



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI  
H.C. CIVIL SUIT NO. 26 OF 2002

IN THE MATTER OF SECTION 17 OF THE MARRIED

WOMENS PROPERTY ACT – 1882

AND

IN THE MATTER OF SECTION 3 (1) OF THE JUDICATURE

ACT CAP 8 OF THE LAWS OF KENYA

BETWEEN

SHAN ROSEMARIE LINCK ..... PLAINTIFF

V E R S U S

ROBERT SCHLOLER LINCK .....DEFENDANT

R U L I N G

Respondent raised preliminary objections on chamber summons dated 10th May, 2002.

The Notice of Preliminary Objection was of 27th May, 2002.

In short two issues were contended by Mr. Ongicho the learned counsel for the Respondent, namely (1) The provisions of Civil Procedure Rules do not apply to the matter brought under section 17 of the Married Women’s Property Act (1882) and (2) The application is brought under wrong provisions of the Civil Procedure Rules assuming the provisions thereof apply to these proceedings.

The counsel contended that the Married Women’s Property Act is a self contained Act conferring distinct jurisdiction upon the court. He added that Section 17 has expressed the procedure the Act intends to apply which is stated to be “by summons or otherwise”. The application once filed by way of Originating summons does not envisage any other application for interim remedies by way of Chamber summons. He relied on a Court of Appeal case of Lilian Njeri Mungai Civil Appeal No. 191 of 1995. He relied on observations made by Shah J.A. on page 6 of his judgment which are: and I quote:

*“The 1882 Act remedies are of a special nature, Section 17 of the 1882 Act being a procedural section merely declares the rights of a married woman to properties jointly held by spouses or by the husband”*

I must confess I do not comprehend how the above observations made by Shah, J.A. can be construed to state that once the suit is filed by Originating Summons no other application by Chamber Summons can

be filed by the parties therein.

The purpose of the 1882 Act was to confer upon the married woman right to own, and to share the property along with her husband and right to protect her right of the properties. The provisions of section 12 of the 1882 Act stipulates thus:

*“Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, (emphasis mine) and also (subject as regards her husband, to the proviso herein –after contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.”*

Ms Omamo stressed on the words to wit: “shall have the same Civil remedies”

I do agree with her that the words “Civil Remedies ” do include the interim remedies. I am further fortified in my observation by the proviso of the said section and I shall stress on the last words to wit: “unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.” In short the wife has been given right to commence even Criminal Proceedings against the husband to protect her property. There is no bar against the wife in any way to bring civil proceedings to seek that protection.

Even if I am wrong in my above observation, the provisions of Section 17 of the Act do not bar married women to file an application to seek interim relief. It is true that Section 17 of the Act is a procedural section and when it provides for an application by summons or otherwise in a summary way, it does not pin down the applicant with only an application by way of Originating Summons only.

Considering the purposes of the Act it would be unthinkable that the Parliament would have contemplated that the husband, while the Originating Summons is pending hearing, be allowed to deal with the property to the detriment of the wife and that too when the wife has been granted to seek all the Civil remedies under section 12 which is a substantial provision of the Act.

I may properly state that the court does not inquire what the legislator willed a century ago, but what he would have willed if he would have willed if he had known what our present condition would be. I shall adopt the finding made by Court of Appeal in the case of Boyes V. Gathure 1966 E.A. 385. I am aware that the Court of Appeal in that case was interpreting the word ‘Summons’ mentioned in Section 57 of the Registration of Titles Act. However, I do not think that the meaning of the said word would differ when the same is used in another Act giving similar procedure.

It was held in Boyes case (supra) that ‘Summons ’ means an originating summons if there is no suit in existence or an interlocutory summons if there is a suit in existence.” I can thus properly hold that Section 17 of the Married Women’s Property Act does not bar an interlocutory application to preserve the matrimonial property. Mr. Ongicho submitted thus in support of the second objection. He stated that the application is brought under the provisions of Order XXXVIII of the Civil Procedure Act which is an absolutely wrong provision and thus the application is incurably defective and should be struck out. He relied on the case of Njagi Kanyunguti & Others V/S David Njeru Njogu (Civil Appeal No. 181 of 1994) (Unreported ) wherein Court of Appeal held an application filed under Order IXB Rule 8 of the Civil Procedure Rules to be incurably defective. The observations were made on page 4 of the Judgment. But I also note on the said page that it was also observed inter alia that neither Order IXA Rule 10 and nor order

XXA Rule 25 of the Civil Procedure Rules empowers a court to set aside a Judgment entered.

Taking on from the said observation, I shall note that this application was mainly brought under section 12 & 17 of the Married Women's Property Act and all enabling provisions of the law.

Furthermore this is an interim application and the mention of the provision of law seems to be a typographical error or an omission or a mistake of the counsel. Should a litigant suffer because of the Advocates mistake?. In the case of Michael Njoroge 'B' & others V. Vincent Kimani Chege (Misc application No. Nai 217 of 1998) (Unreported ), the court of Appeal ruling of A.B. Shah J.A. observed as under:

*“The next question that arises is what of the Litigant? Should he suffer because of his Advocate's oversight? Rule of Procedure are said to be good servants but bad masters. I am not saying that the rules can be flouted with impunity. All rules have their specific purposes but I would not want a rule of procedure to drive a litigant out of Judgment seat if other rule (s) allow such litigant to come back to this court.”*

The wrong citation of one of the provisions of law under which this application does not, in my view, make it incurable and defective.

I also bear in mind general power of this court to amend any error or defect in any proceedings in a suit conferred by section 100 of the Civil Procedure Act. In the premises, I allow the oral application made by Ms Omamo the learned counsel for the Applicant to read 'Order XXXIX of Civil Procedure Rules' instead of 'Order XXXVIII of Civil Procedure Act.' In the application.

The upshot of all the above is that I do not allow the preliminary objections raised by the Respondent. However I shall order that the costs be paid by the Applicant to the Respondent.

Dated and delivered at Nairobi this 17th day of June, 2002.

**K.**  
**J U D G E.**

**H.**

**RAWAL**