdiction of this court to hear and determine the Originating Summons and thus the application on hand. The Notice was dated 28th November, 2005 filed on the same day.

It was consented that the interim orders made in pursuance to the application dated 15th November, 2005 be extended pending hearing and determination of the said application.

On the hearing date the preliminary objection as to the jurisdiction of this court under section 17 of the Married Women Property Act, 1882 was raised.

The prayers sought for under the said application are:

(a) THAT this Honourable court be pleased to grant a temporary injunction directed to the Respondent by himself, his servants, agents or otherwise anyone claiming through him howsoever from alienating, transferring, charging, selling, removing or any other manner disposing off all that property described as LR No.12938/LR.No.209/4965 pending the hearing and determination of this application.

(b) THAT this Honourable court be pleased to grant a temporary injunction directed to the Respondent by himself, his servants, agents or otherwise anyone claiming through him howsoever from alienating transferring, charging, selling removing or any other manner disposing off all that property described as LR. No.9081/ LR.No.209/2888 pending the hearing and determination of this

application.

(c) THAT this Honourable court be pleased to order attachment of the Respondents and/or his agents and/or servants monies deposited in the following accounts:-

Prime Bank:

- i. AS10011**
- ii. 5501181007**
- iii. 5501456006**
- iv. 5501051000**

Southern Credit Bank:

- i. 0012510368**

Standard Bank:

- i. 015013844100**

Hongkong and Shanghai Banking Corporation Ltd:

- i. 716893 201 31 – USD**
- ii. 800342 001 - HKD**

The said application was supported by supporting affidavit and supplementary affidavit of the Applicant sworn on 15th November, 2005 and 2nd July, 2007 respectively.

I may also note that similarly several affidavits were filed on behalf of the 1st Respondent and interested parties namely Lucheka Lubricants Ltd. 2nd to 4th Respondents though filed the Appearances, but their advocate applied to withdraw from acting on their behalf and that they have not filed any pleadings.

The nature of Preliminary Objection has been very ably described by Sir Charles Newbold in the case of **Mukisa Biscuit Co. vs. West End Distributors 696 at page 701**, and I quote:

“A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.” (*emphasis mine*).

Of course, in the judgment of Law J.A. it is stated that point of jurisdiction can be raised as a preliminary point. That is the reason, despite all the extensive pleadings on the file, I allowed the counsel for the 1st Respondent to argue the point.

The first point that was raised as a preliminary objection was that this court cannot determine the rights of the parties on the amended Originating Summons as it contravenes Order VIA Rule 4 of the Civil Procedure Rules, was abandoned when the court confronted the counsel with the other provisions of Order VI of Civil Procedure Rules.

It was then contended that the 2nd to 4th Respondents are the transferees of the matrimonial properties and thus the court has no jurisdiction over them under section 17 of the Married Women’s Property Act 1882.

It was suggested that the only way for the Applicant is to file a plaint.

The case of **Mbugua vs. Mbugua (2001) 2 EA HCK 445** was cited by Mr. Okundi, the learned counsel for the 1st Respondent. The court of Appeal case of **Kamore Vs. Kamore (2000) 1 EA 80** was also relied upon.

In the case of **Mbugua (supra)** Visram J. agreed with the judgment of Ransley J. in the Case of **David Mukii Mereka Vs. Margaret Njeri Mereka Nairobi. H.C.C. 32 of 1986**, when the judge said, while commenting on the case of **Mungai Vs. Mungai (1995) LLR 405**, namely:

“There is nothing in that decision (the Mungai case (Supra) which inhibits a court from dealing with the title to shares under The Act”.

Visram J. also said thus on page **455 of Mbuga’s case (Supra)**.

“In my view, Mungai case does not in any way support the proposition that shares owned in a limited liability company cannot be the subject of an application under Section 17 of the Act In fact although the decision of this court in the Mungai’s case (supra) was reversed by the Court of Appeal a close reading of it reveals that it supports the proposition that shares in a limited liability can be made a subject of an application under section 17 of the Act”.

This observation, which I do agree with were made pursuant to observations made by Kwach J.A namely:

“The application under section 17 of (the Act) could only deal with property held by the Respondent, as a husband. It could not cover shares held by the Respondent in a Ltd. Company in which the wife also held shares in her own right.”

