



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS**

Misc Appli 1418 of 2002

SOPHIE MOGAKAAPPLICANT

VERSUS

TOM MOGAKA AND THREE OTHERSRESPONDENT

RULING

The Applicant herein has filed a substantive Originating motion under Section 17 of the Married Women's Property Act, 1882. (Herein after, I shall refer the same as '**the Act**'). She has filed the said suit in respect of a parcel of land known as Title No.L.R.7993 (I.R. 9427) situate at Trans Nzoia in Kenya. Mainly, she is claiming that she has legal and equitable right in the said property as a wife of the 1st Defendant and thus claimed beneficial ownership and redemption right under the Act.

She was given interlocutory orders and pleadings were filed by all concerned herein.

It is on record, and cannot be disputed, that the 2nd Defendant National Bank of Kenya Ltd had obtained a decree against the 1st Defendant in H.C.C.S. No.5081/1987 at Milimani Commercial Courts which was issued on 29th August, 2001.

Be that as it may, during pendency of hearing of interlocutory application, the Plaintiff has filed the Application on hand.

On the face thereof it is premised under Sections 70, 74, 75, 77 and 81 of the Constitution of Kenya and under Rule 3 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of Individual) High Court Rules, 2006, (hereinafter referred to as "**the Rules**").

When submissions were made on the competency of the application under Rule 3 of the said Rules, Mr. Nyandieka the learned Counsel for the Applicant was quick to submit that mention of Rule 3 in the application was a typographical error and the same should read as Rule 23 of the Rules. He applied orally to allow him amend the said error.

It cannot be questioned that the application herein has been filed in a suit which is already before this court, and the Rules have not provided for procedure under which a constitutional issue could be raised or brought before this court under the circumstances.

I shall revisit this issue in a short while as I intend to come to the points raised by way of Preliminary Objections against this application.

The issues raised in the application, if I am right in summarizing them, are:

- 1. Whether Section 17 of Married Women Properties Act 1882 confers proprietary rights and/or equitable right (trust) to the married women over matrimonial properties?**
- 2. If so, whether the mortgage of the subject land under the Banking Act (Cap 488 Laws of Kenya) is subject to the proprietary rights of the married women.**
- 3. Interpretation of the provisions of the Banking Act (Cap 488 Laws of Kenya) in view of the aforesaid issues.**

The Applicant has also raised other issues which are enumerated on the face of the application.

The 3rd and 4th Defendants raised preliminary objections to the application and filed their Notice of such objections which is dated 12th July, 2006.

I shall enumerate them for the sake of clarity:

- 1. The application is incompetent and incurably defective as it fails to comply with the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006.**
- 2. The Applicant has no cause of action against the 3rd and 4th Defendant/Respondents under the provisions of Section 70, 74, 75, 77 and 81 of the Constitution of Kenya.**
- 3. The application does not raise any issues that can be the subject matter of a Constitutional reference.**

Now I shall turn to point No.1 as to the competence of the application as per the Rules.

I have already outlined the provisions under which the application is filed and application for correcting a typographical error as prayed by Mr. Nyandieka, the Learned Counsel for the Applicant.

Obviously, Rule 3 provides for procedure in matters where the parties are invoking jurisdiction of the court under Section 65 of the constitution (See Rules 2 and 3 of the Rules). Obviously the present application does not fall under the provisions of Section 65 of the Constitution which confers to this court jurisdiction to supervise Civil and Criminal Proceedings before a subordinate court-martial.

This application is brought in a suit which is before this court. Thus it falls in all fours under Rule 23 of the Rules. Once again, it cannot be disputed that no procedure is laid down under the Rules as regards the manner in which a party can come before the High Court under Rule 23.

Moreover, the contention by Mr. F. Ojiambo the learned Counsel appearing for the 2nd Defendant that the application should be in the form of either originating Notice of Motion or, a Petition is self destructive. These two forms are obviously in respect of the matters which are separate matters by themselves. This application is one made in a suit which is pending before the High Court.

In absence of the procedure specified in the Rules, I can safely go back to the procedure adopted by the High Court in matters filed under Constitutional provisions before the publication of any Rules which includes the previous Rules published vide Legal Notice No.133 of 2001 which are revoked by provisions of Rule 35 of the Rules.

The earlier procedure accepted by the High Court was the application by way of Notice of Motion. The Applicant has come before the court under the same procedure.

I shall thus reject the point of incompetence of the application and find that the application is appropriately before the court.

In support of point No.2, it has vehemently contended that the dispute before the court is filed under the Act and is between individual parties which have arisen from a sale of land at an auction. This question of entitlement of the land is within the confines of private law and civil litigation. Thus, it does not raise any issue as regards Constitutional rights of the Applicant.

The Reliance was placed by both counsel on an unreported decision of the High Court in the case of **Kenya Bus Service Ltd. and 2 others –vs.- Attorney General and others being Misc. Civil Suit No.4131/2005.**

After finding that there is no legal nexus between the two individual parties and Government, it was held that the fundamental rights and freedoms as contained in the Constitution are principally available against the state because the Constitution function is to define what constitutes Government and it regulates the relationship between the Government and the governed.

I do not think I can raise any issue on the findings of the aforesaid case as per its facts and circumstances.

However, in my humble view the Applicant in this application, is raising a wider issue of a statute conferring a right granted under the constitution as a fundamental right i.e. property right and the inability of the state to protect the same or to enact a statute which can enable a discriminatory treatment to women.

If I go further, the issues raised by the applicant may find support from International Treaties or Conventions like Convention on the Elimination of All forms of Discrimination against women. There are provisions in the said convention which enjoin the Party States to accord to women equality with men before the law and also to agree that all contracts with a legal effect which are directed at restricting legal capacity of women shall be deemed null and void. Kenya has ratified the said convention.

Coming back to the issue raised in points 2 and 3 of the Notice I observe that the nature of Preliminary objection has been defined, so to say, in the case of **Mukisa Biscuit Co. –vs.- West End Distributors (1969) EACA 696.**

At page 700 it has been observed, by the court namely:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”

In the case **of Muriuki –vs.- Kimemia (2002) 2 KLR 677,** it has been held:

“A Preliminary Objection is in the nature of a demurrer in that it raises a pure point of law which is argued on the assumption that all facts pleaded by the other side is correct. A preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”

I may also add here that a matter cannot be dealt with by way of a preliminary point if the issues raised are interpretation and ramification of statutory provisions, vis-à-vis a constitutional right pleaded. It is contended by the Applicant that the statutory provision (Banking Act) is discriminatory to the equal rights conferred by constitution on women.

Can I trivialize this issue? Or to put it mildly, can I decide those issues by a preliminary point? I think that it was not and is not the scope of a Preliminary Objection.

As prudence dictates I shall not dwell much further on merits or demerits of the submissions made and/or

the pleadings filed.

I can only direct that the application before me be heard fully with specific direction that the Hon. Attorney General be served with the application to enable his office to respond to the claims made by the Applicant. I say so as the Applicant has raised issue on interpretation and/or effect of statutory provisions.

Costs of these proceedings be in the cause, in the background of the Constitutional provisions.

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

K.H. RAWAL

JUDGE

6.10.2006