



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 43 OF 2016 (OS)**

**R G A.....PLAINTIFF**

**VERSUS**

**J T M.....DEFENDANT**

**RULING**

1. The suit herein was initiated by way of Originating Summons. The summons in question is dated 12<sup>th</sup> October 2016. Contemporaneously filed with it is a Motion which seeks preservation of the property the subject of the summons.

2. In response to the Motion, the defendant filed a Notice of Preliminary Objection and Replying Affidavit. It is curious that she would do that for a Preliminary Objection ought to dispose of the matter on points of law alone, without having to advert to facts. The mere fact that she thought it fit to file an affidavit suggests that she was not confident that her Preliminary Objection had any chance of success.

3. The Preliminary Objection is on the basis that the suit is founded on a repealed law, the Married Women's Property Act, 1882. The argument is that a suit founded on such a law cannot stand. I have noted that the said statute is cited as the statute upon which the suit is premised. I have noted too that the suit is about division of matrimonial property, which is currently governed by the Matrimonial Property Act, No. 49 of 2013.

4. The citation of the repealed statute in my view is a matter that does not go to the core of the suit. It is clear that the suit is one for division of matrimonial property. There is no doubt at all that the law that governs the subject is the Matrimonial Property Act, and the court that will deal with the matter will no doubt be guided by that law.

5. Justice of the matter does not bend towards striking out a suit on the mere technicality of citing a law that has since been repealed. Substantive justice would frown at that. Article 159 of the Constitution enjoins me to overlook such shortcomings and to go to the heart of the matter. In any event, the shortcoming is of the type that can be cured by amendment.

I shall and do hereby dismiss the Preliminary Objection dated 27<sup>th</sup> December 2016. Costs shall be in the cause.

**DATED, SIGNED and DELIVERED at NAIROBI this 2<sup>ND</sup> DAY OF JUNE, 2017.**

**W. MUSYOKA**

**JUDGE**