



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL SUIT NO. 20 OF 2004 (O.S.)**

**NETTA MWIHAKI GEENEN.....APPLICANT**

**Versus**

**ERIK GEENEN.....RESPONDENT**

**RULING**

The applicant Netta Mwihaki Geenen has sought for the following orders, inter alia:

That the respondent either by himself his servants and or agents he restrained by an order of injunction from selling, transferring, charging and/or disposing off the property known LR No. Nairobi/Brock 90/163.

The application is brought under order 39 Rule of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application is supported by the applicant's affidavit sworn on 30th July 2004 and various annexures annexed thereto. This chamber summons was filed simultaneously with the filing of the originating summons by the same applicant which is brought pursuant to the provisions of Section 17 of the Married Women's Property Act of 1982 England, whereby the applicant seeks for the determination of her share of the above property which is held in trust.

According to the applicant, she is the lawful wife of the respondent and the property in question was purchased with the joint effort of both applicant and respondent. The applicant relied on payment receipts issued by D.S. Kitaa & Co. Advocates to both the applicant and respondent in respect of the purchase of the suit premises. This property was intended to be the matrimonial home of the parties but before they could take occupation an issue arose, and the respondent intends to sell the property.

Indeed the respondent has already executed instruction to M/s Hass Consultant being the authority to sell the property. The applicant claims that unless the respondent is restrained from selling she will suffer substantial loss as it will be difficult for her to recover from the respondent resides outside the jurisdiction of this court. The applicant's claim is based under the Married Women's Property as she claims to have gone through a Kikuyu Customary Ceremony of marriage on 8th June 2002 whereby the respondent paid Kshs.200,000/= as dowry and the marriage ceremony was conducted as per the copies of photographs attached to the application.

The application was opposed by the respondent who relied on a replying affidavit sworn on 11th September 2004. According to the respondent the applicant lacks the locus standi in law to initiate proceedings under Section 17 of the MWPA as set out in the Court of Appeal decision of **Nderitu vs**

**Nderitu C.A. 203 of 1993 page 3** the applicant has a duty to establish that the suit premises was acquired during “coverture”. Counsel for the respondent submitted that the marriage was solemnized on 23rd July 2003 after the property was acquired in the sole name of the respondent and hence it is not part of the matrimonial properties.

Further counsel for respondent went on to add that under this system of marriage parties agreed to hold properties separately. Secondly it was argued that the applicant’s case has failed to conform to the laid down principals in the case of *Giella vs Cassman Brown*, one of the leading authorities in matters of injunctions as she has failed to show any contribution towards the acquisition of the suit premises. The customary marriage ceremony that the applicant relies on, was a mere introduction party, not a wedding.

Lastly the applicant has not been able to show that she will suffer irreparable loss that can not be compensated with damages.

Counsel also relied on various cases that have been determined in respect of property dispute between spouses. I have carefully considered all the material that was placed before me and the very able submissions by both counsel for the applicant and respondent.

At this interlocutory stage of this matter I have no intention into going into the merit of the matter to determine some of the following issues which must be dealt with by way of evidence;

- 1) Was the ceremony held on 8th June 2002 an introduction party or a Kikuyu customary marriage ceremony?
- 2) Was the sum of Kshs.200,000/= dowry?
- 3) What is the import of payments receipts issued to both parties whether they were based on money paid or not?
- 4) Whether there is a resulting or implied trust?

It is my humble view that those issues should be left for determination after oral evidence by trial court. For now, I have to consider whether the applicant has established a prima facie case with a probability of success. I have taken note in this regard of the fact that the suit premises was purchased and transferred on 2nd October 2002, I am not able to determine with certainty whether the parties were married under the Kikuyu Customary Law as I said this is a matter that requires oral evidence save to state that I find the holding by Lord Denning in the case of **Gissing vs Gissing (1970) 2 All ER page 789** very persuasive where he stated that:

**“property, whether real or personal, which has been acquired by either spouse in contemplation of their marriage or during its subsistence and was intended for the common use and enjoyment of both spouses or their children, such as the matrimonial home, its furniture and other durable furniture”**

I have also taken into consideration that payment receipts were issued to the applicant, that the parties are now married although there are divorce proceedings pending in a court in Belgium. In addition to the above the applicant’s apprehension is not without merit as the respondent intends to sell the suit property and he has executed instructions for sale. In the result and for the above reasons I find that the applicant has met the criteria set out under order 39 (1) (a) and (b) and it is in the interest of justice that the property should be preserved.

Accordingly I hereby confirm the temporary order of injunction that was issued on 12th August 2004 which should remain in force until the hearing and determination of this suit. The order as regards the undertaking for damages shall also remain in force. Costs of this application be in the cause.

Ruling read and signed on 21st January 2005.

**MARTHA KOOME**

**JUDGE**