



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Civil Case 258 of 2005**

**AMINA O. ABDULKADIR.....PLAINTIFF**

**VERSUS**

**RAVINDRA N. SHAH ALIAS RAVEEN MOHAMMED NARSHI .....**  
**.....DEFENDANT**

**RULING**

In this originating summons, the plaintiff, Amin Omar Abdulkadir, seeks a declaration that certain properties are jointly owned by her and her estranged husband. About a month later she filed an application and sought an injunction to restrain her husband from *inter alia* alienating, disposing, selling or transferring any of those properties until this originating summons is heard and determined. When the application came up for hearing before me on 1<sup>st</sup> February 2006 Mr. Balala, counsel for the husband, raised a Preliminary Objection (P.O.) written notice of which he had given on 30<sup>th</sup> January 2006. On 31<sup>st</sup> January 2006 the husband also filed an application under Order 36 Rule 12 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. One of the grounds upon which the application is made is one of the grounds raised in the Preliminary Objection. The two were argued together.

The Preliminary Objection is based on the following grounds, namely:-

**“1. That this Honourable court lack jurisdiction in that:**

- (i) The Married Women Property Act (MWPA) of 1882 is not applicable to parties herein as they are governed by Muslim personal law and the provisions of the Mohammedan Marriage, Divorce and Succession Act Cap 156 of the Laws of Kenya.**
- (ii) There are pending proceedings between the parties in KCC NO. 258 of 2005 dealing with the same subject matter.**
- (iii) Orders sought are as against and affect parties not privy to these proceedings. (sic)**

**2. That this application is an abuse of the court process and should be dismissed with costs.”**

Arguing the Preliminary Objection Mr. Balala submitted that the English Married Women Property Act of 1882 (the English Act), though a statute of general application applicable to Kenya, does not apply to Muslims married under Islamic law like the parties herein. He said that such Act could only apply to

Kenya in the absence of any written law dealing with a particular situation. In the case of the parties herein section 66(5) of the Constitution authorizes the Kadhi's Court to apply Muslim law relating to personal status, marriage, divorce and inheritance in proceedings in which all the parties profess the Muslim religion. He said in addition to the Constitution there is the Mohammedan Marriage, Divorce and Succession Act (cap 156) section 2 of which defines "matrimonial cause or suit" to include the wife's claim in this originating summons.

Mr. Balala urged me to ignore the Court of Appeal decision in **Essa – Vs – Essa (1996) EA 53** as the holding that the English Act applies to Muslims was not only *obiter* but also *per incuriam*. He said the court's jurisdiction to apply the English Act to Muslims was not challenged in that case as it is here. He contended that if the application of the English Act to the Muslims had been an issue in that case the court could have reached a different conclusion.

Mr. Balala's other argument on the application of the English Act to this case was that that Act applies only to husbands and wives and not former husbands and former wives. In support of that contention he cited the decision of Ringera J (as he then was) in **He Zhuo Ying – Vs – Qiuwen Ren, Mombasa HCCCNo. 128 of 1994(OS)** in which it was held that notwithstanding the cases of **I – Vs – I (1971) EA 278, Karanja – Vs – Karanja (1976) KLR 306** and **Essa – Vs – Essa** (supra) all of which involved divorced husbands and wives the English Act does not apply to couples in respect of whose marriage a decree absolute has been issued. In this case, he said, although there is a pending matrimonial cause (KCC No. 258 of 2005) between the parties herein in which a certificate of divorce has been sought by the husband, the husband divorced the wife on 15<sup>th</sup> November 2005 and the divorce was complete. The English Act does not therefore apply to these parties. The wife should have brought the claim herein in the Kadhi's case.

Mr. Balala also argued that the injunction application seeks orders against parties who are not party to this suit. He said both the originating summons and the application are an abuse of the court process and should be dismissed.

In response Mr. Kadima, counsel for the wife, submitted that this is a frivolous Preliminary objection intended to delay the hearing of his client's application for injunction. He said cap 156 does not deal with matrimonial property. The English Act therefore applies to Muslims and that was made clear by the Court of appeal decision in **Essa – Vs – Essa (supra)**.

As to whether the parties in this originating summons are divorced Mr. Kadima said if that was the case Mr. Balala's client could not have sought a divorce certificate in the Kadhi's said case. Moreover, he said, the alleged letter of divorce dated 15<sup>th</sup> November 2005 has not been served upon the wife. He said the issue of divorce is seriously contested and that also makes the English Act applicable to the parties herein. Mr. Kadima further submitted that the proceedings before the Kadhi's court do not in any way affect this case as the claim for a share of matrimonial property is not in that case.

I have considered these submissions. I have also read the authorities cited by counsel. I am unable to agree with Mr. Balala that the Court of Appeal decision in **Essa – Vs – Essa (supra)** is *obiter*. The claim in that case, as is the claim in this originating summons, was brought under Order 36 Rules 1 and 12 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Section 28 of the Matrimonial Causes Act and section 17 of the English Act. The Court of Appeal applied the principles enunciated by the English House of Lords' decision in **Pettit – Vs – Pettit (970) AC 777**, which was itself a decision based on section 17 of the English Act, and held that the English Act also applied to Muslims. I cannot therefore accept Mr. Balala's argument that the application of the English Act was not an issue in that case.

I also do not agree with Mr. Balala that divorce, if any, in this case is complete. If it was his client could not have made it an issue in the Kadhi's court and sought a certificate of divorce. Even if it is that would still not warrant the striking out of this case. The authority in **He Zhuo Ying – Vs – Qiu Wen Ren, Mombasa HCCCNO. 1994 (O.S.)** is distinguishable. The claim in that case was based solely on section 17 of the English Act. As I have said the claim in this case is, in addition to that section, brought under

Order 36 Rules 1 and 12 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and section 28 of the Matrimonial Causes Act.

For these reasons I overrule the defendant's (husband's) preliminary objection and dismiss his application dated 31<sup>st</sup> January 2006 with costs to the plaintiff (wife).

DATED and delivered this 10<sup>th</sup> day of February 2006.

**D. K. MARAGA**

**JUDGE**