

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL CASE 161 OF 2004 (OS)

MARY FLORENCE WAMBUI NJENGA.....APPLICANT

VERSUS

JOHN NJENGA KANGARA.....RESPONDENT

RULING

The applicant and the respondent married in August 1974 but were divorced on 8th May, 2001. During the subsistence of the marriage they acquired some property jointly and they included three parcels of land namely **LIMURU/BIBIRIONI/1592, DUNDORI/LANET BLOCK 2/17 and KIAMBU L.R. NO. 8788/5 BLOCK A 111**. On 28th May 2004, the applicant filed an Originating Summons under the provisions of Section 17 of the Married Women Property Act 1882 of England seeking a declaration that the moveable and immovable properties that they had acquired during the subsistence of the said marriage are jointly owned by herself and the respondent and that they should be shared equally between them.

The respondent then filed an application urging the court to strike out the originating summons on the grounds that the parties herein were not husband and wife as contemplated under the Married Women Property Act of 1882 and therefore the question of division of property did not arise. The said application was served upon the respondent's counsel but no grounds of opposition nor affidavit in reply were filed and the application was argued ex parte. Section 17 of the Married Women Property Act of 1882 provides as follows:-

“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 in a summary way to any judge of the High Courtand the Judge may make such order with respect to the property in dispute and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit.....”.

My understanding of the above quoted section is that it applies where the marriage is subsisting and therefore there is a husband and wife relationship. Where the marriage has been dissolved, Section 17 cannot be invoked. RAYDEN ON DIVORCE, 8th Edition at Page 438 makes it very clear that:-

“An application under Section 17 may be made only if the parties are husband and wife. The procedure is not available after the decree nisi has been made absolute but if the summons was issued or an order directing an inquiry was made before the decree was made absolute, the inquiry may be proceeded with notwithstanding that the decree nisi was made absolute before the inquiry began”

Mr. Githui referred this court to the decision of Ringera J (as he then was) in ***HE ZHUO YING VS QIU WEN REN*** Civil Case No. 128 (O.S.) of 1994 (unreported) where the court held that it had no jurisdiction to entertain an application that had been commenced under Section 17 of the Married Women Property Act of 1882 after the marriage had been dissolved. In considering that case, the court observed that courts of Kenya had for a long time acted on the supposition that an application under Section 17 of the Married Women Property Act of England could be made by former spouses after dissolution of their marriage but that was not the true position. I am in agreement with the holding in the said decision.

I therefore allow the respondent's application and strike out the originating summons dated 28th May,

2004. The applicant will have the costs of this application and of the suit.

DATED, SIGNED & DELIVERED at Nakuru this 18th day of June, 2005.

D. MUSINGA

JUDGE

18/6/2005