



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL SUIT NO. 71 OF 2017 (OS)

IN THE MATTER OF MARRIED WOMEN'S PROPERTY ACT OF 1887 LAWS OF KENYA

BETWEEN

MWM.....APPLICANT

VERSUS

JMM.....RESPONDENT

RULING

1. Under **Section 7 of the Civil Procedure Act:-**

“7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

2. To rely on the defence of *res judicata* there must be:-

- a) a previous suit in which the matter was in issue;
- b) the parties were the same or litigating under the same title;
- c) a competent court heard and determined the matter in issue; and
- d) the issue has been raised once again in a fresh suit (**Abok James Odera –v- John Patrick Machira, Civil Application No. Nairobi 49 of 2001**).

3. In the Court of Appeal case of **John Florence Maritime Services Limited & Another –vs- Cabinet Secretary for Transport and Infrastructure & 3 Others [2015]eKLR** it was stated as follows:-

“The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unravelling uncontrollably.”

4. The applicant and the respondent married on 23rd December 1961 at Tetu Mission in Nyeri. The marriage was blessed with nine (9) children. The marriage was dissolved by an order of the Subordinate Court in **CMCC No. 413 of 2016** at Milimani.

5. On 15th November 2017 the applicant filed this Originating Summons dated 23rd October 2017 seeking a declaration that the following movable and immovable property, and the developments thereon, were acquired by the funds and efforts of the two parties during their marriage and were registered in the name of the respondent:-

- a) plot No. [particulars withheld] at Muthuini;
- b) 58 cows and 40 goats;
- c) vehicle KCY [particulars withheld];
- d) property in Makuyu;
- e) matrimonial house in Nyeri Uaso Nyiro/XXX; and
- f) Mweiga/Muthuini/XXX

She asked that it be declared that the respondent holds the property in trust for both, following which the property be sold and/or divided and/or income from them be shared equally between them.

6. The respondent filed a Notice of Preliminary Objection dated 14th December 2017 to say that the suit was *res judicata* because the matter in the suit was directly and substantially dealt with in Provincial Land Appeals Board No. 1 of 2002 at Nyeri, **Nyeri HCCC No. 84 of 2005** and **Nyeri HCCC No. 182 of 1992 (OS)**. In the replying affidavit sworn on 30th April 2019 the respondent annexed the judgment in **Nyeri HCCC No. 84 of 2005 (OS)**. The judgment was delivered on 29th November 2012.

7. I have looked at **HCCC No. 84 OF 2005 (OS)**. It was begun by Originating Summons dated 25th May 2005 by the applicant against the respondent under **Section 17 of the Married Women Property Act, 1882** and **Order XXXVI Rule 7 of the Civil Procedure Rules**. The applicant claimed that she was entitled to whole interest in the following matrimonial properties:-

- a) L.R No. Nyeri/Uaso Nyiro/XXX; and
- b) L.R. No. Mweiga/Block X/Muthuini/XXX

8. Her case was that her and the respondent were married on 22nd December 1961. She was a teacher and he was employed by the Ministry of Social Services. They had jointly acquired the properties but were registered in the respondent's name. She sought a declaration that the respondent held the property in trust for her, and sought an order that the property be transferred to her. The respondent defended the suit by saying that, although they were married as indicated, he had solely bought the property. He stated that he had disposed Mweiga/Block X/Muthuini/XXX in 2005. He testified that the applicant had sued him before the Land Disputes Tribunal claiming Nyeri/Uaso Nyiro/XXX. The dispute had been heard and she had been granted 19 acres of the land. Being aggrieved, she had appealed to the Provincial Appeals Board which had confirmed the decision. She had then, again aggrieved, filed a Judicial Review application by way of *Certiorari* to the High Court in High Court at **Nyeri Misc. Application No. 268 of 2002** claiming that the Disputes Tribunal and the Appeals Board did not have jurisdiction to handle the dispute. On 6th November 2003 the High Court had dismissed the application.

9. The High Court in Nyeri considered the proceedings and decision in the Judicial Review matter, and decided that Nyeri/Uaso Nyiro/XXX was matrimonial property between the applicant and the respondent, and that the applicant had already got 19 acres of the parcel and the decision was not going to be disturbed.

10. I consider that in the instant case, the applicant claimed not only Nyeri/Uaso Nyiro/XXX and Mweiga/Muthuini/XXX but also a vehicle, property in Makuyu, Plot No. XXX at Muthuini, 58 cows and 40 goats as being matrimonial properties whose acquisition she had contributed to. I have shown in the foregoing that Nyeri/Uaso Nyiro/XXX was already divided between the parties and that Mweiga/Muthuini/XXX no longer exists. Regarding the other properties, there is no indication why the applicant did not include them in **Nyeri HCCC No. 84 of 2005 (OS)**, both that suit and the present one having been brought under the **Married Women Property Act of 1882**. I should point out that in **Henderson –v- Henderson (1843)3 Hare 100, 67 ER 313** the English Court of Chancery confirmed that a party may not raise any claim in subsequent litigation which they ought properly to have raised in a previous action. This is what the court stated:-

“... where a given matter becomes the subject of litigation in any adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time ...”

11. The applicant was under duty to include all the assets she considered to be matrimonial property in **Nyeri HCCC No. 84 of 2005 (OS)** for a decision to be rendered thereon. The principle of *res judicata* did not allow her to litigate the issue of matrimonial property in instalments.

12. Further, the applicant may not agree with the decision in **Nyeri HCCC No. 84 of 2005 (OS)** that determined that her share in Nyeri/Uaso Nyiro/XXX was 19 acres. She may not agree with the decision in **Nyeri HC Misc. Appl. No. 268 of 2002**. Quite unfortunately, this court cannot do anything about these decisions. I am a court of concurrent jurisdiction. I consequently find that the issue regarding the determination of matrimonial property between the applicant and the respondent has been heard and determined by a court of competent jurisdiction, and therefore the matter is *res judicata*. Being mindful of the principles in **Mukisa Biscuit Company Ltd –v- West End Distributors Ltd [1969]EA 696**, I determine that the Preliminary Objection dated 14th December 2017 and filed on 20th December 2017 is sustainable. I dismiss the applicant's Originating Summons dated 23rd October 2017 and filed on 15th November 2017 with costs.

DATED and DELIVERED at NAIROBI this 18TH day of JULY, 2019.

A.O. MUCHELULE

JUDGE