REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 13 of 2002

PAUL THUO NG'ANG'A …….....……... PLAINTIFF

VERSUS

IRENE WAMBUI THUO …….....……. DEFENDANT

RULING

I have an application dated 10th March, 2004 by way of a Chamber Summons which is provised under Order VI Rule 13(a) of the Civil Procedure Rules.

In short it seeks an order to strike out the plaint filed on 11th March, 2002. The ground on which the prayer is based, is that the properties in question have been acquired during the marriage between the parties and the Plaintiff and the Defendant are evidently a husband and a wife.

If so, it is contended that the only way a party can come before the court is under Section 17 of the Married Women Properties Act, 1882 (referred to as '***the Act***').

Relying on the Court of Appeal case between Francis Njoroge and Virginia Wanjiku Njoroge C.A. NO.44/99 (*Unreported*). The counsel for the Defendant/Applicant contends that the cases under Section17 of the Act can only be instituted by way of an Originating Summons. Therefore he prays that the Plaint herein be struck out.

The Court of Appeal in the above referred case was hearing an appeal over the decision of the properties acquired during subsistence of the marriage on the ground that the Hon. Judge who heard the case filed by way of a plaint did not consider in her judgment several issues raised by the two counsel. The Court of Appeal thus allowed the appeal and directed a fresh trial. While granting that order they observed, and I quote:

"**There is the question of the procedure which the respondent adopted in bringing her claim to court. This was clearly a dispute under the Married Women's Property Act, 1882, and the only way provided for such claims is through originating summons. The property which the respondent claimed is still registered in their joint names and somehow, that dispute must be resolved. While we order that the whole dispute be heard afresh i.e. while we order a retrial, *ex debito justitiae*, we also order that for this purpose, the respondent Mrs. Njoroge, shall within 90 days of the date hereof, file an originating summons in the superior court and the appellant shall be at liberty to answer to the said summons. It is the hearing of that originating summons which shall constitute a rehearsing on this dispute. We make no order as to the costs of the appeal and these shall be the orders of the court."**

This application is filed after two years of the parties having filed their pleadings in a long and

contested interlocutory application. In other words the Defendant/Applicant has participated in the proceedings of this case.

Be that as it may, I shall have to quote relevant portions of Section 17 of the Act which stipulates detailed procedures for the determination of the questions as to property between husband and wife. It states:

*"**17: In any question between husband and wife as to the title to or possession of property, either party …….may apply by summons or*** otherwise ***(**emphasis mine**) in a summary way to any judge of the High Court of Justice of England ……"***

The words "***otherwise***" in the said section does not correspond to the observations made by the Court of Appeal in **Njoroge's case** (*Supra*) to wit. "This was clearly a dispute under the Married Women's Properties Act, 1882 and the **only way provided** for such claim is through originating summons" (*emphasis mine*).

Moreover, the observations made by the Court of Appeal were not in response to any issue raised and thus, in my most humble view, those observations made may be relegated to the realm of "*Obiter dicta"*. Obviously filing of the cause by way of summons is not the only way provided by the Act. I further note that the word '***may***' has been used in the section which does not make the suggested procedure a mandatory one.

Section 17 of the Act however clearly indicates that the dispute be resolved in a summary way. The filing the case by way of a plaint cannot be considered a summary procedure and the best way available to us, in our judicial system and under the Civil Procedure Act and Rules, may be by the Originating Summons. I may be pardoned, if I state, however, that from my experience, the procedure by way of an Originating Summons, specially, as regards marital property disputes, does not in any manner result in a summary procedure.

I also agree with Mrs. Wahome, the Learned Counsel for the Plaintiff/Respondent that Order VI Rule 13(a) stipulates striking of pleadings which do not disclose cause of action. The Plaint herein definitely shows the cause of action.

I also agree with the justified and well maintained judicial principle that, so far as possible, any pleadings which offends the rules of pleading or procedure shall be allowed to be amended instead of being ordered to be struck out. The Learned Counsel for the Respondent relied on two authorities namely **Parklands Properties Ltd. –vs.- Patel (1981) KLR 52 and Macharia –V- Wanyoike (1981) KLR 45.**

In short, in premise of the observations made hereinbefore, I shall not agree to strike out the Plaint as prayed and reject the prayer for striking out made in the application before me.

Finally, I have to give directions as to the proper format of the pleadings in this case, which is filed by way of a plaint.

Although as observed by me there may not be any legal impediment in the manner in which it is filed, I cannot on the other hand ignore the established procedure to file the case by way of an originating summons for determination of the issues which fall within the purview of the Act.

It shall be thus advisable for the Plaintiff to file an originating summons instead of the plaint. I direct that the plaint be deemed to have been withdrawn on the filing of an originating summons in this case without any further court fees being paid.

The parties thereafter, to follow further procedures accordingly.

For the application before me I shall not make any order on costs.

Dated and signed at Nairobi this 6th day of July, 2006.

K.H. RAWAL

JUDGE

6.7.06