Section 17 of the Act, although gives wide powers to the court, as per **Kamore’s case (supra)**, it does not give powers to the court to substitute title from the one spouse to the other. I do note, however, the Court of Appeal in the said case reiterated that **Pettit vs. Pettit (1969) 2 All ER 385** and **Gissing vs. Gissing (1971) the 888 (Supra)**.were good law in Kenya.

In **Gissing’s case (supra)** Lord Reid has this to say at page 792:

“If there has been no discussion and agreement or understanding as to sharing in the ownership of the house and the husband has never evinced an intention that his wife should have a share, then the crucial question is whether the law will give a share to the wife who has made those contributions without which the house would not have been bought. I agree that this depends on the law of trust rather than on the law of contract, so the question is under what circumstances does the husband become a trustee for his wife in the absence of any declaration of trust or agreement on his part. It is not disputed that a man can become a trustee without making a declaration of trust or evincing any intention to become a trustee. The facts may impose on him an implied, constructive or resulting trust. Why does the fact that he has agreed to accept these contributions from his wife not impose such a trust on him?” (emphasis mine)

As per the above passage, the concept of trust was invoked and adopted in respect of the properties acquired during marriage.

In short, the law as regards rights of the Married Spouse developed as the circumstance of a given case required.

This case presents peculiar circumstances when, as per the averments made by the Applicant, the husband transferred the matrimonial properties to his family members and employees pending the negotiations of the division of matrimonial properties. I have also seen that in some of the affidavits sworn by the 1st and 2nd Respondents in February, 2005 they did agree that some of the properties,

specifically LR. No.7752/65 was jointly owned by the Applicant and 1st Respondent. It is averred very clearly by the applicant that the properties were transferred by the Respondent to '**steal a march**' on the Applicants. I may not go much in details of the pleadings before me but obviously, it is on record that the properties were sold at a low price and immediately thereafter were charged for more than double the amount of purchase price. It is also clear that parties were negotiating the division of the matrimonial properties and during the negotiations those transfers were made.

In these circumstances and in view of several issues yet to be determined, I do not agree that I would forsake my jurisdiction at this stage. The issue of jurisdiction is not proved with crystal clarity, looking to the circumstances of this case. Moreover, it is agreed that one property in this cause is clearly within the jurisdiction of this court.

I can only find at this stage that, if I have the power to hold that the properties which are matrimonial could be held in trust for the Applicant, then, I also have the right to determine under which circumstances the said trust was breached. The concept of trust is in any event, recognized under the Registration of Titles Act (Cap 281 part XVII thereof) under which Act the properties in question are registered.

It is true that Kenya has not made any independent legislation as regards the subject matters of the Married Women Properties and it is also true that the amendments made by British Parliament in the Act cannot apply to our jurisdiction. But, that fact only should not be held against the Applicant. Our courts have made big strides in developing this law and do not think we have reached the brink, or end of such development.

I can and would clutch to the Ruling of Hon. Owuor J.A. in Civil Application Nairobi No.180 of 1999 between **Pilar Timon Shar and Kaushik Mohanlal Shah and another** (*unreported*). The Judge of Appeal was determining an application under the Act. She accepted the concept of '**stealing a march**' as held by the Court of Appeal in the case of **Haircare Beautician Ltd versus Standard Properties and another C.A. No.179/98** (*unreported*). The Court of Appeal said that '**stealing a march**' is an abuse of the court.

I could take a step further that if a party 'steals a march' with knowledge of an impending dispute, that also could be seen as a factor which should not deter a court from holding a party under its jurisdiction to ensure justice is done. I am aware that the properties were transferred just before she filed this matter but her averments of negotiations in between and their failure are yet to be determined and the same have to be determined in the background of implied trust as declared in **Gissing's case** (*supra*)

I have spent long anxious moments over this objection which is unique in all respect, and having considered those circumstances, the wordings of Section 17 of the Act and case laws, I am of a humble view, that the objection did not raise a pure and clear point of law, and that there are several facts which are not agreed.

In view of the aforesaid, I shall dismiss the preliminary objection. Costs in the cause.

I may also mention that as I was determining the point as a preliminary objection, I have restrained my hands in going into details of the facts of the case as well as my observations on the authorities cited.

In furtherance, I may note that this cause is brought as Originating Summons and it being a proceedings of civil nature, the provisions of Order XXXVI, Rule 10 of Civil Procedure Rules can also apply and thus this court can, if deemed fit, proceed to hear this cause accordingly.

Dated and signed at Nairobi this 26th day of May, 2008.

K.H. RAWAL

JUDGE

